

THE INTERNATIONAL CRIMINAL COURT: A CASE FOR CONSERVATIVES REVISITED

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

An earlier version of this paper, published in 2005 and reprinted thereafter, examined the important concerns that conservative Americans expressed regarding the ICC, and offered responses to them. Now that the Court is operational with its first cases being investigated and trials underway, this paper reexamines these concerns and seeks to identify and address any issues that may have emerged from this new experience and performance. This examination shows that the Court continues to implement and respect the values that are important to conservatives, and the Court's actions to date have met their concerns.

The ICC in Operation

On July 1, 2002, the ICC came into existence following the necessary 60th ratification of its governing treaty, the Rome Statute, with jurisdiction over crimes committed after this date.¹ The ICC is designed to advance national and global peace by encouraging local and domestic prosecutions and trials in cases of extreme atrocities and, where these fail, through administering international justice. It is the first permanent tribunal to try individuals, regardless of nationality, for the most serious crimes, including genocide, crimes against humanity, war crimes, and when defined and amended into the Rome Statute, the crime of aggression.

The Court's laws and procedures express democracy, and most of the states which support the ICC are democratic and free. Thus the judges elected will almost always be from democratic countries, as has been the case 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 served as a senior prosecutor responsible for managing the Uganda case.

The ICC is up and running, with the support of over 110 countries from across the globe which have all ratified the Rome Statute, including Canada, Australia, Japan, all the members of the European Union, and all members of NATO except Turkey and the US.² Countries that have recently emerged from conflict and/or experienced mass violations of human rights are also members, including Cambodia, Colombia, East Timor, the Republic of Korea, Sierra Leone and the former republics of Yugoslavia. The governments of the Democratic Republic of the Congo (DRC), Uganda and the Central African Republic (CAR) were among the first to refer situations to the ICC. The United Nations Security Council referred the situation in Darfur (Sudan) to the Court, and the pre-trial judges have authorized the Office of the Prosecutor (OTP) to begin a formal investigation in Kenya. In addition, Côte d'Ivoire has consented to the Court's jurisdiction, and the Prosecutor is monitoring the situations

¹ The International Criminal Court, About the Court, available at <http://www.icc-cpi.int/Menus/ICC/About+the+Court/>.

² ICC, Assembly of States Parties, available at <http://www.icc-cpi.int/Menus/ASP/states+parties/>.





in Afghanistan, Iraq, Guinea, Colombia, Gaza and Georgia based on information received by his office.³ Arrest warrants have been issued in the Uganda, Sudan and DRC situations. Eight cases are being heard before the relevant chambers, and the trials of *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* are underway.⁴ The alleged crimes of the accused thus far include genocide; crimes against humanity, including rape, torture and murder; and war crimes, including rape, pillaging, torture and the conscription of children as soldiers.⁵ These crimes might have gone unnoticed or unpunished had it not been for the ICC.

Conservative support was an important influence on the Bush administration decision to abstain from voting on the UN Security Council resolution which referred the situation in Darfur to the ICC, thus allowing it to pass. Conservatives therefore made possible an important international action against the atrocities taking place in Sudan. Americans overwhelmingly supported the referral, and at that time, public opinion polls indicated that 91% of Americans believed that the US should cooperate with the ICC to help bring to justice those responsible for the atrocities in Darfur.⁶ In light of the effectiveness of the Court's activities so far, including the Darfur referral, its record of objective promotion of due process and other rights, and the professional conduct of its Prosecutor and judges, some conservatives have begun to reconsider 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 US 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 and other heinous 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 immediate 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 atrocities later committed in Sierra Leone, Rwanda, East Timor, the former Yugoslavia, and other countries. At least 160 million people have died from such atrocities since World War II. The ad hoc tribunals for Rwanda and the former Yugoslavia became possible after the end of the Cold War and were pilot projects for the International Criminal Court. However, their experiences made it evident that a permanent court was needed and that the UN Security Council should create only courts tied to a specific situation and that it would not authorize any more temporary tribunals.

³ For information on the ICC Cases and Situations see the International Criminal Court, Situations and Cases, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>.

⁴ Id.

⁵ For more information on the confirmation of charges and the arrest warrants, see id; and Press Releases, available at <http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/>.

⁶ Poll conducted in May 2005 by the International Crisis Group and Zogby International. See the International Crisis Group, Do Americans Care about Darfur?: An International Crisis Group/Zogby International Opinion Survey, Update Briefing, Africa Briefing Number 26, Washington/Brussels, June 1, 2005, available at <http://www.cmi.no/sudan/doc/?id=146>.





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 establishment of the ICC. Many countries which negotiated and drafted the Rome Statute had recently emerged from dictatorships to democracy. It was their unstable and violent pasts, coupled with the desire to have a permanent court to deal with atrocities that continued 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 in their operations, especially early on, the tribunals have worked. As of April 2010, more than 105 individuals have been prosecuted and are serving sentences for the crimes committed in the former Yugoslavia and Rwanda, and there are over 60 cases still pending.⁷ 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, made obvious the need for a permanent court.

Concerns

The ICC incorporates most American values about trials and justice, and thus far has demonstrated its impartiality, independence and international acceptance. However, in the US there is still fear and deep doubt about the reach, mandate and operation of the Court. As expressed in think-tank studies and the media, the concerns of conservatives include: that the Court will be able to prosecute Americans, that US participation may be unconstitutional, that there will be a loss of American sovereignty, that there is an absence of procedural safeguards, especially when the US 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

The restraints and limitations of the Court make it highly unlikely that it will ever prosecute Americans and give the US effective ways to stop this should it be tried. 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 the US reject and abhor the kind of atrocities that the Court has been created to adjudicate. It is only the tyrannical leaders of countries and organizations that repeatedly violate the most fundamental and basic human rights that will be brought before the Court and held to account for their crimes. 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 (where the US enjoys the veto), or a country accepts the Court's jurisdiction, can the ICC act when the individuals involved are not nationals of the states party to the Court.

In order for an American to be tried before the ICC, several requirements would need to be met. First, he or she would have to commit crimes of the horrible nature described in the Statute on the territory of a State Party

⁷ For more information see the International Criminal Tribunal for Rwanda, Status of Cases, available at <http://www.icttr.org/default.htm>; the International Criminal Tribunal for the former Yugoslavia, The Cases, available at <http://www.icty.org/action/cases/4>.





(provided that the US does not become a State Party). Second, the Court would have to determine that the US failed to investigate the crime or conduct a trial thus leading one of the most respected legal systems in the world to be deemed biased by the ICC. Finally, the Pre-Trial Chamber of the Court, composed of elected judges, would have to authorize, despite objections of the US and its allies, the Prosecutor's decision to bring a case on his own initiative. In addition, and outside of the Court, the Security Council would have to refuse to exercise its power to tell the ICC to defer the investigation despite US influence.

Concerns have been raised about the Prosecutor monitoring situations in Iraq and Afghanistan, and what it would mean for American servicemembers and civilians serving American interests abroad. The OTP has received over 8,461 communications from some 132 countries, including individuals and organizations in the US, regarding potential situations that the Court could consider. However, receipt and review of a communication does not mean that the Prosecutor will investigate. His office must first gather and examine the available information, potentially including consultations with other governments, to determine whether there is "a reasonable basis to proceed."⁸

With respect to Iraq, the OTP received over 240 communications before 2006. After review, it determined that the crimes alleged in the communications did not rise to the level of crimes under the jurisdiction of the Court; nor did they meet the threshold required by the Statute. Furthermore, the Prosecutor has indicated that he does not have jurisdiction over the US or Iraq, neither of which is a State Party. His inaction strongly suggests that he will not seek permission to undertake a formal investigation.⁹

Regarding Afghanistan, the ICC has jurisdiction since Afghanistan is a State Party, but again the Prosecutor has only been monitoring the situation and has not indicated the intention or taken any steps to formally investigate. The decision of the Prosecutor not to act in these situations demonstrates that he takes seriously the extremely high threshold that must be met in order to warrant an investigation; he will pursue only the most serious crimes.

Concern 2: US participation is unconstitutional

Some Americans believe that US participation in the ICC as a State Party would 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 US cannot be tried in a court located outside of the country, one which Congress did not establish.

However, the US does subject its nationals to be tried in a judicial system other than an American one. The US 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 US has established and continuously honors with many countries. For example, if an American commits a crime in another country, and the US has an extradition treaty with that country, the US is obliged to send that person to that country. A state has absolute

⁸ See ICC, Communications and Referrals, available at <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Referrals+and+communications/>.

⁹ See ICC, OTP response to communications received concerning Iraq, February 9, 2006, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Iraq/>.





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 clear from these cases that Americans can be extradited, and have been extradited, to countries whose judicial systems are very dissimilar to American courts – their courts do not have trial by jury.

The Congress is authorized to establish, under Article III of the US Constitution, courts within the US and its legal system. The ICC is not this kind of court. Instead, it is a court outside the US and in that respect is similar to the courts of foreign countries. American citizens do not escape the Court’s jurisdiction if the US does not sign onto the ICC. As long as the US is not party to the Rome Statute and does not wish to make its nationals available to the Court, the ICC will only be able to prosecute Americans who commit crimes on the territories of States Parties, 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, the Court could actually serve to help the US regain jurisdiction over its citizens accused abroad and sent to the ICC.

Concern 3: Loss of American sovereignty

The creation of the ICC is not an attempt to check American power, nor is it a step toward world government. Moral outrage and guilt over past inaction 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 over 160 nations¹⁰ indicates that it is not an outside institution which simply materialized by its own accord to impose its will on the US. 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, exercised their right to create an international organization and to determine how to deal with crimes committed on their territories and by their nationals. These countries retain 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 Rome 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. It is very unlikely that the US would allow a crime heinous enough to fall under the Court’s jurisdiction, and committed by an American, to go unpunished.

In addition, some Americans are concerned that the power of ICC judges to determine whether a criminal proceeding was conducted in good faith could compromise American sovereignty. 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 US legal system. Such a determination would only be an examination of what the US 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

¹⁰ See Coalition for the International Criminal Court, History of the ICC, Rome Conference, available at <http://www.coalitionfortheicc.org/?mod=rome>.





able to independently evaluate a country's claim that its prosecutorial or court proceedings have been in good faith. No true court can be denied the right to determine whether it has jurisdiction over a case. Although there is a technical possibility that judges could conclude that a US trial was not conducted in good faith, this is very unlikely since the international community is very aware that the US judicial system has functioned with judicial rigor and independence for over 200 years. The US prides itself upon the importance of an independent judiciary. In the unlikely event that the trial of an individual for crimes falling under the jurisdiction of the Rome Statute is not genuinely conducted or is externally influenced, conservative and liberal Americans alike should demand that this trial's credibility be examined.

Concern 4: No safeguards or 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 or be the result of deliberate plans or policies by a nation or organization.

If US 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 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.

A Court of Last Resort. Perhaps the most significant limitation and check on the Court is that it is a court to be used only as a 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. This is not a Court that will call into question American trials. It exists as a safeguard to prevent individuals from acting with impunity or hiding behind their respective States. The Court's authority to determine whether a trial is conducted in good faith ensures that individuals of countries that are unwilling, or simply do not have the resources or ability to investigate and/or try that individual, are held to account.

Assembly of States Parties. Moreover, the ICC has four independent organs that serve as checks on 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, which is responsible for managing the administration of the ICC, deciding what measures to take when a member fails to cooperate, and controlling the budget. In addition, if a judge or the Prosecutor does not act independently or is biased, the Assembly can remove him or her. The ASP ensures 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 the US develops a close relationship with the Court and its State Parties, and even more if it ratifies the Rome Statute, it will have the power to work with allies to shape the work of the ICC and hold it accountable.





The Prosecutor. 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 begin active prosecution of a case. He or she cannot begin a formal field investigation without the approval of the Pre-Trial Chamber of judges. Furthermore, the judges are responsible for overseeing his impartiality whenever it might reasonably be doubted on any ground. Additionally, the Court must accept a request from the Security Council to defer action on a case for one year. Such a request can be renewed annually.

The Prosecutor has continuously demonstrated that he is not politically motivated. As is the case with Afghanistan and Iraq, concerns have been raised regarding Gaza. Here, the Prosecutor is monitoring the situation and has not asked to open an investigation. The Goldstone report, which urges an investigation into the conflict, citing Israel and Hamas as responsible for war crimes and crimes against humanity, was an independent undertaking outside of the ICC. The ICC was not involved in prompting these recommendations nor did it request that the report be commissioned. The Prosecutor has indicated that the Court does not have jurisdiction over Israel or Palestine as they are not States Parties to the ICC. Moreover, he has not anticipated that the ICC will have jurisdiction. It does not appear that the Security Council would refer the situation to the Court.

As evidenced by his actions and the decisions he has taken thus far, the Prosecutor has been consistently and continually prudent and impartial in these preliminary examinations in situations which have the potential to be highly politicized and, in regard to Afghanistan and Iraq, could involve Americans. He has demonstrated that he will not bend to political pressure and that he takes very seriously the safeguards inherent in the Rome Statute.

The Judges. The ICC judges must have very high credentials to be nominated, and 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 Court's first judges established a precedent of required excellence. US participation in these elections, including the election of an American judge to sit on the ICC bench, would be a very powerful way to ensure that this continues to happen. This would require that the US become a State Party, but even before then an active role at the Court would give the US great influence over the elections.

The actions of the judges to date also demonstrate their impartiality, their respect for the due process standards guaranteed by the Statute, and the high quality of their work. They have not bowed to the will of the Prosecutor and if anything, have rigorously tested the OTP's evidence and cases. This is particularly evident with respect to the Lubanga trial, mentioned in greater detail below. This was the Court's first trial and there was a great deal of pressure for it to begin. However, rather than allow the trial to commence without the defense having all relevant information available, the judges gave first priority to the defendant's due process rights and the obligation of the Prosecutor to fully disclose his evidence.

Due Process and Trials. Even if such an unlikely scenario should occur, the accused American would come before a court whose due process requirements are effectively those provided in US courts – the provisions of the Rome Statute are identical to those in the US Bill of Rights. For example, Article 66 guarantees the presumption of innocence until proven guilty; Article 67 (1)(c) provides for the right to a speedy trial; Article





67 (1)(g) provides for the right to remain silent; and the right to be questioned with counsel present is found in Article 67 (1)(d). These rights are further elaborated upon and clarified in the Rules of Procedure and Evidence of the Court.

The only difference between the rights provided for Americans in US courts and the ICC is that there is no trial by jury. However, a jury trial for the likes of Pol Pot, Idi Amin, Saddam Hussein or Adolf Hitler would be an impractical mockery of the meaning and purpose of juries. It would be difficult to assemble a jury of such an individual's peers. Moreover, US military courts do not use juries and the US regularly extradites its citizens for trials in countries which do not have juries in criminal trials. The ICC provides instead for trial by judges expert in the legal principles of the Court, thus ensuring that their rulings will be rooted in them.

The Court's mandatory due process protections for defendants have already been tested, and it is clear that its judges are enforcing and upholding the rights of the accused. In the case of Thomas Lubanga Dyilo, the Trial Chamber issued a stay of the trial due to failure of the prosecution to disclose all exculpatory documents.¹¹ The stay allowed the accused time to access and review information that could be useful to his defense. The ICC's conduct of this trial demonstrates that due process standards will be upheld in the Court. It is clear from its record that the ICC is a court founded on the same basic rights and privileges awarded to Americans, ensuring that Americans would receive a proper and fair trial before the Court.

Several critics have voiced concern about the length of the Lubanga trial and the slowness of proceedings generally. The Lubanga trial is the Court's first and questions of procedure, the handling of evidence, and the role of witnesses, among others, have had to be resolved for the first time, often by appeals judges. ICC cases are very complicated in terms of evidence and procedure. ICC trials are comparable to similarly complicated trials in the US, for instance organized crime trials, which also involve very complex and long-term investigations and have similar evidentiary challenges. This is because of the amount of information that must be gathered, the accessibility of the territory involved, the number of victims and witnesses and the difficulties of identifying and locating them. However, the Lubanga trial commenced much earlier than expected even with the delay due to the stay of proceedings.

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 were established only after the crimes they address have been committed. The alleged corruption of the International Criminal Tribunal for Rwanda, the difficult start of the International Criminal Tribunal for the former Yugoslavia, and the occasional failure of the tribunals to follow rules and safeguards in their statutes, are all pointed to as inherent weaknesses of the international tribunals. The setbacks of the tribunals came from their improvised nature, lack of a permanent mandate, and inadequate supervision by their overseeing body, the

¹¹ The Prosecutor v. Thomas Lubanga Dyilo, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01-06/1401, June 13, 2008. For general information about the Lubanga case, see <http://www.icc-cpi.int/Menu/Go?id=b7e416a8-54c9-413c-a09d-7f13f6b2abd2&lan=en-GB>.





UN Security Council. As each was established, it had to start from scratch in operations, investigations, prosecutions, personnel recruitment and financing.

The permanence of the ICC 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 were carefully discussed and reviewed before approval by the ASP. The ability of the ICC to have organized itself permanently before its first indictments gave the institution a huge advantage over the ad hoc tribunals. At the same time, the ICC has been learning from the experience of the tribunals. Many of the tribunals' staff were closely involved in ICC negotiations, and some have even been elected to serve as judges or hired as 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 expressed by many military officials, is that military operations may constitute crimes against humanity, war crimes, or, once defined, the crime of aggression. Such concerns are unnecessary because the ICC was not designed to prosecute citizens of democratic countries which 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 just 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 Rome Statute proscribes are also prohibited by the military manuals of the US army. The definitions of the ICC crimes' elements were shaped, supported and finally approved by the US 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 US need not fear prosecution from an error or combat miscalculation. 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 offers protection for US citizens serving in the military or as officials abroad. It requires the ICC to defer to Status of Forces Agreements (SOFAs), which protect US soldiers, sailors, air force personnel and marines abroad, and to Status of Mission Agreements (SOMAs) for US officials. Therefore, it may even be argued that the Court will aid in the protection of Americans, especially servicemembers, because of its many protective provisions and, in the long term, it might well deter atrocities.

The Crime of Aggression, the Review Conference, and Beyond

Concern over possible prosecution of the crime of aggression is understandable. However, it should be clear that the Court does not yet have jurisdiction over the crime of aggression, and such jurisdiction will only be activated after a provision is adopted defining the crime and setting out the conditions for its jurisdiction.





Negotiations on this provision will continue at the Review Conference of the Rome Statute of the ICC in May/June of 2010. It must also be remembered that the ICC has jurisdiction over individuals, not States, and thus would not make any determinations regarding the actions of a State or its foreign policy.

The proposed definition of the crime of aggression lays out requirements for the intent and gravity of the crime. The draft definition has due regard for the Charter of the United Nations, indicating that the crime must be of a character, gravity and scale to constitute a manifest violation of the Charter. The Court will not have jurisdiction over this crime unless the definition is agreed upon and the Rome Statute is amended, which requires consensus or at least a two-thirds majority of the Assembly of States Parties. Furthermore, when this crime is defined it will have the same safeguards applied to it as the other crimes under the jurisdiction of the Court.

Conservatives are concerned about the Obama administration's decision to engage with the Court and participate in the upcoming Review Conference as an observer. However, active participation with the ICC is beneficial to American interests. The US will have the ability to offer its perspectives on the definition of the crime of aggression and on the jurisdiction of the Court over the crime. The US will also be able to participate in negotiations surrounding its adoption. The issue of the role of the Security Council with respect to this provision is still open for discussion, and the Obama administration has been firm in favor of the Security Council's involvement. Furthermore, although as an observer the US cannot vote, it has a number of allies who are States Parties with votes and will insist on an active role for the Security Council.

Conclusion

Freedom, democracy, equality and the individual worth of and dignity of every human being – these are all profoundly American values upon which the US was founded. The US 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 are fundamental values 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 US 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. No longer is impunity inevitable. Americans fight to end atrocities such as human trafficking, slavery, religious persecution and mutilation. Such crimes are included in the jurisdiction of the



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Court. The Court is an embodiment of American values – justice, personal accountability and respect for the rule of law. The Court’s aims and objectives demonstrate that the ICC shares these values and moral history on which America was founded, and that there is common ground between the US and the Court, which strongly justifies American acceptance of it.

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