

# The International Criminal Court: An Opposing View

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Professor Nagengast, thank you for inviting me here to present the case for why the United States should not join the International Criminal Court (ICC). I must admit that there are some good points for why the United States should join the ICC. Likewise, those who argue that the U.S. should join should acknowledge that the United States rightly has at this point some difficulties with the Rome Statute.

With that preface, let me begin. The Rome Statute establishing the International Criminal Court was adopted by the United Nations in 1998 over the opposition of the United States. Then-president William Clinton signed the Rome Statute on December 31, 2000, just before leaving office—leaving the Senate and incoming president George W. Bush to deal with the question of ratification. The Senate had already expressed its opposition to ratification, and in May 2002, President Bush “unsigned” the treaty; that is, he made it clear that his administration would not even seek ratification. During the Bush Administration, the United States took several steps signaling that it was not, however, implacably hostile to every act of the ICC. Most importantly, this occurred in 2005 when it abstained from the UN Security Council resolution referring the prosecution of any perpetrators of the Darfur genocide to the ICC.

Since 2009, President Obama’s Secretary of State, Hillary Clinton, has expressed “regret” that the United States has not joined the ICC; but despite that and other favorable comments within President Obama’s administration, there has been no push for ratification. Since the Constitution requires the consent of two-thirds of the Senate for ratification, it is safe to say that the United States will not ratify the Rome Statute any time soon, regardless of who is in the White House. So what is the Rome Statute, what does the International Criminal Court do, and why have politicians as far apart on the left and right as Joseph Biden and Jesse Helms expressed their opposition to joining?

The Rome Statute is a treaty drafted under the aegis of the United Nations, and became effective in 2002 when it was ratified by its sixtieth member nation. It creates the International Criminal Court, a permanent court with jurisdiction over “persons for the most serious crimes of international concern,” namely genocide, crimes against humanity, war crimes, and the crime of aggression. Let me start there.

First, jurisdiction is over persons. One of the fundamentals of international law, in the 500 years that it can be said to have existed, is that international law is between nations. We are all familiar with

that concept; the United States is a charter member of the United Nations, after all, and is even a member state of the International Court of Justice (ICJ). So ICJ, ICC—what is the big difference? The big difference is that nations sue nations at the ICJ. For a decision of the ICJ to have any effect in the United States, the United States must enact implementing legislation. At the ICC, the prosecutor, exercising the power of the United Nations, prosecutes any citizen of a member state. In other words, it is the world versus me or you.

Why is that a problem? After all, don't we all want genocide prosecuted, even if the defendant is me or you? (Which, of course, it won't be.) Hasn't the United States itself prosecuted war criminals? Yes, and yes. After World War II, the victors established several *ad hoc* tribunals to prosecute war criminals; the Nuremberg tribunal and the parallel International Military Tribunal for the Far East are familiar to us all. More recently, in 1993, the UN created a tribunal for war crimes committed in the former Yugoslavia and, in 1994, a tribunal for the genocide in Rwanda. Not only that, but there is a separate concept in international law, that of "universal jurisdiction." Most nations, including the United States, recognize universal jurisdiction—that is, the right to prosecute and punish crimes even when there is no formal law that has been broken. Due process of law demands that before any person can be found guilty of a crime, there must be a pre-existing law clearly stating what conduct is illegal, where the law applies, and what the penalty is. Universal jurisdiction says that for some crimes, due process is unnecessary.

In historical order, pirates (since Julius Caesar fought pirates in the First Century B.C.), slave traders (since the Congress of Vienna in 1815), and war criminals (since World War II) have all been recognized as the common enemy of mankind. Whether it is Adolf Eichmann in Argentina or Somali pirates on the high seas, any nation that can catch them can punish them. So, if the United States recognizes universal jurisdiction and participates in *ad hoc* tribunals, why is the ICC so bad? Let me quote George Washington, who said it better than I can in his 1796 Farewell Address:

The great rule of conduct for us in regard to foreign nations is...to have with them as little political connection as possible. So far as we have already formed engagements, let them be fulfilled with perfect good faith. Here let us stop. Europe has a set of primary interests which to us have none; or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities.

The International Criminal Court, as a permanent court, is precisely the opposite of what the United States has trusted—in Washington's words, again: "temporary alliances for extraordinary emergencies." Permanent government institutions have a way of mutating, rarely in a good way. During the Senate debate, enemies of the International Criminal Court called it a Court of Star Chamber, expecting that in a world of sound-bite politics everyone would recognize that was an insult. But that misses the whole point, because the Court of Star Chamber was a welcome and universally praised law

enforcement body for its first 100 years, and only late in the day was its potential for abuse recognized.

To find a historical parallel, I searched public opinion polls for any institution in the United States that enjoys a better reputation for competency and fairness than it did thirty years ago, and found only one: the military. I doubt that many here would welcome military rule, not because you know any military tyrants personally, but because you fear the possibilities. Just the same way, I do not doubt the good intentions of the members of the International Criminal Court, or fear that the International Criminal Court has abused its power. But I greatly fear what it might become. That is the fundamental philosophical difference between the proponents and opponents of the International Criminal Court. Europeans have been thoroughly converted to the view of Jean-Jacques Rousseau that men are inherently good but are corrupted by bad environments.

The establishment of the International Criminal Court represents what T.S. Eliot in his poem, “Choruses from *The Rock*,” called the search for the system “so perfect that no one will need to be good.” The United States never underwent this conversion. We were settled and our country was founded on the rather more pessimistic philosophy of an earlier resident of Geneva than Rousseau, John Calvin. Our constitution was written by politicians who believed that man was thoroughly depraved and almost inevitably would go bad. As James Madison observed in Federalist No. 51, “But what is government itself, but the greatest of all reflections on human nature?” Madison conceded that men are not angels and tried to build a government of checks and balances to keep power from collecting in the hands of the few. Yet the International Criminal Court, to me, is built on the false faith that in international bodies we at last have an answer to the question, “*Quis custodiet ipsos custodes?*” The answer is no man can be trusted to watch the guardians—not in the long run.

Let me descend from philosophy to lawyerly quibbling and tell you why you should be concerned about the International Criminal Court. The first particular you should note is the misnomer that what the Rome Statute sets up is actually a court. In the United States, criminal courts have evolved from the English common-law tradition toward the idea that the judge is an umpire and the prosecutor and defense counsel stand on a theoretically even footing in attempting to prove their respective whodunits. The state and the accused square off before the law, so to speak. The International Criminal Court is a tribunal, not that English kind of court, and it descends much more from the Roman civil law tradition in which the judge was the inquisitor; counsel (whether for or against the defendant) was relatively an afterthought. Quite simply, the state squares off against the individual.

If my use of the word “inquisitor” makes you nervous, good. I do not want to repeat some of the stupid and bigoted remarks senators threw around in the 1930s when debating whether the United States should join the Permanent Court of International Justice. I do want to stress that if your assumption is that the relationship of the International Criminal Court to the procedure you expect under the Constitution

would be anything like the relationship of state courts to federal courts, your assumption is wrong.

There were not very many controversies over crime and punishment when our constitution was written. One was that crimes had to be prosecuted where they allegedly took place. Our Framers remembered what an instrument of tyranny English laws could be in moving the trials of smugglers to the West Indies. Some of them even remembered the fate of the Scottish rebels of 1745 who were tried before English juries. And yet Article 62 of the ICC provides that all trials will be at The Hague. But this is no problem, really; since the International Criminal Court is a tribunal, not a court, there will be no jury. Under Article 74 of the Rome Statute, guilt is determined by a majority vote of the judges. I will be the first to admit that juries have made some spectacularly bad decisions over the years. But I fear judges without juries far more than I would fear bad juries. From what I can see, the first crop of judges is really quite good. But they will only be there for nine-year terms, not life tenure.

Even before the American Revolution, Parliament had recognized that judges who were dependent on the King for continuation in office could not be expected to be unbiased. But nine years, that's still pretty independent, right? No; under Article 46, judges can be removed by a secret ballot of member states at any time for misconduct or inability to carry out the function of the International Criminal Court. Will such judges fearlessly decide cases, or will they decide them with one eye on the international reaction? We have enough trouble with international figure skating and boxing judges. Under Article 48, whether in office or out, the ICC judges will have only such immunity from legal process as the majority of their fellow judges grant them. That is quite an incentive to conform to the policies of the majority.

The International Criminal Court is quite lacking in the sort of internal separation of powers that we have in the United States where appeals courts and trial courts frequently check the worst of each other's mistakes. The eighteen judges of the ICC (no more than one per country—so North Korea has the same influence as New Zealand) organize themselves into Pre-trial, Trial, and Appeals Divisions. Under Article 39, the appeals court is separate, but the other judges can switch back and forth from investigative roles to presiding over trials. Will there be an appropriate hard look at evidence developed by one's colleagues? Or will the Trial Division give the Pre-Trial judges too much benefit of the doubt in the expectation that they, too, will receive similar review in the next case? Lack of internal checks is significant, because the member states will not be able to question the International Criminal Court's actions. Under Article 59, a nation that signs onto the Rome Statute cannot even question whether ICC arrest warrants are issued properly. Again, for a historical parallel, think about a prosecutor with a fugitive warrant coming into a Pennsylvania court in the 1850s and demanding that escaped "property" be returned to slave states. Yes, the International Criminal Court will be doing right and good, but no doubt slave catchers thought they were protecting right and good, too.

Yet the cultural differences over slavery that tore this country apart were minor ones compared to the cultural differences in the world today that the ICC ignores. The United States Supreme Court thought that the right to question the legality of one's detention was so important in the case of Guantanamo Bay detainees that it was willing to confront both Congress and the president by applying domestic *habeas corpus* law to prisoners captured on the battlefield and being held overseas by the military. Yet under Article 60, the International Criminal Court has no obligation to ever bring a captive to trial. Yes, the judges are required to consider releasing a captive in the case of "unreasonable delay," but they only have to consider doing so. There is no Sixth Amendment right to a speedy trial and nobody with the power to enforce that right if it existed.

Finally—or maybe I should have begun here—the crimes that the International Criminal Court are to pursue are overly broad and imprecisely defined. In Articles 6 through 8b, genocide can include causing serious "mental harm." Crimes against humanity include "torture," which is defined as "severe pain" unless that pain is "inherent in, or incidental to, lawful sanctions." War crimes include directing attacks against "individual civilians not taking direct part in hostilities" or actions which cause "damage to the natural environment" that is "excessive in relation to the concrete and direct overall military advantage anticipated." War crimes also include deporting the native population of a conquered territory or re-settling your own civilians on occupied land. Article 8b, Crimes of Aggression, was so controversial that it was left out of the original Rome Statute, but was added in 2010 and now crimes of aggression are defined as the use of armed force in a manner "inconsistent with" the UN Charter.

These are fuzzy terms; when you read the definition of war crimes, did you think of the CIA using drones in Afghanistan? The U.S. refusal to sign a treaty banning the use of land mines? The Pilgrims settling Massachusetts? Or the Sooners occupying Oklahoma? Did the United States practice torture when it water boarded al Qaeda members? Or when Texas executes murderers by lethal injection? Under Article 9, a two-thirds majority of member states can adopt certain "Elements of Crimes" to assist the judges of the ICC in deciding the answers to these questions. Under Article 29, there is no statute of limitations, so a changing consensus on (for instance) capital punishment, such as has taken place in Europe in the last fifty years, may mean that actions thought to be lawful even to the international community when they were undertaken may subject a person to eventual prosecution. Under Article 28 that includes prosecution for actions by one's military or civilian subordinates, so long as one's superior knew or consciously disregarded information that the subordinates were committing crimes and failed to take "all necessary and reasonable measures within his or her power to prevent" the crimes.

So if a Supreme Court justice refuses to issue a stay of execution in a capital case, is that justice committing a crime against humanity? Lawyers love worst-case scenarios. The remarkable thing in the short time the Rome Statute has been in effect is how few of these worst-case scenarios even sound

plausible. There have been a few more than a dozen prosecutions at various stages before the ICC in its first decade, almost all of them relating to charges of war crimes in Africa. There seems to be grounds for hope that some of the more dangerous open-ended crimes will be confined to reasonable limits by precedents and custom. But the United States is very much in the position of one of the original thirteen states in 1787, being asked to give up its independence under the Articles of Confederation for the much tighter control and the much stronger central government of the Constitution. What made the Constitution work was a consensus, driven by Shays's Rebellion and other contemporary failures due to the lack of a stronger central government, that something had to be done or anarchy would ensue. We ratified the Constitution because it was the best we could do at the time, not because we thought it was perfect—or even a good idea.

Today, we have not had our Shays's Rebellion. We have adequate tools in the United States and even in the UN Security Council to deal with future Slobodan Milosevics. We cannot bring to justice all the Idi Amins of the world, but that is a failing of the world—and one that the International Criminal Court will not remedy. We are being asked to ratify the Rome Statute and join the International Criminal Court because it looks like a symbol of a good idea and because everyone else is doing it. I quoted George Washington, now let me quote another great historical figure: everyone's mother. "If everyone else were jumping off the roof, would you do it, too?" For all of America's optimism, we have not discarded, and should not discard, the idea that government is a necessary evil and therefore that government is best that governs least. We should continue to stand apart from the International Criminal Court because it is not a necessary evil.