COURT SCARES US AND EXPOSES ITS HYPOCRISY

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The reluctance by the United States to ratify the accord that could create the International Criminal Court represents the hypocrisy of the world's prefect.

The creation of a permanent International Criminal Court, designed to hold individuals (rather than States) accountable for failing to obey international humanitarian law, promises to become the single most important international institutional innovation since the founding of the United Nations more than a half-century ago.

Although nearly all of the world's major democracies and even transitional democracies in Africa support the court, the United States opposes it. Why?
Once established, the world's first permanent criminal court will investigate the worst international crimes known to humanity whenever and wherever they occur.

It will help deter crimes by confronting law-breakers with the possibility of investigation, trial, and punishment. Unlike temporary tribunals, the new court will have the greater efficiencies and impact of permanency, with the authority to build respected precedents over time.

The court can contribute to reconciliation by replacing the stigma of collective guilt, which often condemns an entire society for the sins of a minority, with individual accountability. These achievements can help discourage future cycles of violence.

The Rome Statute, which establishes the Court, currently has 139 signatories and 67 ratification. As of April 11, the number of ratification had surpassed the requisite minimum of 60 countries, thus enabling the treaty to come into force on July 1.

United States' allies - Canada, France, United kingdom, Germany and Belgium- have ratified the treaty.

In opposing the court, and in purporting to "withdraw" its signature to the Rome Statute on May 6, the United States placed itself on the same plane with countries such as Afghanistan, Iraq, Libya, and China, which have denounced the treaty and whose record for human rights protection has attracted criticism from the United States.

The reason for US opposition is simple. All the temporary tribunals that the United States has supported were limited to investigating others; they could not hold US citizens accountable.

Expecting that the new court would not be allowed to take any action until after a United Nations Security Council decision had referred a case to the court, US officials at first supported the court.

Within the Security Council, the US could use its veto power to prevent any investigation of itself or its friends. The US wanted a court in which the prosecutor could never bring charges against anyone from the US, although the US could, through a Security Council decision, bring charges against others.

This position so flagrantly violated principles of equal justice that eventually the rest of the world rejected the US position to establish a court with independent authority.

Why does the US refuse to accept the jurisdiction of an impartial court over the conduct of its own law-abiding citizens, if by accepting the court it could in turn gain reciprocal legal constraints on others?

Why does the US not want international laws against war crimes and genocide, with which it agrees, applied to itself?

The US fears that the mere existence of an independent court might limit US uses of military power. To have a court ready to investigate US officials for war crimes or crimes against humanity might inhibit officials from sending forces into combat and using aerial bombardment that might kill civilians.
Yet the establishment of the proposed court does not change the laws governing international military conduct. If US military actions are legal, it has nothing to fear from the court.

US leaders fear that an international prosecutor might bring politically-motivated charges against its officials. The concern about politically motivated prosecutions of US (or other) nationals is understandable, but the treaty contains four important safeguards:

The court's jurisdiction will be limited to the most serious international crimes, like genocide and crimes against humanity, and their commission must have been authorised policy by the state for the prosecution to proceed. The US was closely involved in defining the relevant crimes and in establishing high thresholds to limit the court's jurisdiction.

The proposed court is only a court of last resort. Under the well-known principle of complementary in international law, the court will not be allowed to act when national judicial systems are available and willing to prosecute suspects.

If a state carries out its obligation to investigate a suspected crime, even if it decides there is no reason to prosecute a suspect, the international court cannot intercede.

The only exception allowing independent court action is when a state intentionally tries to avoid its international obligation by shielding a criminal from responsibility, as has been the case in Serbia.

Because the international court is not designed to supplant effective national judicial systems such as US military and civilian courts, it is unlikely US nationals would come before the international court.

The prosecutor will be accountable to oversight by a panel of judges who will ensure that investigation by the prosecutor is warranted.

Safeguards exist in the procedures for electing judges, who are to be highly respected justices of impeccable credentials, and for selecting the prosecutor, as well as for removal if the prosecutor engages in politically motivated investigations.

These should ensure that the US would not be subjected to unwarranted charges.
The United States claims that the court's prosecutor has too much independence to launch investigations, because he or she could do so without a Security Council decision.

But if the draft treaty had stipulated instead that the prosecutor could act only with a Security Council referral, then the Council's role would have politicised the court, treating permanent members like kings, and putting them, as well as all those they would shield with their veto, outside the law.
Again, this would be such an extreme violation of fair legal practice that even France and Britain, who are permanent members enjoying the veto power, both parted company from the United States on this issue.

The US now opposes the court, even as a non-party to the treaty, claiming that it will exercise unjustified jurisdiction over US nationals by binding non-parties. Even if the United States has not ratified the treaty, the argument goes, US citizens could be accused of a crime.

The overreach/long arm argument, recently voiced by United States Under Secretary for Political Affairs prior to the unprecedented US decision to "withdraw" from the Rome Statute, is a gross mis-characterisation of the court.
The court statute creates no new laws for human conduct; existing laws will simply be better enforced.

The core crimes in the treaty are crimes of universal jurisdiction - that is, they are so universally condemned that every nation now has a duty to exercise jurisdiction over suspects even without the proposed court.

All nations are already obligated to prosecute or extradite for prosecution anyone who commits genocide or crimes against humanity.

And the United States already participates in many treaties that permit US citizens to be held accountable for criminal actions in foreign jurisdictions without special permission for prosecutions, including the treaty banning genocide, the Geneva Conventions on war crimes, and the long-standing international laws against piracy and slave trade.

In short, the treaty does not impose any obligation on non-parties that they are not already bound to fulfil, but is needed to enforce existing laws more effectively.

In addition, the proposed court enhances protection for US nationals

by ensuring rights of defence and other due process guarantees that cannot be ensured in every national prosecution around the world.

The continued US insistence that no person should be tried without the consent of his or her national government seems a self-defeating condition, which if established, would enable any world-class criminal to stay out of court.
It is difficult to imagine the governments of Saddam Hussein or Slobodan Milosevic consenting to the prosecution of their own crimes.

Although the United states has formally purported to wriggle out of the Rome Statute by taking the unprecedented initiative of notifying the UN Secretary General of its unwillingness to abide by the letter and spirit of the treaty, a rational cost-benefit analysis dictates that the benefits of the Treaty would far outweigh its costs.

The costs of ratification are extremely low. The existing treaty as herein before argued meets the dual US interests in an effective court and in protecting itself against inappropriate prosecutions.

Although the court will not deter all crimes, its permanent presence and international stature will likely deter at least some atrocities and perhaps a few genocide, and this will serve US interests.

If law does not deter such crimes, the US may feel compelled to impose economic sanctions or send soldiers into dangerous contexts, resulting in loss of lives.

If the court can thus save the lives of even a small number of US service men and women, as well as the lives of other victims, it is worth it.

The court is a cost-effective institution for addressing violations of international humanitarian law because it will avoid the recurring need to devote time, energy, and money to establishing less effective ad hoc tribunals.

To the extent that it does deter, it will also save the money that otherwise would go into costly US or UN deployments.

For the world's only democratic superpower to encourage other countries to reject law enforcement and to keep themselves outside the law is a disastrous policy that will boomerang, haunting it today and in the future, and on many more legal issues than the criminal court itself.

In refusing to participate constructively in international law enforcement, the US seems to confirm and lend credence to the claim by Milosevic, and Saddam Hussein, and others that international trials are not impartial and are politically motivated, because the law does not apply equally to all.

The issue is not whether it is good to give up US sovereignty to a new global institution. Instead, it is how all countries' sovereignty can be shaped, including US sovereignty, so that legal instruments will bridle the misuse of sovereignty.

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