

The United States and the International Criminal Court
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I've been asked to open this 20th anniversary convention of the Federalist Society with some remarks about the pressures of national security on American government. With this in mind, I'd like to address the topic of the International Criminal Court and detail our reasons for opposing it. As I will explain, the problems inherent in the ICC are more than abstract legal issues -- they are matters that touch directly on our national security and our national interests.

For a number of reasons, the United States decided that the ICC had unacceptable consequences for our national sovereignty. Specifically, the ICC is an organization whose precepts go against fundamental American notions of sovereignty, checks and balances, and national independence. It is an agreement that is harmful to the national interests of the United States, and harmful to our presence abroad.

U.S. military forces and civilian personnel and private citizens are currently active in peacekeeping and humanitarian missions in almost 100 countries at any given time. It is essential that we remain steadfast in preserving the independence and flexibility that America needs to defend our national interests around the world. As President Bush said,

The United States cooperates with many other nations to keep the peace, but we will not submit American troops to prosecutors and judges whose jurisdiction we do not accept.... Every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable International Criminal Court.

So in order to protect our citizens, we are in the process of negotiating bilateral agreements with the largest possible number of states, including non-Parties. These Article 98 agreements, as they are called, provide American citizens with essential protection against the Court's purported jurisdiction claims, and allow us to remain engaged internationally with our friends and allies. To date, 14 countries have signed Article 98 agreements with us. It is a misconception that the United States wants to use these Article 98 agreements to undermine the ICC. To the contrary, we are determined to work with States Parties, utilizing a mechanism prescribed within the Rome Statute itself, to find an acceptable solution to one of the main problems posed by the ICC.

In the eyes of its supporters, the ICC is simply an overdue addition to the family of international organizations, an evolutionary step ahead of the Nuremberg tribunal, and the next logical institutional development over the ad hoc war crimes courts for the Former Yugoslavia and Rwanda. The Statute of Rome establishes both substantive principles of international law and creates new institutions and procedures to adjudicate these principles. The Statute confers jurisdiction on the ICC over four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. The Court's jurisdiction is "automatic," applicable to covered individuals accused of crimes under the Statute regardless of whether their governments have ratified it or consent to such jurisdiction. Particularly important is the independent Prosecutor, who is

responsible for conducting investigations and prosecutions before the Court. The Prosecutor may initiate investigations based on referrals by States Parties, or on the basis of information that he or she otherwise obtains.

So described, one might assume that the ICC is simply a further step in the orderly march toward the peaceful settlement of international disputes, sought since time immemorial. But in several respects, the court is poised to assert authority over nation states, and to promote its prosecution over alternative methods for dealing with the worst criminal offenses.

The Court's flaws are basically two-fold, substantive, and structural. As to the former, the ICC's authority is vague and excessively elastic, and the Court's discretion ranges far beyond normal or acceptable judicial responsibilities, giving it broad and unacceptable powers of interpretation that are essentially political and legislative in nature. This is most emphatically not a Court of limited jurisdiction. Crimes can be added subsequently that go beyond those included in the Rome Statute. Parties to the Statute are subject to these subsequently-added crimes only if they affirmatively accept them, but the Statute purports automatically to bind non-parties, such as the United States, to any such new crimes. It is neither reasonable nor fair that these crimes would apply to a greater extent to states that have not agreed to the terms of the Rome Statute than to those that have.

Numerous prospective "crimes" were suggested at Rome and commanded wide support from participating nations, such as the crime of "aggression," which was included in the Statute, but not defined. Although frequently easy to identify, "aggression" can at times be something in the eye of the beholder. For example, Israel justifiably feared in Rome that certain actions, such as its initial use of force in the Six Day War, would be perceived as illegitimate preemptive strikes that almost certainly would have provoked proceedings against top Israeli officials. Moreover, there seems little doubt that Israel will be the target of a complaint in the ICC concerning conditions and practices by the Israeli military in the West Bank and Gaza. Israel recently decided to declare its intention not to become a party to the ICC or to be bound by the Statute's obligations.

A fair reading of the treaty leaves one unable to answer with confidence whether the United States would now be accused of war crimes for legitimate but controversial uses of force to protect world peace. No U.S. Presidents or their advisors could be assured that they would be unequivocally safe from politicized charges of criminal liability.

As troubling as the ICC's substantive and jurisdictional problems are, the problems raised by the Statute's main structures -- the Court and the Prosecutor -- are still worse. The ICC does not, and cannot, fit into a coherent, international structural "constitutional" design that delineates clearly how laws are made, adjudicated or enforced, subject to popular accountability and structured to protect liberty. There is no such design, nor should there be. Instead, the Court and the Prosecutor are simply "out there" in the international system. Requiring the United States to be bound by this treaty, with its unaccountable Prosecutor and its unchecked judicial power, is clearly inconsistent with American standards of constitutionalism. This is a macro-constitutional issue for us, not simply a narrow, technical point of law.

We are considering, in the Prosecutor, a powerful and necessary element of executive power, the power of law-enforcement. Never before has the United States been asked to place any of that power outside the complete control of our national government without our consent. Our concern goes beyond the possibility that the Prosecutor will target for indictment the isolated U.S. soldier who violates our own laws and values by allegedly committing a war crime. Our principal concern is for our country's top civilian and military leaders, those responsible for our defense and foreign policy. They are the ones potentially at risk at the hands of the ICC's politically unaccountable Prosecutor, as part of an agenda to restrain American discretion, even when our actions are legitimated by the operation of our own constitutional system.

Unfortunately, the United States has had considerable experience in the past two decades with domestic "independent counsels," and that history argues overwhelmingly against international repetition. Simply launching massive criminal investigations has an enormous political impact. Although subsequent indictments and convictions are unquestionably more serious, a zealous independent Prosecutor can make dramatic news just by calling witnesses and gathering documents, without ever bringing formal charges.

Indeed, the supposed "independence" of the Prosecutor and the Court from "political" pressures (such as the Security Council) is more a source of concern than an element of protection. "Independent" bodies in the UN system have often proven themselves more highly politicized than some of the explicitly political organs. True political accountability, by contrast, is almost totally absent from the ICC.

The American concept of separation of powers, imperfect though it is, reflects our settled belief that liberty is best protected when the various authorities legitimately exercised by government are, to the maximum extent possible, placed in separate branches. So structuring the national government, the Framers believed, would prevent the excessive accumulation of power in a limited number of hands, thus providing the greatest protection for individual liberty. Continental European constitutional structures do not, by and large, reflect a similar set of beliefs. They do not so thoroughly separate judicial from executive powers, just as their parliamentary systems do not so thoroughly separate executive from legislative powers. That, of course, is entirely Europe's prerogative, and may help to explain why Europeans appear to be more comfortable with the ICC's structure, which closely melds prosecutorial and judicial functions in the European fashion.

In addition, our Constitution provides that the discharge of executive authority will be rendered accountable to the citizenry in two ways. First, the law-enforcement power is exercised through an elected President. The President is constitutionally charged with the responsibility to "take Care that the Laws be faithfully executed," and the constitutional authority of the actual law-enforcers stems directly from the only elected executive official. Second, Congress, all of whose members are popularly elected, through its statute-making authority, its confirmation authority and through the appropriations process, exercises significant influence and oversight. When necessary, the congressional impeachment power serves as the ultimate safeguard.

In the ICC's central structures, the Court and Prosecutor, these sorts of political checks are either greatly attenuated or entirely absent. They are effectively accountable to no one. The Prosecutor

will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight, elected or unelected, in the Statute of Rome. The Prosecutor is answerable only to the Court, and then only partially, although the Prosecutor may be removed by the Assembly of States Parties. The Europeans may be comfortable with such a system, but Americans are not.

By long-standing American principles, the ICC's structure utterly fails to provide sufficient accountability to warrant vesting the Prosecutor with the Statute's enormous power of law enforcement. Political accountability is utterly different from "politicization," which we can all agree should form no part of the decisions of either Prosecutor or Court. Today, however, precisely contrary to the proper alignment, the ICC has almost no political accountability, and carries an enormous risk of politicization. Even at this early stage in the Court's existence, there are concerns that its judicial nomination process is being influenced by quota systems and back-room deals.

Under the UN Charter, the Security Council has primary responsibility for the maintenance of international peace and security. The ICC's efforts could easily conflict with the Council's work. Indeed, the Statute of Rome substantially minimized the Security Council's role in ICC affairs. While the Security Council may refer matters to the ICC, or order it to refrain from commencing or proceeding with an investigation or prosecution, the Council is precluded from a meaningful role in the ICC's work. In requiring an affirmative Council vote to stop a case, the Statute shifts the balance of authority from the Council to the ICC. Moreover, a veto by a Permanent Member of such a restraining Council resolution leaves the ICC completely unsupervised. This attempted marginalization of the Security Council is a fundamental new problem created by the ICC that will have a tangible and highly detrimental impact on the conduct of U.S. foreign policy. The Council now risks having the ICC interfering in its ongoing work, with all of the attendant confusion between the appropriate roles of law, politics, and power in settling international disputes. The Council already has had to take action to dilute the disincentive the ICC poses to nations considering troop contributions to UN-related peacekeeping operations.

Paradoxically, the danger of the ICC may lie in its potential weakness rather than its potential strength. The most basic error is the belief that the ICC will have a substantial deterrent effect against the perpetration of crimes against humanity. Behind their optimistic rhetoric, ICC proponents have not a shred of evidence supporting their deterrence theories. In fact, they fundamentally confuse the appropriate roles of political and economic power, diplomatic efforts, military force, and legal procedures. Recent history is filled with cases where even strong military force or the threat of force failed to deter aggression or gross abuses of human rights. ICC proponents concede as much when they cite cases where the "world community" has failed to pay adequate attention, or failed to intervene in time to prevent genocide or other crimes against humanity. The new Court and Prosecutor, it is said, will now guarantee against similar failures.

But deterrence ultimately depends on perceived effectiveness, and the ICC fails badly on that point. The ICC's authority is far too attenuated to make the slightest bit of difference either to the war criminals or to the outside world. In cases where the West in particular has been unwilling to intervene militarily to prevent crimes against humanity as they were happening, why will a

potential perpetrator feel deterred by the mere possibility of future legal action? A weak and distant Court will have no deterrent effect on the hard men like Pol Pot most likely to commit crimes against humanity. Why should anyone imagine that bewigged judges in The Hague will succeed where cold steel has failed? Holding out the prospect of ICC deterrence to the weak and vulnerable amounts to a cruel joke.

Beyond the issue of deterrence, it is by no means clear that "justice" as defined by the Court and Prosecutor is always consistent with the attainable political resolution of serious political and military disputes. It may be, or it may not be. Human conflict teaches that, much to the dismay of moralists and legal theoreticians, mortal policy makers often must make tradeoffs among inconsistent objectives. This can be a painful and unpleasant realization, confronting us as it does with the irritating facts of human complexity, contradiction, and imperfection.

Accumulated experience strongly favors a case-by-case approach, politically and legally, rather than the inevitable resort to adjudication. Circumstances differ, and circumstances matter. Atrocities, whether in international wars or in domestic contexts, are by definition uniquely horrible in their own times and places.

For precisely that reason, so too are their resolutions unique. When the time arrives to consider the crimes, that time usually coincides with events of enormous social and political significance: negotiation of a peace treaty, restoration of a "legitimate" political regime, or a similar milestone. At such momentous times, the crucial issues typically transcend those of administering justice to those who committed heinous crimes during the preceding turbulence. The pivotal questions are clearly political, not legal: How shall the formerly warring parties live with each other in the future? What efforts shall be taken to expunge the causes of the previous inhumanity? Can the truth of what actually happened be established so that succeeding generations do not make the same mistakes?

One alternative to the ICC is the kind of Truth and Reconciliation Commission created in South Africa. In the aftermath of apartheid, the new government faced the difficult task of establishing and legitimizing truly democratic governmental institutions while dealing simultaneously with earlier crimes. One option was widespread prosecutions against the perpetrators of human rights abuses, but the new government chose a different model. Under the Commission's charter, alleged offenders came before it and confessed past misdeeds. Assuming they confessed truthfully, the Commission in effect pardoned them from prosecution.

This approach was intended to make public more of the truth of the apartheid regime in the most credible fashion, to elicit admissions of guilt, and then to permit society to move ahead without the prolonged opening of old wounds that trials, appeals, and endless recriminations might bring.

I do not argue that the South African approach should be followed everywhere, or even necessarily that it was correct for South Africa. But it is certainly fair to conclude that that approach is radically different from the ICC, which operates through vindication, punishment, and retribution.

It may be that, in some disputes, neither retribution nor complete truth-telling is the desired outcome. In many former Communist countries, citizens are still wrestling with the handling of secret police activities of the now-defunct regimes. So extensive was the informing, spying, and compromising in some societies that a tacit decision was made that the complete opening of secret police and Communist Party files will either not occur, or will happen with exquisite slowness over a very long period. In effect, these societies have chosen "amnesia" because it is simply too difficult for them to sort out relative degrees of past wrongs, and because of their desire to move ahead.

One need not agree with these decisions to respect the complexity of the moral and political problems they address. Only those completely certain of their own moral standing, and utterly confident in their ability to judge the conduct of others in excruciating circumstances can reject the amnesia alternative out of hand. Invariably insisting on international adjudication is not necessarily preferable to a course that the parties to a dispute might themselves agree upon. Indeed, with a permanent ICC, one can predict that one or more disputants might well invoke its jurisdiction at a selfishly opportune moment, and thus, ironically, make an ultimate settlement of their dispute more complicated or less likely.

Another alternative, of course, is for the parties themselves to try their own alleged war criminals. Indeed, there are substantial arguments that the fullest cathartic impact of the prosecutorial approach to war crimes occurs when the responsible population itself comes to grips with its past and administers appropriate justice. The Rome Statute pays lip service to the doctrine of "complementarity," or deference to national judicial systems, but this is simply an assertion, unproven and untested. It is within national judicial systems where the international effort should be to encourage the warring parties to resolve questions of criminality as part of a comprehensive solution to their disagreements. Removing key elements of the dispute to a distant forum, especially the emotional and contentious issues of war crimes and crimes against humanity, undercuts the very progress that these peoples, victims and perpetrators alike, must make if they are ever to live peacefully together.

In the absence of the means or political will to address grave violations, the United States has supported the establishment and operation of ad hoc tribunals such as those in Yugoslavia and Rwanda. Unlike the ICC, these are created and overseen by the UN Security Council, under a UN Charter to which virtually all nations have agreed.

As the ICC comes into being, we will address our concerns about the ICC's jurisdictional claims using the remedy laid out for us by the Rome Statute itself and the UN Security Council in the case of the peacekeeping force in the former Yugoslavia. Using Article 98 of the Rome Statute as a basis, we are negotiating bilateral, legally-binding agreements with individual States Parties to protect our citizens from being handed over to the Court. Since the European Union's decision in September to permit its member states to conclude Article 98 agreements with the United States, our negotiators have been engaged in bilateral discussions with several EU countries. In the near future we will also be holding discussions on the issue with several countries in the Middle East and South Asia. Our ultimate goal is to conclude Article 98 agreements with every country in the world, regardless of whether they have signed or ratified the ICC, regardless of

whether they intend to in the future. These agreements will allow us the necessary protections in a manner that is legally permissible and consistent with the letter and spirit of the Rome Statute.

In order to promote justice worldwide, the United States has many foreign policy instruments to utilize that are fully consistent with our values and interests. We will continue to play a worldwide leadership role in strengthening domestic judicial systems and promoting freedom, transparency and the rule of law. As Secretary Powell has said:

We are the leader in the world with respect to bringing people to justice. We have supported a tribunal for Yugoslavia, the tribunal for Rwanda, trying to get the tribunal for Sierra Leone set up. We have the highest standards of accountability of any nation on the face of the earth.

It is important to note that we are not seeking immunity for our citizens, but a simple, non-surrender agreement as contemplated in the Rome Statute. We fully commit ourselves to, where appropriate, investigate and prosecute serious, credible allegations of war crimes, crimes against humanity and genocide that have been made against any of our people.

We respect the decision of States Parties to join the ICC, but they in turn must respect our decision not to be bound by jurisdictional claims to which we have not consented. As President Bush stated in his National Security Strategy,

We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court, whose jurisdiction does not extend to Americans and which we do not accept.

Signatories of the Statute of Rome have created an ICC to their liking, and they should live with it. The United States did not agree to be bound, and must not be held to its terms.

NOTE: A similar version of this speech was delivered to the Aspen Institute in Berlin, Germany on September 16, 2002.

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