The International Criminal Court: A Case for Conservatives

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Executive Summary

American conservatives have been attentive to the implications of the International Criminal Court (ICC) since negotiations to create it first began in 1995. Concern over possible restrictions on U.S. freedom of action and foreign policy have led many to oppose U.S. involvement with the ICC. In this paper, we aim to address the most common conservative concerns over American involvement: (1) the ability of the Court to prosecute Americans; (2) potential political manipulation of the Court; (3) the fairness of trials; (4) the crime of aggression; (5) the constitutionality of US membership in the Court; and (6) possible Palestinian use of the ICC against Israel.

The History of the ICC

The Court represents an international political ideal that has deep historical roots. As a concept and aspiration, it is not new or untested. As an institution, it is not unprecedented.

A permanent international criminal court was first proposed in 1872 to deal with the crimes of the Franco-Prussian War. Such a court was again proposed by the drafters of the Versailles Treaty in the aftermath of World War I as a way to prevent such crimes and to recompense victims. Neither effort succeeded.

Following World War II, the world’s attention again focused on international criminal justice. The scale of the horrors of the Holocaust demanded that justice be imposed on the leaders of these atrocities. As the United States became a true superpower, its influence on these efforts grew as well. American troops led the effort to liberate Nazi concentration camps, while American judges and academics led the Allies in establishing the Nuremberg and Tokyo tribunals, helping to carry out in action the principle of individual accountability for war crimes for the first time.

Though these tribunals seemed to be the realization of a long standing international vision, their success did not lead to a permanent court. Despite the efforts of the UN General Assembly, strong American leadership, and despite the support of Holocaust survivors and human rights advocates worldwide, the Cold War blocked United States and international efforts to create such a court.

Thus, the international community had to establish temporary tribunals to try those leading in the mass atrocities committed in Cambodia, Bosnia, Sierra Leone, Rwanda, East Timor, and the former Yugoslavia. Established after the end of the
violence, these tribunals eventually were successful, but had serious difficulties—in organization, funding, selecting judges, and organizing trials.

However, the experiences of the ad hoc tribunals especially helped motivate the creation of the ICC. They were eventually effective in convicting perpetrators. The Yugoslavia and Rwanda tribunals alone prosecuted successfully more than 50 persons who are currently serving their sentences. This demonstrates that international criminal justice through temporary courts is possible, but their cost, their impermanence, and disparate rules and procedures are serious flaws. The largest disadvantages of such ad hoc tribunals, however, are both their inability to deter continuing crimes—without the guarantee of a permanent court, there is always a chance of impunity or escaping justice—and also to act while crimes are being committed.

National historical experiences were the other main motive for the creation of the ICC. Many of the countries who drafted and first ratified the Rome Statute were haunted by their often unstable and violent past. The deep concern of these most ardent creators of the Court was not to attack any particular country, but rather to punish and stop atrocities and redress their victims.

**Current Operations of the Court**

The ICC came into existence on July 1st, 2002, following the necessary 60th ratification of its governing treaty, the Rome Statute. The Court is the first permanent tribunal to try individuals and for only the most egregious offenses—genocide, crimes against humanity, war crimes, and eventually, the crime of aggression. Crucially, it possesses jurisdiction only over those crimes which have occurred after its founding in 2002.

The sole purpose of the ICC is to end impunity for present atrocity crimes, and deter future ones. It is a true criminal court and has no other purpose or function. In any situation, the Statute requires that the first step for the Court must be to foster and encourage local prosecutions and trials of atrocities. Where these fail or are impossible, the work of the ICC punishes, declares the facts and seeks justice for the victims through its own prosecutions and trials. Moreover, the Court’s laws and procedures express democratic values, and most of the states which support the ICC are similarly free and democratic.

The staff of the ICC is drawn from countries all over the world, both members and nonmembers of the Court. For example, Americans have twice served as senior prosecutors on the Uganda case, and American lawyers frequently act as advisors to the Court.

The ICC enjoys world-wide support which sustains its legitimacy and credibility. While its member countries do not yet represent a majority of the world’s
population, they do include major international players. The 122 countries that have ratified the Rome Statute, comprise Canada, Australia, Japan, all the members of the European Union, and all members of NATO except Turkey and the U.S. Countries that have recently emerged from conflict and/or experienced mass violations of human rights are also members, including Afghanistan, Cambodia, Colombia, Timor-Leste, the Republic of Korea, Sierra Leone and the former republics of Yugoslavia. Many of these countries initially shared the same concerns of American conservatives today; but in working with the Court, they have found most of their reservations satisfied: the prosecutors have been responsible, due process has been preserved, and judges are capable and fair.

The major countries not yet members of the Court – the United States, Russia, China and India- have sometimes, but not always, supported Security Council referrals of cases. They participate as observers in meetings of the Assembly of States Parties (ASP), the Court’s governing body.

The ICC case load is almost entirely voluntary referrals from governments or from the UN Security Council. The former include the Democratic Republic of the Congo (DRC), Uganda, the Central African Republic (CAR) and Mali. The Security Council has referred the situations in Darfur (Sudan) and Libya. 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 child soldiers. Two accuseds from the DRC have been convicted, while the trials of 2 DRC nationals and 3 Kenyan nationals are still under way. Proceedings against five alleged criminals in the CAR are slated to begin in 2014. Arrest warrants have been issued in Uganda, Darfur, Kenya, and Côte d’Ivoire, and investigations in Mali began in early 2013. The only cases brought on the Prosecutor’s own initiative with the authorization of the pretrial judges are Kenya and Côte d’Ivoire. Both initially had the consent of the respective governments. Without the ICC, these crimes might have remained uninvestigated and unpunished. This record answers the fear of many conservatives that the prosecutor would be undisciplined and irresponsible—a “loose cannon.”

The Five Most Common Conservative Concerns about the ICC

The ICC accords with American values about trials and justice, and thus far has demonstrated its impartiality, independence and international acceptance. However, in the U.S. 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, here are the top five concerns most often expressed by American conservatives over the ICC:

**Concern 1:** The ability of the Court to prosecute Americans

First, it is important to reiterate the focus of ICC investigations. The Court was not founded to try individual soldiers, nor the type of domestic crimes that we are most
familiar with (i.e. theft or fraud.). The ICC was founded to try only the most serious crimes—genocide, crimes against humanity, and war crimes—and only those individuals who are most responsible for planning and directing these crimes—generals, heads of states, and the issuers of orders to commit mass atrocities.

Moreover, the Rome Statute respects status of forces and status of mission agreements which cover almost all American military and civilian personnel abroad on official or military business, and of any rank. The Statute specifically authorizes parties to set aside obligations under it in favor of obligations under these agreements. This safeguard is particularly important because it is automatic and does not depend on anyone at the Court to operate.

Since the United States has not ratified the Rome Statute, the ICC can only try American citizens on the basis of crimes committed on member states’ territory, or in special cases where it is granted jurisdiction over a particular region (for instance, the UN Security Council extended ICC jurisdiction over Libya and Sudan).

Ultimately, the ICC was designed to try instigators and planners of atrocities—not low-level perpetrators, or individual soldiers. The crimes that the Court was established to try are those which “shock the conscience of humanity.” Lesser crimes are inadmissible at the Court which would therefore not try average Americans. The ICC focuses its work on trying the decision-makers and policy-makers of crimes significant enough to meet the standard of seriousness and where domestic courts are unwilling or unable to investigate and prosecute. In this way, the ICC ensures that crimes that often would otherwise be unlikely or impossible to be tried domestically are prosecuted.

**Concern 2: Political Safeguards & Checks and Balances Against Potential Political Manipulation of the Court**

Particularly in regard to the prosecution of American citizens, conservatives worry that the Court could be manipulated, used as a political tool against American interests or do as it wishes without oversight and control by its members states. The writers of the Rome Statute, many of whom were American, foresaw these dangers, and created safeguards against them. In particular, the ICC has four independent organs that serve as checks on one another.

*A Court of Last Resort*

The Court is obliged to defer to national proceedings unless it concludes that a state with jurisdiction over a case, requesting deference, is unable or unwilling to act effectively or in good faith. Such a state must be notified if the Court is beginning an investigation. The country will therefore be able to invoke this requirement (complementarity) by demonstrating that it can prosecute and try the case. At the same time, it is of fundamental importance, if the Court is to function effectively, that
its judges be able to independently evaluate a country's claim that its prosecutorial 
or court proceedings have been in good faith. The ability to determine its own 
jurisdiction is essential to the legitimacy of any court. However, as part of one of the 
strongest, longest-running, and most well-respected criminal justice systems in the 
world, American prosecutions and trials would almost automatically be deferred to 
by the ICC.

Assembly of States Parties

The ultimate oversight authority of the Assembly of States Parties (ASP) gives the 
Court’s states parties control and direction of it. It is the Assembly, not the Court, 
which is responsible for supervising the overall administration of the ICC, deciding 
what measures to take when a member fails to cooperate, and for controlling the 
budget. It elects the judges and senior officials of the Court. 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. If the U.S. further develops its relationship with the Court and the State 
Parties, or even one day ratifies the Rome Statute, it will have the power to work 
with allies to shape the work of the ICC and to hold it accountable.

The Prosecutor

The Prosecutor and Deputy Prosecutor, who must be of different nationalities and 
the President are elected by an absolute majority of the ASP.

There have been fears that the Prosecutor’s independence would make her or him 
unaccountable and freewheeling. In fact, the Statute limits the powers of the 
Prosecutor. One of the most important limitations on the Office of the Prosecutor 
(OTP) is that it has no authority to decide on its own to begin active prosecution of a 
case- it must have the approval of the Pre- Trial Chamber of judges. Furthermore, 
the judges are responsible for overseeing her conduct of trials, including specific 
actions such as the handling of evidence. The judges have already vigorously 
exercised this responsibility.

Additionally, the Court through the Prosecutor must accept a request from the 
Security Council to defer action on a case for one year, an important further 
safeguard. Such a request can be renewed annually, providing time to complete 
peace settlements, organize domestic trials and stabilize national governance as 
necessary. As one of the Permanent Five (P-5) members of the Security Council, the 
U.S. is in a strong position to personally oversee this check on the ICC.

The Judges

Since judges are the final decision-makers regarding formal field investigations, and
control the conduct of trials, they are carefully nominated, and elected by a two-thirds majority of the ASP.

In addition, no two judges may be nationals of the same state. Provisions of the statute ensure that they are from all over the world. Their qualifications and histories are reviewed and reported on by an independent panel of experts the election of the Court’s first judges established a precedent of required excellence.

However, the actions of the judges so far have demonstrated their impartiality, their respect for the due process standards guaranteed by the Statute, and the high quality of their work. Rather than bowing to the will of the OTP, for instance, they have rigorously tested the Prosecutor's evidence and cases.

This judicial independence was particularly evident in the Lubanga trial, the Court’s first. Despite a great deal of pressure for it to begin quickly, the judges did not allow the trial to start immediately. The judges gave first priority to the defendant’s due process rights to have full relevant information, and the obligation of the OTP to fully disclose its evidence.

As a non-member, the U.S. cannot vote in the ASP, nominate judges, nor have an American as a judge. However, there are many judges from our close military and economic allies- an additional safeguard against any possible manipulation against American interests.

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<tr>
<td>Judge Sang-Hyun Song (President)</td>
<td>Republic Of Korea</td>
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<td>Judge Sanji Mmasenono Monageng (1st Vice-President)</td>
<td>Botswana</td>
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<td>Judge Akua Kuenyehia</td>
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<td>Judge Joyce Aluoch</td>
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<td>Judge Christine Baroness Van Den Wyngaert</td>
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<td>Judge Howard Morrison</td>
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<td>Judge Olga Herrera Carbuccia</td>
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Concern 3: Due Process and Fair Trials

In the unlikely situation an American were to come before the Court, they would be provided with effective due process protections like those of the U.S. legal system. This similarity recalls the drafting of the Rome Statute, which involved many American lawyers and academics, as well as the great international deference given to the U.S. criminal justice system.

Perhaps the best example of the influence of the American judicial system on the Rome Statute can be found in its protections for the accused. The following provisions of the Rome Statute are identical to those in the US Bill of Rights:

- 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
- Article 67(1) (d) secures the right to be questioned with counsel present

The only right provided for in U.S. criminal courts not available at the ICC is the right to trial by jury. Cases are instead heard in front of a panel of elected judges, of diverse nationalities. This process was designed in full understanding of the nature of the crimes and accused being tried—atrocities and heads of state. Assembling a jury of peers for the likes of Pol Pot, Idi Amin, Saddam Hussein, or Adolf Hitler would be impractical. In particular, the Court’s jurisprudence is not entirely like any national set of laws.

Moreover, the right to a trial by jury is not necessarily sacrosanct in the U.S. either. The U.S. military, for instance, does not use juries. American citizens are also frequently extradited by the U.S. government to countries without trial by jury, even for lesser criminal crimes. American citizens extradited to most European nations, for instance, are given a trial in front a judge, rather than a jury, in accordance with the civil law system.

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. This includes establishing and enforcing high standards for evidence and witness testimony. 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. The stay allowed the accused time to access and review information that could be useful in his defense.
Several critics have nonetheless voiced concern about the length of the Lubanga trial and the slowness of proceedings more generally; not just in terms of the efficiency of trials, but in the impact that the trial has on the lives of the accused. However, the Lubanga, Katanga, and Chui cases were the first before the Court. 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, which have slowed the process considerably.

Further, the nature of the crimes being prosecuted make the proceedings much more complex than a typical criminal trial—like organized crime trials in the U.S., these are cases that cover entire communities, thousands of interviews, and literally tons of printed and recorded evidence. Thoroughly examining and constructing these cases simply takes more time.

The protections put in place to prevent hasty decision making, the admission of improper evidence, and the safety of defendants and witnesses also have a role in the relative slowness of these criminal proceedings. Besides the complexities of the cases themselves, the ICC has strict rules for fact-finding, admitting evidence, and trial procedure. In addition to ensuring the accuracy of information and witness testimony, the Court also cooperates with witnesses to ensure their safety after testifying, and works to collect evidence on behalf of the defendants. Nevertheless, the Court and judges have recognized the need and are taking steps now to serve fairness by speeding up trials responsibly.

**The Office of Public Counsel for the Defense**

The Office of Public Counsel for the Defense (OPCD) is a major protection of the fairness of trials. Its mandate is to represent and protect the rights of the accused. It provides support and assistance to defense counsel, acts as ad hoc counsel if necessary, and generally supports the rights and case of the accused. The Office especially secures the rights of the defense in the critical early stages of prosecution until the accused obtains counsel of his or her choice.

**Concern 4: The Crime of Aggression**

The notion of the crime of aggression troubles many conservatives because it could restrict military action that they may find necessary to protect the country’s interests. Proponents of the crime argue that it is important to include in the Court’s jurisdiction. They say that besides being included in the Statute subject to further action, it derives directly from the Nuremberg Tribunal, where it was first called “a crime against peace.”

The crime of aggression began to be activated in the Court’s jurisdiction at the Kampala Review Conference of the ICC in 2010, though no action by the ASP
regarding the crime is expected until at least 2017. As defined by the conference, the crime of aggression includes acts of “invasion, military occupation, and annexation by the use of force, blockade of the ports or coasts,” which are of a sufficient “gravity and scale” to violate the United Nations Charter.

The crime additionally has the same safeguards as the other crimes under the jurisdiction of the Court. There are also extensive provisions for opting out of the Court’s jurisdiction over the crime of aggression. These provisions that U.S. negotiators made sure to include in the Statute, and which would continue to protect U.S. interests, regardless of its level of involvement with the Court.

**Concern 5: U.S. Participation in the Court Would Be Unconstitutional**

Critics argue that future U.S. membership in the ICC would be unconstitutional. Some conservatives maintain that such membership would circumvent the constitutional powers granted to Congress to establish the federal judicial system, and that an American who has committed a crime in the U.S. cannot be tried in a court located outside of the country, one which Congress did not establish.

Congress’s ability to establish courts under Article III of the U.S. Constitution would not be contravened by U.S. membership in the ICC. While Congress has the sole ability to establish courts within the U.S. and its legal system, the ICC, as an international court based in the Netherlands, is actually similar to the courts of foreign countries.

Further, the U.S. frequently allows its nationals to be tried under non-American judicial systems, through the same mechanism as the ICC—international treaties. The U.S. has previously entered into treaties that allow its nationals to be brought before foreign courts. Examples of such extraterritorial judicial reach are the extradition treaties that the U.S. has established and continuously honors with many countries. Thus, when an American commits a crime in a foreign country with which the U.S. has an extradition treaty—if that individual returns to the U.S., the American government is obliged under that treaty if its provisions are met to send its citizen to the foreign country for trial.

**Concern 6: Possible Palestinian Use of the ICC against Israel**

Many conservatives have expressed concerns over the likelihood of Palestinian accession to the ICC, which might create the possibility of a case being brought against Israel. These fears were strengthened in May 2014, when a group of eighteen human rights organizations encouraged Palestine to seek admittance into international agencies and institutions—among them, the ICC—following indications by Palestinian officials that they would do this. This decision was bolstered by the 2012 grant of non-member observer status by the United Nations General Assembly (UN GA) to Palestine. This increase in UN GA status raised
concerns about the prospects of a Palestinian statehood, a status that would allow ratification of the Rome Statute.

Palestinian acceptance of the ICC’s jurisdiction could be either by ratification of the Rome Statute or, as not a party to the Statute, making a declaration accepting the Court’s jurisdiction on just the Israel/Palestine situation. Since the UN Secretary-General who would have to accept Palestine’s ratification document has already done so for several other treaties, that option is clearly open.

On the option of a declaration, the Registrar in consultation with the Prosecutor would have to decide whether Palestine had the state status to make the declaration. It is likely that he would, given the position of the Secretary-General.

Whatever happens about ICC jurisdiction over Palestine, any Court investigation of alleged Israeli crimes would also have to address crimes committed by Palestinians—as required by the Rome Statute. Therefore, before bringing a case to the Court, Palestine will need to carefully weigh the potential costs of opening themselves up to investigation.

**US-ICC Relations – Evolving Conservative Attitudes toward the Court**

Responding to changes in conservative attitudes, the George W. Bush administration moved from early active hostility toward the Court to growing acceptance and beginning support. In its early years it deactivated the U.S. signature of the Rome Statute and encouraged Congress to pass the American Servicemembers Protection Act (ASPA). This was intended to block U.S. support to the Court, but gave the President authority to waive most of its provisions. The administration also negotiated treaties with 100 countries requiring the parties to send nationals under ICC arrest warrants home rather than to the Court.

In the United States, conservative support for prosecuting the situation in Darfur was an important influence on the Bush administration’s decision in 2005 to abstain from voting against the UN Security Council resolution which referred the situation in Darfur to the ICC. This crucial abstention allowed the resolution 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 U.S. should cooperate with the ICC to help bring to justice those responsible for the atrocities in Darfur (International Crisis Group and Zogby International, 2012).

In turn, the Obama administration was able to vote for the Security Council referral of Libya to the Court in 2010 and participate vigorously in a campaign to refer Syria in 2014.

In light of the effectiveness of the Court’s activities so far, its record of objective
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promotion of due process and other rights, and the professional conduct of its Prosecutor and judges, many conservatives have begun to be cautiously reassured about the Court and willing to use it in selected cases. Moreover, conservatives’ loathing of the especially horrible atrocities of this period began to modify their perspectives on the Court, especially when it appeared to be the only option for some immediate action.

For example, for quite a few conservatives, the ongoing and vicious bloodshed by Joseph Kony’s Lord’s Resistance Army in Uganda became a personal concern. Christian missionaries were witnesses to the sadistic violence in the conflict firsthand, and their testimony spurred important members of the conservative community to demand action. In response, senators Inhofe and Brownback, and Representative Roy cosponsored a successful bill which has sent American soldiers to help train Ugandan forces and participate in the manhunt for Kony. The bill specifically recognized the ICC’s arrest warrant for Kony and the ICC’s work in Uganda. Kony is currently wanted by the ICC for his leadership in atrocities committed in Uganda and the DRC. This measure represents a clear evolution from conservative feelings in 2002—the U.S. is no longer unwilling to cooperate with the ICC, when this serves U.S. national interests.

Recently, this has been seen in unanimous votes in Congress to pass several bills and resolutions calling for further U.S. action in other specific country situations, and referring favorably to ICC activities in them. A further law provides rewards to persons assisting in arrests under warrants from international criminal tribunals.

Current fugitives from ICC justice like Kony and Sudanese President Omar al-Bashir, accused of ordering the genocide in Darfur, would find their escape from justice at the ICC far more difficult if the U.S. were willing to involve itself fully. In every stage of the judicial process, U.S. lawyers, soldiers, and financial assistance would serve a key role—collecting evidence, apprehending suspects, trying cases, protecting witnesses, ensuring the rights of the accused, and ultimately, administering justice.

Conclusion

Conservatives are some of the most frequent supporters of international humanitarian efforts through religious organizations, missionary work, and corporate and personal philanthropy. In both Congress and in civil society, conservatives frequently mount 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 that must be relieved and punished. The ICC provides a way to peacefully ensure justice and deter future atrocities, with a financial, military, and judicial burden shared by many nations. While humanitarian efforts are crucial and greatly aid victims, there must also be an
ultimate goal to prevent these atrocities, to punish the perpetrators, and to bring reparations, justice, and closure to victims. This is the mandate of the ICC. Alone of the historical international tribunals, the ICC possesses the power to end impunity for heads of state—to ensure that perpetrators of atrocities, no matter their rank, their wealth, or their political connections, will be held to justice.

In this way, the ICC embodies the profoundly American ideal of equality under the law. More than this, it is an embodiment of and advocate for justice, personal accountability, respect for the rule of law, and peaceful democratic solutions. The Court shares the values and moral commitments on which America was founded. Americans appear to recognize this: the most recent polling data available demonstrates significant support, with 70% of Americans in favor of joining the Court (Chicago Council for Global Affairs, 2012). Deeper support of the Court would be a powerful way to extend these values, peace, and justice to the rest of the world. It is an important additional way for the United States to pursue its foreign policy objectives. The U.S. should continue to develop its relationship with the Court, so as to be better able to address those cases and interests most important to conservatives.