

The United States and the International Criminal Court: Achieving a Wider Consensus Through the “Ithaca Package”

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The debate over the International Criminal Court (ICC) has reached a crucial juncture. The ICC has been a long-standing project, actively underway since the 1980s. Originally, the ICC was designed to meet the concerns of Caribbean countries about extraterritorial national criminal jurisdiction. The war in the former Yugoslavia and the massacres in Rwanda made it plain that additional forms of deterrence were necessary to address genocide, systematic war crimes, and crimes against humanity. In 1994, the International Law Commission proposed a draft statute for a permanent international criminal court worked over and debated during three additional years of preparatory work, and then brought forward in July 1998 by the Rome Conference, after five weeks of intense negotiations, in a proposed treaty package to establish the ICC.

The Rome Conference achieved several important goals. The Rome Treaty established that the Court’s jurisdiction should extend to internal as well as international conflicts. Although the Geneva Conventions of 1949 restrict their jurisdiction to interstate war and many States remain equivocal about international intervention, the Bosnian and Rwandan examples are too shocking, and the development of international human rights law too far along, to permit the claim that abuse of a national population is of no concern to other international actors. The Rome Treaty also applied the modern definition of crimes against humanity, recognizing that constraints on gross abuse of a population should not be limited to events in a state of war. Rather, systematic and extreme mistreatment of a local population, through torture, disappearances, and extrajudicial executions, can be charged as a crime against humanity even if war has not been declared. A broad definition of crimes against humanity warns all governments of the possible consequences of violence directed towards their own people.

The Rome Statute confronts the problem of sexual violence in warfare, specifying that systematic rape and sexual assault are war crimes. The scandal of the Bosnian war, in which Muslim women were allegedly forced

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to bear children fathered by their rapists, is condemned as a war crime under the language of the Rome Treaty. The Catholic Church and women's groups crafted common language to condemn rape, sexual slavery, enforced prostitution, enforced sterilization, and any unlawful confinement of a woman made pregnant with the intent of affecting the ethnic composition of a population.

The Rome Treaty also addresses the crucial tenets of command responsibility. The Treaty creates a duty for military commanders to monitor and control their troops. Military leaders cannot shield themselves from liability for widespread misconduct by claiming ignorance. This becomes especially important in the violent combat of civil wars, where difficult logistics and communications have been used to disclaim responsibility for wanton actions on the ground. This duty has also been extended to civilian leaders who may be held complicit if they consciously disregard information that troops, paramilitaries, or police under their control abuse civilians.

Furthermore, by setting sensible limits to the defense of obeying orders, the Rome Statute addresses the nihilism of criminal regimes that try to substitute their own law for the standards of human rights. While a soldier is expected to carry out the directions of his military superiors, he is obliged to decline orders that are manifestly illegal – a workable standard that will preserve military discipline and guard against lawless disregard of universal moral limits.

Finally, the Rome Treaty declares that the prerogatives of public office are limited by the demands of humanitarian law. The power of office does not immunize a person from responsibility under the basic laws of war. Although good faith judgment is protected, deliberate abuse of a national population is not immune from scrutiny merely because it was the policy of a criminal regime.

The ICC Statute is worthy of admiration, despite its birth in the difficult circumstances of a large multilateral conference limited by a five-week negotiating space. It is, however, a fundamental question for the success of the ICC whether the United States will be able to join. The experience of the International Criminal Tribunal for the former Yugoslavia has shown that the orders of an international court are often disregarded unless the court is supported by the economic, diplomatic, and military assets of major powers. The orders of an international court are not self-executing. The court must rely upon States to enforce its rules and judgments. In a world in which few countries have the ability to project force at a distance, the role of the United States is crucial.

The United States is among the strongest supporters of the ad hoc tribunals for the former Yugoslavia and Rwanda and acted through the Security Council to create those institutions. The United States has also pressed for an ad hoc tribunal to prosecute the crimes of Saddam Hussein against the Kurds and Marsh Arabs. Nonetheless, there is a limit to the ability of the Security Council to continue down a path of "ad-hocism." First, the decision to establish an ad hoc tribunal is prey to the potential veto of China and Russia. Second, continued exercise of Council authority

to create judicial institutions has been questioned by some members of the United Nations. The continuing debate over the representativeness of the Security Council and possible Council expansion has had a subtly derisive effect. A treaty-based court would conserve crucial Council authority. Furthermore, ad hoc tribunals face the daunting task of beginning anew without personnel or courtrooms, attempting to establish a credible presence while designing new Rules of Evidence and Procedure, making arrangements for defense counsel, security, and witness protection, obtaining facilities for pretrial and penal detention, and waiting for supporting States to pass implementing legislation. There are considerable start-up costs and disruptive time delays. It makes sense from both a practical and political point of view to have a standing institution. Though the permanent ICC will be limited in its jurisdiction to future episodes of lawless behavior, it will have the ability to address events with greater speed. The permanent ICC will enjoy an authority founded on the willing consent of its State Parties and will be able to accept future referrals from the Security Council where the Council chooses to act under Chapter VII.

U.S. support for the ICC is a worthy goal for all parties since the United States can strengthen the Court in important ways – by advancing money and supplies, seconding legal and investigative personnel, providing security for on-the-ground investigations, sharing timely information on the location of fugitive defendants, and using diplomatic, economic, and military contacts to persuade governments to comply with ICC judgments. The obstacles to a Presidential signature – even if Senate ratification must remain a more distant goal – can be overcome so long as both sides in the debate address the issues from a practical rather than ideological perspective. There is concern among U.S. foreign policy actors that U.S. personnel are especially vulnerable to misuse of the Court for political purposes because of U.S. forward deployments and U.S. security tasks. There are 200,000 U.S. soldiers, sailors, airmen, and marines stationed in Asia, Europe, and the Middle East, as part of the U.S. security commitment to deter regional aggression and maintain the balance of power among sparring regional neighbors. With U.S. troops in foreign territory, the relationship between national military justice and international and foreign legal systems is not a hypothetical question.

U.S. apprehension also stems from the particular tasks of the U.S. military abroad. The United States remains the only power capable of sustaining long-distance military operations with sophisticated logistics, communications, intelligence, and airlift. Peacekeeping, peace enforcement operations, anti-terrorism, and freedom of navigation exercises have become the daily task of U.S. military personnel in a rapid tempo of operations, and foreign adversaries may be inclined to use the Court to mount an attack on operations they dislike. While many allies of the United States are also engaged in peacekeeping, the demands of peace enforcement, anti-terrorism, and freedom of navigation operations leave the United States as the primary actor in many instances. The United States is certainly the

only power that sees itself as having global responsibilities in the Asia, Europe, and the Middle East.

In addition, the hazards of some of these operations have led to differences in how the United States and some other responsible militaries design rules of engagement. In the Somalia peacekeeping operation, for example, the truck-mounted automatic weapons brandished by brigands in downtown Mogadishu posed an obvious danger. U.S. forces announced a defensive rule of engagement: that these so-called technical vehicles would be considered hostile. Similarly, in the Tanker War in the Persian Gulf during the conflict between Iran and Iraq, the United States attempted to protect its escort operations for Kuwaiti oil tankers by declaring maritime exclusion zones – a minimum distance of separation between U.S. naval vessels and approaching craft – to guard against the approach of hostile forces. Some nations disagreed with this improvisation, even though this was designed to deter attacks and minimize violent engagement. U.S. commanders have also been encouraged to be forward leaning – not to take the first hit, but to ward off threats. If a fire-control radar paints a U.S. aircraft in a hostile situation, the rules of engagement may permit the aircraft to respond. These actions are, in the judgment of the United States, necessary and prudent.

Furthermore, there is an ongoing debate over the limits of self-defense, a right recognized by customary law as well as by the U.N. Charter. The international legal community entertains a range of views about the limits of anticipatory self-defense, for example, when a hostile power acquires weapons of mass destruction with an apparent willingness to use them, or harbors a terrorist group with similar ambitions.

Even the enforcement of human rights will lead to disputed instances of the use of force. The NATO intervention in Kosovo necessarily proceeded without the legal comfort of a Chapter VII resolution to authorize the use of force, because of a threatened Russian veto in the Security Council. Regional organizations have a recognized role under the U.N. Charter, but it is unclear whether they are entitled to act without prior Council authorization. Belgrade denounced NATO's attempt to thwart the Serb policy of ethnic cleansing as aggression. Absurd as this pronouncement may sound, it demonstrates how rogue regimes may attempt to misuse the ICC in future crises.

Nonetheless, there is a workable set of clarifications that would assure responsible actors that the Court will not be misused. During an Ithaca symposium on the ICC sponsored by the *Cornell International Law Journal* in March 1999, a number of participants had the good fortune to be delayed from departing by an unseasonable snow storm. The productive discussions at a snowbound dinner among the symposium participants who were involved with the Rome Conference in led to a proposed set of clarifying interpretations of the treaty text dubbed by this author as the "Ithaca Package." This modest package may provide a starting place for reconciliation between the United States and its treaty interlocutors, clarifying the intent of a number of treaty provisions through the mechanism of

"binding interpretive statements" by the Preparatory Commission (PrepCom). These statements would quiet U.S. concerns without venturing near the precipice of any attempt to reopen the treaty text.

The first clarification is to make plain that all good faith military judgments will be protected. Only manifestly unlawful actions could be challenged in the confines of the ICC. This judgment of legal sufficiency could be made at the outset, rather than by requiring the long commitment of a field investigation, thus discouraging rogue regimes from misusing the ICC's forensic process. This standard is analogous to the European idea of a "margin of appreciation" — recognizing that some considerable deference must be given to good faith differences in national practice and implementation. The Treaty already recognizes the standard of "manifest illegality" as the outer limit in a defense of obeying orders, and its parallel use here in regard to leadership would assure commanders that their decisions will be respected unless they fall outside the standards recognized by all responsible militaries. For example, this would condemn Saddam Hussein's massacre of civilians at Racak, yet protect a judgment on the selection of dual-use targets.

In implementing this zone of good faith for military judgments, one must also protect highly sensitive classified information. Although the Rome Statute provides that no State Party can be required to disclose delicate national security information, the scope of the provision can be usefully clarified. There may be tactical choices, especially in the arena of dual use targets, where the detailed factual basis for target selection in a military campaign cannot be shared with the court because it would compromise intelligence sources and methods. An example from recent experience is the targeting of the al Shifa pharmaceutical plant in Sudan, which the United States believed was used as a point of manufacture or transshipment for chemical weapons. In public discussion of the widely disputed raid, still facing an ongoing and serious threat from the terrorist network of Osama bin Laden, the U.S. government was constrained from describing in detail its intelligence supporting the target choice, including alleged telephone contacts between senior officials of the plant and the former head of the Iraqi chemical weapons program, for fear of prejudicing its ability to monitor bin Laden's activities. The ICC will operate in a world with extant threats and serious problems of international security. Of necessity, the tribunal must explore ways to have governments explain their actions responsibly, yet without prejudice to sensitive sources, here perhaps accepting a solemn representation by the U.S. government that it possessed certain kinds of evidence that the target was a chemical weapons transshipment point — without any disclosure of particular intelligence sources and methods.

A third clarification concerns the Rome Statute's possible expansion to cover the crime of aggression. Although the United States joined in the prosecution of fascist leaders for their participation in the Nazi war of conquest in Europe, aggression is sometimes harder to define. The law governing the use of force is not always simple — for example, in West Africa,

the regional organization ECOWAS (the Economic Community of West African States) felt compelled to intervene in Liberia and Sierra Leone, even without prior Security Council authorization, to stem the bloody civil wars in those countries. Some opponents of the intervention might attempt to charge that the requirements of Article 53 of the U.N. Charter were not met – a disputable proposition, but one that could be used to harry an opponent. Likewise, NATO's intervention in Kosovo, though designed to save lives, could be challenged as an innovation in the law, albeit part of an emerging norm of humanitarian intervention. Many States at the Rome Conference were thus unwilling to see a broad category of aggression added to the statute.

As a compromise, the Rome negotiators included aggression within the jurisdiction of the ICC, but provided that it could not be charged until States Parties reach a satisfactory definition of the crime. The Rome Statute also provides that an amendment to the Treaty with which any State Party disagrees (including the definition of aggression) will not bind the dissenting States. This guards against an inappropriate use of majoritarian power to force an answer to this key provision.

The United States may stand outside the Treaty for some time and hence needs the clarification that States that have not yet joined the Treaty are, like dissenting State Parties, also to be protected against disputed definitions of aggression and other changes in the Statute's jurisdictional reach. In addition, it must be recognized that the Security Council retains prime responsibility under the U.N. Charter to decide what constitutes aggression.

Third party status is another issue that the PrepCom must clarify, for it is perhaps the most important in securing U.S. support. The ICC will have a jurisdiction founded on State consent and on Security Council referrals. However, at the last moment in the negotiations, the Rome Conference declared in Article 12 that even where a State has not yet joined the Treaty, its nationals are susceptible to prosecution as third parties if another interested State gives its consent. This is a lop-sided provision. The tangled language of Article 12 may be read to suggest that crimes committed by governments in civil wars are not within reach under this third party provision – even though such abuses were the primary impetus behind the ICC project – because the consent of the state of nationality or the state of the place of the conduct is required. Yet international intervention to stem genocidal action, already regulated by the Geneva Conventions and universal jurisdiction in national courts, would be superfluously covered by Article 12.

Recruiting other States to consent to third party jurisdiction is unnecessary, because the Security Council already has the power to refer any case to the ICC. A broad reading of Article 12 also potentially conflicts with Article 11 of the Rome Statute, for the latter says that prosecutions can only be brought for crimes occurring after a State Party joins the Statute. Straightening out the reach of this puzzling language would allow the United States to support the Court, even while it decides whether or not to

join as a full party. It is crucial to make clear that third party provisions do not reach the official acts of constitutional democracies absent Security Council referral. This is a matter of jurisdiction, not a change in the substantive standards for the use of force.

In addition, a sensible reading of Article 12(3) will help parry misuse of the Court's jurisdiction. If a nonparty State agrees to ad hoc ICC jurisdiction "with respect to the crime in question," the State must be willing to have its own conduct scrutinized as well. Saddam Hussein has no standing to bring a complaint about Allied enforcement action against his country unless he is willing to accept scrutiny of his own actions in killing the Kurds in the north and the Marsh Arabs in the south.

Fifth, U.S. troops deployed abroad should have the same protections as countries whose troops are garrisoned at home. In current arrangements, the so-called status-of-forces or SOFA agreements protect U.S. forces from local arrest in the countries where they are stationed for actions undertaken in the course of their duties. SOFA agreements bar arrests under ICC jurisdiction as well, in light of Article 98 of the Rome Statute, and working arrangements that amount to less formal agreements should be respected as well. In the unlikely event that a charge was brought against a U.S. citizen, the demand for his surrender would be presented to the U.S. government, so that the President could decide whether compliance was appropriate. This would put U.S. soldiers on an even footing with other countries' personnel, and would give confidence that a U.S. soldier abroad would not be arbitrarily snatched from his post on an ill-founded warrant of arrest. Clarification of this understanding will help to assure treaty skeptics.

Finally, the PrepCom needs to provide assurances regarding the protection of Israel and its role in the Middle East peace process. The Rome Statute notes in Article 8(2)(b) that the transfer of a civilian population into an occupied territory can constitute a war crime, and adds to the language of the Fourth Geneva Convention by stating that the prohibition extends to actions undertaken "directly or indirectly." But as others have noted, the Rome Statute also limits the ICC's jurisdiction to violations which are "within the established framework of international law." As an additional safeguard, the United States has offered language in the PrepCom clarifying that this only reaches a voluntary population transfer "intended" to "endanger the separate identity of the local population." This will avoid any misuse of ICC jurisdiction to disrupt the Middle East peace process, which is ongoing and newly optimistic.

The important work of the ICC can be fully reconciled with concerns about U.S. sovereignty and the U.S. role in the world. The ICC provides another way to discipline rogue regimes and to prevent the foreign outrages that often call U.S. troops to the field. Clarifying the Treaty's problematic texts through these several guidelines in the seven binding interpretive statements of the Ithaca package will allow the United States to lend its strength to the ICC in its crucial early years.

