The United States' Need to Ratify the Rome Statute

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The Need to Ratify the Rome Statute: The United States and Its International Obligation

Abstract

The Rome Statute of the International Criminal Court establishes a permanent court to prosecute individuals who have committed atrocity crimes such as torture, genocide and crimes of war. Initially, the U.S. supported the Court, but several factors caused it to actively work against the Court during the Bush Administration. The main arguments against joining the Court are rooted in its constitutionality (especially the rights of due process), state sovereignty, the role of the UN Security Council and a fear of politicized prosecutions. But the Court is a supranational entity as well as *a court of last resort*; it does not override national courts but acts only in situations where nations' courts are unable or unwilling to prosecute. Upon examination, the U.S.' concerns reflect a unidirectional model for human rights in that the U.S. supports prosecuting criminals as long as they are not U.S. nationals. But the roots of the ICC are based in customary international law as well as the laws of nature, which should be denied by no state- especially the most powerful nation in the world. Based on the theory of natural law, the United States has an obligation to the international community to support the Court in prosecuting atrocity crimes. The United States has immense power to help shape the Court and often overlooks the option to amend or make reservations on areas of the Court that it sees as unfit. By refusing to ratify the Rome Statue, the United States disrespects the law of nations and fails to play the role in advancing international law that it should.

Introduction

The International Criminal Court, although a relatively new instrument in international law, plays a distinctive role in furthering the global community's dedication to human rights.[1] This permanent tribunal works closely with the United Nations, but is its own independent institution. The Court came into being in 2002 through the Rome Statute of the International Criminal Court:[2] the Court aims to prosecute individuals for genocide, crimes against humanity, war crimes and the crime of aggression.[3]

This court is designed to be a supranational entity, but one that would only be utilized when national courts are unable or unwilling to prosecute these principles of international law, earning it the nickname *a court of last resort.* The distinguishing feature of the ICC is that it prosecutes individuals who have committed atrocity crimes, while other international courts focus on crimes of state against state.[4] As of 2012, one hundred and twenty-one nations were members of the Rome Statute, not including the United States.

Despite its repeatedly proclaimed dedication to human rights, the U.S. has not only failed to ratify the treaty, but has, at times, actively worked against the Court. While international commitments should be taken carefully, the United States' resistance towards the Court demonstrates not a dedication to state sovereignty, but a case of extreme American exceptionalism. Many scholars say that the failure to ratify

"has damaged the moral credibility of the United States -it now places the U.S. in the company of notorious human rights abusers like Iraq, North Korea, China, Cuba, Libya and Burma."[5]

During the lengthy debates of the Rome Statute, the United States played a large role in the conceptualization of the Court. Under the Clinton administration, the United States signed the treaty but had reservations about complete ratification; the Bush Administration and the tense setting of post-9/11 America caused loose cooperation with the Court to turn into outright hindrance. Infamously, George W. Bush officially *unsigned* the Rome Statute in his first term, stating that the United States recognized no obligation to the Court.[6] Not only did the U.S. unsign the treaty, but several diplomatic actions were taken against the Court that epitomize the real commitment of the U.S. to American exceptionalism above all else.

For example, Article 98 of the Rome Statue provides that the Court cannot act in a way that would breach a state's prior international obligations. The Clinton administration's interpretation of the Article was initially designed in response to the SOFA agreements, protecting soldiers overseas. But under the Bush admission, as dislike of the Court was greatly heightened, Article 98 was used to create a web of bilateral treaties with other states, declaring that each state could not bring any U.S. nationals to the ICC. [7] Acts such as this (and others such as the Nethercutt Amendment, economic sanctions and the American Servicemembers' Protection Act) embody American exceptionalism at the price of human rights. Creating a bilateral system of unidirectional immunity in hopes of protecting nationals who may not deserve protection is an embarrassing testament to the way in which America holds itself above the law.

Towards the end of Bush's second term, however, a more pragmatic approach to dealing with the Court came into play. And since, the United States' cooperation with the Court is looking increasingly optimistic. President Obama has said he hopes to reestablish positive relations with the Court; Secretary of State Hillary Clinton has stated, "We will end hostility to the Court[8]." Although this bodes well for ratification in the future, the U.S. has made no definite plans. This is due to various arguments that attempt to rationalize the U.S.' lack of involvement but, after evaluation, are shown to be nothing more than thinly coated excuses.

James Mayerfeld establishes a dichotomy of two ways to analyze international human rights goals. Firstly, a collective approach, such as the ICC, is obtained through codification of natural law wherein all states pull together equally and cooperatively within the international community. Instead of a collective approach, the U.S. prefers a unidirectional model; Mayerfeld describes this model:

"One-sided, or unidirectional, enforcement differs from anarchic enforcement in that the states seeking to enforce compliance with human rights norms claim a right of exemption from any such enforcement applied to themselves."[9]

Looking historically at events such as the Nuremburg Trials, Yugoslavia, Bosnia and centralization of powerful countries through mechanism such as the United Nations Security Council (UNSC), it is clear that the U.S. is committed to a model of unidirectional exceptionalism. Mayerfeld goes on to say, "The assertion of a right to enforce human rights standards upon others while claiming immunity from similar enforcement upon oneself flouts *elementary* axioms of fairness and reciprocity."[10] To more closely evaluate America's unidirectional stance, its objections to the Court must be examined before discussing the benefits and international obligations connected to the Court.

Constitutionality & State Sovereignty

The most common argument against the Court is the belief that it violates the U.S. Constitution and the sovereignty of the U.S. by subjecting nationals to another court and therefore breaching the supreme law of the land. While these concerns are worth analysis, a brief assessment of these grievances demonstrates that the International Criminal Court, in fact, does not violate Constitutional principles.[11]

Judicial Power, found in Article III, Section I of the U.S. Constitution, establishes the United States Supreme Court as the highest legal authority.[12] But this criticism ignores one of the most basic principles of the Court's design; the ICC is not intended to replace or override national courts, it is *supranational*.[13] With the purpose of protecting state sovereignty, the Court utilizes the Complementarity Principle in exercising jurisdiction. As implied, the Court is a

complementary institution to national courts. Article 17 of the Rome Statute establishes that the Court only has jurisdiction when national courts are "unable or unwilling" to prosecute crimes, and Article 18 of the Statue reinforces the opportunity of all states to exercise national and territorial jurisdiction within their own courts before the ICC becomes involved. [14] "If national authorities of a state adequately investigate or prosecute, or if they decide on solid grounds not to prosecute, the case will be inadmissible before the Court."[15] This Complementarity Principle allows for the United States to exercise the full powers of the Supreme Court initially, in no way infringing on Article III. Some scholars even argue that the Court does not violate Article III's Judicial powers, but that the ICC is actually rooted in both Article II's power to make treaties and Article I's Define and Punish Clause.[16]

A further note on the supranational aspects of the court: some areas of the Rome Statute's codified customary law are not present in the U.S. Constitution. For example, various definitional problems of genocide (and ethnic cleansing) create a gap between U.S. law and the Law of Nations. Before ratifying the Statute, the U.S. should close these gaps in its national laws both for the sake of customary law in general and to avoid falling under ICC jurisdiction as an *unwilling* nation.

One of the biggest threats to ratification is the lack of jury trials within the Court; the ICC prosecutes before a panel of judges. While this seemingly violates due process rights of the Fifth and Six Amendments, Scheffer demonstrates that even this is not a breach of the Constitution. The Complementarity Principle, as described above, allows the opportunity of U.S. nationals to be tried before a jury in the Supreme Court. And while several instances in the past demonstrated that the right to a jury has not always been present (especially in instances of military trials), reservations and amendments to the Court can be made. By further ensuring the due process rights of nationals, the U.S. could help shape the ICC by enhancing the areas it sees as unfit. For example,

"the United States could attach a declaration explaining that any U.S. national subject to an arrest warrant approved by the ICC, particularly for an atrocity crime committed in the United States, would be investigated and, if merited, prosecuted before a U.S. court by jury trial or court martial."[17]

Despite the brevity of this discussion on the intricacies of constitutionality, it is clear that the Court does not violate the Constitution but supplements it as *a court of last resort*. And the constitutionality excuse does not hold up very well when examining the complementary nature of the ICC, as well as the U.S.' options to make amendments and reservations before the Court.

Reservations About the UNSC & Jurisdiction

The independence of the Court from the United Nation Security Council is one of the United States' greatest objections, as well as a blunt demonstration of Mayerfeld's unidirectional model of human rights; if the Court were subject to the Security Council, permanent members would be able to veto cases brought to the Court. Although the Court accepts recommendations from the UNSC, the ICC decisions are not made by the Security Council members. The protection of U.S. nationals that could have been obtained through dependence on the UNSC did not come into being.[18] But when thinking about the overall objective of the Court, it is obvious that a connection to the Security Council would make it merely a tool of the major world powers instead of a collective, international institution. The ability of major countries to dictate the movements of the Court undermines its entire purpose; this would be obvious to any legal scholar, yet the United States seeks this unfair and unwarranted authority to bring other nationalities to Court while refusing to take accountability for its own actions.

Politicized Prosecutions

According to U.S. Ambassador Rapp,

"We've had a concern in the past that the ICC could undertake politically motivated prosecutions, could perhaps come after Americans who were engaged in protecting people from atrocity instead of emphasizing those that were committing the crimes."[19]

The fear of politicized prosecutions is tied to the structure of the Court's jurisdiction and triggering mechanisms, as well as the role the United States plays in the world. Cases can be triggered through a request from the United Nations Security Council, by request of a member state or through the request of the Prosecutor, empowered by the pre-trial chamber. Furthermore, the ICC can claim jurisdiction both when a member state's national has committed an atrocity crime and when an atrocity crime occurs territorially within the member state. This structure concerns the United States: with military troops deployed globally, their role may put them at a higher risk of being prosecuted under the territoriality principle.[20] But if that is the global role the U.S. insists on playing, so be it. There is no situation where military intervention can be used as a justification for crimes such as genocide or torture.

Recently, the ICC has received requests for the prosecution of former President George W. Bush based on alleged War Crimes in Iraq.[21] Desmond Tutu has stated, "The Iraq war has destabilized and polarized the world to a greater extent than any other conflict in history."[22] While some critics may argue that this is an example of politicized prosecutions, if atrocity crimes had not been committed, what is the United States so afraid of? Judge Baltasar Garzon of Spain writes,

"We should look more deeply into the possible criminal responsibility of the people who are, or were, responsible…There is enough of an argument in 650,000 deaths for this investigation and inquiry to start without more delay."[23]

The fear of politicized prosecutions amounts to nothing more than the U.S.' refusal to take accountability for its actions. Its prominent military role in the world will surely draw attention to the U.S., but the impartiality and safeguards established in the Rome Statute will hopefully ensure that the ICC will act only when actual atrocity crimes are involved. The Court, built with many balances and safeguards, works to prevent unwarranted and unfounded prosecutions, such as the United States fears: "Decisions are fair because they are rendered by impartial judges, not identified with either party to the dispute, and chosen on the basis of their competence and integrity." [24]Ambassador Rapp concludes, based on the Court's short history to date, "thus far, the Court has been appropriately focused."[25]

The Obligation of Natural Law

The ICC plays an important and distinctive role in international law; it can be seen symbolically as a definite step of progress in the worldwide framework for human rights. The United States' disappointing role in the Court is clearly of high importance, but it begs an even broader question: what is the role that the United States is playing in international law as a whole? It seems like a lesson learned by children: *it's not what you say, it's what you do.* And the United States can give (and has given) as many long-winded speeches as it desires about its dedication to international human rights, but all of its red, white and blue rhetoric means nothing without decisive action. The United States continues to act like a bully instead of the protector of human rights it claims to be.

In the debate over the UNSC and the specifics of constitutionality, many critics of the Court fail to take a step back and look at the bigger picture. While they cite the necessity of the United States Supreme Court, they often forget what many international lawyers consider the true *supreme values.[26]* Although positivist thinking has dominated recent decades of law, [27] natural law cannot be ignored.[28] There are clear principles, respected by nations and people around the world, which cannot be denied. Proposing that genocide or torture do not contain clear ethical divides between right and wrong is illogical. The idea of *jus cogens* and natural law rests in the roots of law as a whole, the self-evident truths that make us human.[29]

"The idea of a universal human nature which recognizes that because such a nature is universal and its good common amongst all of humanity regardless of nation, tribe or state, points to one global human community as a result of the shared nature of all humans."[30]

In many treaties and instances of international law, a positivist point of view is rational based on state sovereignty and national interest. But when it comes to human rights and these very evident laws of *jus cogens,* a naturalist's perspective must override the positivist viewpoint. A collective model of international law must replace this

unidirectional approach:

"Since all states have an interest in an international system governed by the rule of law, they will recognize that certain rules must bind them all equally even where they are opposing the rule's development."[31]

Based on Dubois' lengthy discussion, as well as the general theories of peremptory law, the United States' involvement in the ICC is not just beneficial; it is a moral obligation. While many critics of the Court cite the fact that the U.S.' role as the leading world hegemon offers protection against atrocity crimes such as torture, the inverse of this argument seems more logical. It is the very same role as the world police and chief peacemaker that make it crucial for the United States to defend human rights with more action and more decisiveness than any other nation. If the U.S. continues to insist on leading the world then it must actually do so. Human rights, the most fundamental of all laws, deserve far less hesitation from what is supposedly their strongest supporter.

If further study reveals that the Court does in fact breach due process rights, the United States should propose amendments to further these rights for all humans instead of abandoning the ideas of international justice. If the United States has objections to structural aspects of the Court, it should continue cooperative discussions to create those changes. The U.S. prides itself on the high functionality of its judicial system; why would it not use its influence to further enhance the international system for people of all nationalities? Amending areas of the Statute offers possibilities to enhance the Court and would be far preferable to remaining uninvolved.

The ability of the United States to help shape and strengthen the Court in its early stages is an extremely important factor. Their cooperation with the Court would strengthen international law as a whole while promoting human rights law: "Joining the Court would be a big boost to its legitimacy and workings."[32] As international and human rights law continues to grow, the United States can help steer its path as well as lead other countries to do the same. Recently re-elected President Barak Obama advocated the U.S.' involvement "because there is no force in the world more powerful than the example of America."[33]

Conclusion

"President Obama is being too wimpy about joining the rest of the world," said *Progressive* magazine in 2010, and two years later, ratification of the Court still seems unlikely in the foreseeable future.[34] There is a crucial distinction between rational suspicions and making excuses – the constitutionality, the safeguards and the international importance of the Court are clearly proven. What has held us back from ratification is not a legitimate concern over matters of due process; it is fear of American nationals and military leaders being held accountable for their actions. The International Criminal Court and many other aspects of the international community (such as the Inner-American Convention or the Convention on Women's Rights) demonstrate the need for the United States to change the role it plays in international law from a unidirectional to a collective approach. The U.S. cannot continue its internationalist stance in all other arenas and then claim a nationalistic role when it comes to international accountability.

This discussion has, in no way, explored all of the many workings of the Rome Statute or the United States' objections to it. But by analyzing several of the United States' greatest concerns, it is apparent that they do not seem completely sincere or justified. All objections accumulate into a policy of exceptionalism that ignores customary law and *jus cogens.*

As international law grows, the U.S. should help develop the Court rather than work against it. The theory of natural law demonstrates that there are standards of humanity that countries do not get to opt out of; the American public should be concerned by a government that so strongly defends its rights to commit atrocious acts.

"The idea is that some crimes, atrocity crimes, are so egregious and shocking to all decent people that they constitute crimes not only against the immediate victims, but against all of humankind no matter what situation."[35]

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[1] The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community. International Criminal Court, "The Rome State of the International Criminal Court," ICC. (Nov. 2012).

[2] On 17 July 1998, the international community reached an historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries. ICC, "The Rome State of the International Criminal Court,"

ICC. (2012).

[3] As a whole, these crimes are commonly referred to as “atrocity crimes.” It is also important to note that the Court cannot exercise jurisdiction on the crime of aggression until 2017 due to prolonged debate about its operational definition. ICC, “The Rome State of the International Criminal Court,” ICC. (2012).

[4] This is the important distinction between the ICC and the ICJ (the main court of the United Nations). The ICJ prosecutes states who have violated international law such as *pacta sunt servanda*, while the ICC can bring individuals to trial. ICC, “The Rome Statute of the International Criminal Court,” ICC (2012)

[5] Andrea Birdsall, “The Monster That We Need to Slay,” *Global Governance* 4 (2010): 459.

[6] “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third State.” Attila Bogdan, “The United States and the International Criminal Court,” *International Criminal Law* 8 1/2 (2008): 16.

[7] According to the law of treaties, initially signing a treaty reflects a state’s intention to not commit “acts which would defeat the object and purpose” of the treaty, while not making the state legally bound by the treaty’s contents. ICC, “The Rome State of the International Criminal Court,” ICC. (2012).

[8] “…look for opportunities to encourage effective ICC action in ways to promote U.S. interests by bringing war criminals to justice.” Clinton quoted in Birdsall, “The Monster That We Need to Slay,” 464.

[9] James Mayerfeld. “Who Shall be Judge? The United States, the International Criminal Court and the Global Enforcement of Human Rights.” Human Rights Quarterly 1 (2012):114

[10] Ibid., 115.

[11] David Scheffer and Ashley Cox. “The Constitutionality of the Rome Statute of the International Criminal Court.” *The Journal of Criminal Law and Criminology* 3 (2008).

[12]“The Judicial Power of the United States, shall be vested in one Supreme Court.” Legal Information Institute. “The Constitution of the United States of America.” *Cornell University Law.* law.cornell.edu/constitution/ (accessed Nov. 2012).

[13] Rome Statute Preamble,” the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.´ International Criminal Court, “The Rome Statute,” 2012.

[14] Article 18.2, “ Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction.” International Criminal Court, “The Rome Statute,” 2012.

[15] Marten Zwanenburg. “The Statute for an International Criminal Court and the United States.”*European Journal of International Law* 10.1 (1999): 130.

[16] Article 1, Section VIII enables Congress “to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.” Legal Information Institute. “The Constitution,” 2012.

[17] Scheffer and Cox “The Constitutionality of the Rome Statute,” 1061.

[18] Birdsall, “The Monster,” 454.

[19] Amitabh Pal, "United States Should Join the International Criminal Court." *The Progressive Magazine* (2010).

[20] Courts Jurisdiction, as outlined by Art 12 of the Statue, concerns critics of the Court. A Territorial Principle would allow for United States Nationals to be prosecuted for crimes committed on member-states' territory. Lawyers counter this argument of universal jurisdiction, saying that individuals are subject to states' territorial jurisdiction which includes extradition to international courts. Birdsall, "The Monster That We Need to Slay," 454.

[21] Following Article 6 of the Nuremburg Tribunals as well as Articles V(Crimes within the jurisdiction of the Court**)** and VI (Genocide) of the Rome Statute of the ICC. David Swanson, "Prosecution of George W. Bush by the International Criminal Court." Global Research (2008).

[22] David Stringer. "Desmond Tutu: Bush and Blair should 'Answer for Their Actions." *Associated Press* (2012).

[23] Swanson, "Prosecution of George W. Bush," 2008.

[24] Mayerfeld, "Who Shall be Judge?," 126.

[25] Harold Koh, "U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference." U.S. Department of State (June 15, 2010).

[26] Dan Dubois, "The Authority of Peremptory Norms in International Law: State Consent or Natural Law?"*Nordic Journal of International Law 78.2* (2009): 134.

[27] Positivist thinking denotes the idea that law is rooted in the consent of those it governs.

[28] Dubois, "The Authority of Peremptory Norms," 133-140.

[29] Jasper Doomen, "The Meaning of 'International Law" *Original Law Review 7.2* (2011): 66-70.

[30] Dubois, "The Authority of Peremptory Norms," 152.

[31] Dubois, "The Authority of Peremptory Norms," 141.

[32] Pal, "The United States Should Join the Court," 2010.

[33] Megan A. Fairlie, "The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage." Berkeley Journal 29.2 (2011): 543.

[34] Pal, "The United States Should Join the Court," 2010.

[35] Judge Richard Goldstone, "The Future of International Criminal Justice: The Crucial Role of the United States." *ILSA Journal 18.2* (2012): 615.

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