

Is ICC Submission in the Best Interest of US National Security? A Cost-Benefit Analysis

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Abstract

Since the Rome Statute's ratification in 2002, the United States government has pursued one future for the International Criminal Court illustrated perfectly by three words: "wither and collapse." This isolation from and even antagonization of the ICC has created an intensive tug-of-war in American political dialogue between international law and national sovereignty. This paper aims to break the rhetorical stalemate by instead examining the rational effects of submission to the ICC on American national security; it addresses three potential costs to submission (1) prosecution of American soldiers, officials, etc., (2) constrained foreign policy, and (3) entanglement of resources and weighs these with four important benefits (1) international rule of law, (2) regional security from assistance to developing nations, (3) soft power, and (4) influence on the Court's future. The ICC's Assembly of States Parties recently gathered in Kampala, Uganda, at the First Review Conference to discuss the future of the Rome Statute; at the same time, prosecutors in The Hague are trying their first criminal Thomas Lubanga for his alleged past of war crimes. This paper encourages the international community to seek the United States's critical involvement in securing the ICC's future by integrating American national security objectives.

Key Words: International Criminal Court, United States, National Security, American Involvement, and Cost-Benefit Analysis

Introduction

On December 21, 1988, Libyan government official Abdelbaset Ali Mohmed Al Megrahi bombed Pan Am Flight 103 from London to New York, killing 270 people (Koppel & Labott, 2002; Rosenberg, 2010). Although a Scottish court convicted and sentenced him to life in prison in 2001, Al Megrahi is currently living in Tripoli, Libya ("Lockerbie", 2009; Rosenberg, 2010). In August 2009, after serving eight years of his sentence, the Scottish government released him into the Libyan government's custody because of his terminal prostate cancer (Rosenberg, 2010; "Lockerbie", 2009; "Gadhafi's Son", 2010). While Libyan doctors gave him "only three months to live," Al Megrahi is still alive in a hospital bed ("Gadhafi's Son", 2010). Why did police take more time to investigate and capture Al Megrahi than they actually held him in prison? Why did the Libyan government only pay reparations to American families after the UN lifted its sanctions, the US restored commercial trade, and the State Department removed Libya from its list of state sponsors of terrorism? (Koppel & Labott, 2002) And why did the European legal and penal systems release a convicted terrorist to return to his native country, which until recently had been recognized as a state sponsor of terrorism?

The international community has gradually recognized the absurdity of allowing impunity for such atrocities as terrorism, genocide, and aggression and has come together to form an International Criminal Court to bring such criminals to justice. Yet naysayers in the United States oppose the Court on the grounds of violating national sovereignty and even jeopardizing national security. In the end, membership within the International Criminal Court will actually serve US national security, but unfortunately short-term risks will continue to haunt American policymakers unless swift international action is taken to prove the Court's independence and effectiveness. In order to bolster national and international security, the United States and the International Criminal Court must recognize the mutual benefit of their cooperation. As demonstrated at the Kampala Review Conference, the ICC's state parties must welcome the United States's objectives and aim to incentivize American involvement in the Court. If such consensus is not achieved soon, or worse, never attempted at all, both the United States and the international community will suffer.

International Criminal Court

On July 17, 1998, the Rome Statute establishing an International Criminal Court passed the United Nations General Assembly by a margin of 120 to 7 (Amann & Sellers, 2002; Chibueze, 2003). Despite the Security Council's important role in the ICC, three permanent members still oppose the Court: Russia has signed but not yet ratified the Statute, the United States has signed but then "unsigned" it, and China has never signed it at all (Ntale, 2010). American opposition to a permanent international court independent of the United Nations has evolved historically in the context of international tribunals, national security threats, and human rights issues. To begin, at the Paris Peace Conference of 1919 the United States voiced its support for war crimes trials succeeding World War II but effectively killed the Commission of Responsibilities's resulting proposal for a permanent court (Schabas, 2004). Twenty years later, the United States saw a repeat of the same crimes against peace and humanity when Adolf Hitler's Germany invaded Czechoslovakia and Poland and Imperial Japan attacked the US at Pearl Harbor (Weisbord, 2008); by 1945 and World War II's end, the United States was contributing legal and financial support for ad hoc tribunals in Nuremberg and Tokyo to prosecute more war crimes (Schabas, 2004; Amann & Sellers, 2002).

Fast forward to 1989, when Trinidad and Tobago proposed to the International Law Commission an international court to deal with drug trafficking and terrorism (Amann & Sellers, 2002; "The International Criminal Court", 2002); when a draft emerged in 1994 that featured an International Criminal Court perfectly subordinate to the UN Security Council, the United States had few if any true reservations (Scheffer, 1999). Like in 1945, the US played an integral role in prosecuting genocide and crimes against humanity at the International Criminal Tribunals for Yugoslavia and Rwanda in 1993 and 1994, respectively (Amann & Sellers, 2002; "The International Criminal Court", 2002). During the next four years, the ILC draft received many edits and emerged in 1998 as the Rome Statute, which notably limited Security Council authority and refused exemptions, causing the US to reverse its stance (Schabas, 2004). The Rome Statute passed the UN General Assembly in 1998, received the required 60 ratifications in 2002 to create the ICC, and underwent revisions at the First Review Conference in Kampala, Uganda, in May-June 2010 ("Courting Disaster", 2010). American foreign policy-makers continue to express their reluctance to join the International Criminal Court, with many desiring for the ICC to "wither and collapse" (Bolton qtd. in Johansen, 2006, McKay 2003-4). While the Obama administration sent legal advisor Harold Koh and Ambassador Stephen Rapp as delegates to

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Kampala, the President has not formally stated whether he intends to seek ICC membership (Koh & Rapp, 2010).

The structure and function of the International Criminal Court critically shape its national security impact on the United States and, therefore, US policy towards it. The ICC is a permanent, treaty-based court established by the Rome Statute to bring justice and end impunity for atrocities committed by individuals (‘About the Court’, 2010; ‘Rome Statute’, 2002). Since Bangladesh’s inclusion in March 2010, 111 states have ratified the Rome Statute and participate in the Assembly of States Parties; another 37 states have signed but not ratified the Statute, meaning they will follow international law but have not yet codified such policies into domestic law (‘About the Court’, 2010). The Court is largely dominated by South America, Europe, and Africa and lacks the support of such great powers as the United States, China, India, and Russia (‘About the Court’, 2010; ‘Courting Disaster’, 2010). Though it does not have truly universal jurisdiction, the ICC may bring charges against individuals in three ways: if the alleged crime occurred in a state party, if the alleged criminal is a national of a state party, or if the UN Security Council votes to refer a case (‘Rome Statute’, 2002; ‘The International Criminal Court’, 2002). The court is currently investigating cases in five areas—the Republic of Kenya, the Sudan, the Central African Republic, the Democratic Republic of the Congo, and Uganda—and has indicted fourteen people (Goldston, 2010; ‘Courting Disaster’, 2010). Crimes currently under the ICC’s jurisdiction include genocide, crimes against humanity, war crimes, and the crime of aggression (‘Rome Statute’, 2002; ‘The International Criminal Court’, 2002), the last of which was defined at the First Review Conference but will not go into effect until the Second Review Conference in 2017 (Koh & Rapp, 2010). An important aspect of the ICC’s jurisdiction is the concept of *complementarity*, which appears in the Preamble to the Rome Statute and later in Article 17 and states that the Court will only try a case if the appropriate national court(s) is ‘unwilling’ or ‘unable’ to investigate and punish the crime (‘Rome Statute’, 2002); this doctrine leaves ‘the primary responsibility for enforcing the laws of armed conflict’ to the nation-state’s legal and judicial system (Wedgwood, 1999). Because of certain characteristics of the ICC, the United States and other great powers are wary of submitting their national sovereignty to the ICC’s jurisdiction and potentially jeopardizing national security.

America’s Critical Role

While scholars debate over the associated benefits and costs of the United States’ membership in the ICC on American national security, the literature features very little doubt about the impact of such membership on the Court itself. American legitimacy and resources are absolutely critical to the effective functioning of the International Criminal Court. The United States has always served as a forerunner in the field of international justice, leading the push for war crimes tribunals after the atrocities of both the 1940s and the 1990s and revolutionizing diplomacy with its 1997 creation of an Ambassador-at-Large exclusively focused on war crimes (Williamson, 2007). A world order focused on international law that leaves behind its original driving force, the United States, is destined to fail. Jack Goldsmith (2003) argues:

These are unrealistic dreams. They are unrealistic for many reasons. But perhaps the most salient reason is that the ICC as currently organized is, and will remain, unacceptable to the United States. This is important because the ICC depends on the U.S. political, military, and economic support for its success. An ICC without U.S. support—and indeed, with probable U.S. opposition—will not only fail to live up to its expectations. It may well do actual harm by discouraging the United

States from engaging in various human rights-protecting activities. And this, in turn, may increase rather than decrease the impunity of those who violate human rights.

If the International Criminal Court wishes to make a symbolic statement against atrocious crimes, it may continue to issue arrest warrants for only African government officials and rebel leaders and catch only four of the fourteen indicted (‘‘Courting Disaster’’, 2010). However, if the International Criminal Court instead wishes to establish a system of retributive justice, criminal accountability, and deterrence of mass crimes, it will need the United States.

The critical problem is that ‘‘the ICC has no inherent enforcement powers’’ but instead must rely on its member states to contribute financial support, legal assistance, military power, intelligence information, and more (Goldsmith, 2003). The United States contributed the majority of economic and political resources required for the relative success of the International Criminal Tribunals in Yugoslavia and Rwanda. Its generous provision of ‘‘funds and staff’’ to the tune of \$500 million has proven essential to the courts’ operation, and the American threat to withhold loans and IMF aid to the former Yugoslavia forced Slobodan Milosevic’s hand-over (Amann & Sellers, 2002; Williamson, 2007). It is for this same reason that proceedings have not begun yet in Sudan’s Darfur region: neighboring African countries promise to arrest Omar Al-Bashir if he enters their nations but refuse to proactively send in troops (Dealey, 2009). As Goldsmith (2003) critically explains, ‘‘As the largest economy, a traditional strong supporter of the ad hoc tribunals, and as the only member of the Security Council able to mount and sustain transcontinental military operations with the necessary air transport, technical means of intelligence and logistics, the US is highly relevant to the future efficacy of the ICC.’’ The United States is the only nation that possesses the requisite capabilities to morph the International Criminal Court from resembling the paper tiger League of Nations to a fully functioning international court (Wedgwood, 2009). Taking this into consideration, the international community must minimize the costs and maximize the benefits in order to incentivize American involvement in the International Criminal Court.

Prosecution of Americans

The first and most obvious cost of American membership is the risk of American soldiers being investigated and prosecuted for actions in military commands, peacekeeping missions, etc. So blatant is the US’s fear of its soldiers’ susceptibility that it passed the American Servicemembers’ Protection Act in 2001, which prevents any American government agency from assisting the ICC, any US peacekeeping troops from being deployed without the promise of immunity, any intelligence or information expert from divulging national security secrets to the ICC, and any soldier from being detained in the Hague (Elsea, 2006). Concerns exist over three main attributes of the Rome Statute that would make American soldiers uniquely vulnerable to prosecution. As former Secretary of Defense Donald Rumsfeld stated in a May 6, 2002 press release, ‘‘The US has a number of serious objections to the ICC— among them, [1] the lack of adequate checks and balances on powers of the ICC prosecutors and judges; [2] the dilution of the UN Security Council’s authority over international criminal prosecutions; and [3] the lack of an effective mechanism to prevent politicized prosecutions of American servicemembers and officials.’’

First, significant checks and balances hold both the prosecutors and judges accountable. The Rome Statute itself lays out a rigorous standard for judges and prosecutors: ‘‘persons of high moral character, impartiality, and integrity who possess the qualifications required’’ (‘‘Rome

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Statute, 2002). In addition to the intense scrutiny that goes into the initial selection of these ICC officials, the Rome Statute carefully prevents any politically motivated investigations or prosecutions. Erik K. Leonard (2007) outlines four layers of checks and balances:

First, a panel of judges that must approve the charges and the arrest warrant; second, the domestic judicial system of the accused, which has the initial opportunity to prosecute (the principle of complementarity); third, a panel of ICC judges which rules on the satisfactory nature of the domestic proceedings and whether the ICC has a right to prosecute; finally, the accused stands trial before the ICC and its liberal-legal principles.

The United States must recognize that no ICC prosecutor or judge could push an illegitimate prosecution through the Court's many checks and balances.

Second and perhaps most important of the three, the UN Security Council lacks the exclusive ability to refer cases. While this theoretically means that a States Party could bring an American national to the International Criminal Court without a US veto, such a scenario could occur regardless of whether the United States is a member or not (Rome Statute, 2002). A check to any abuse does exist within the Rome Statute, which gives the Security Council the power to postpone investigations and/or prosecution for one-year renewable increments (Schabas, 2004). But more importantly, the United States would be more likely to prevent extraterritorial prosecution by signing and ratifying the Rome Statute, which would codify international policies into domestic law and therefore equip its national court system with the power to invoke jurisdiction (Schabas, 2004).

Third, the United States' government fears politically motivated prosecutions of American citizens. According to critics, American service-members and government officials are uniquely vulnerable to international scrutiny due to their both widespread and controversial presence around the globe (Scharf qtd. in Chibueze, 2003; Scheffer, 1999). On the contrary, politically motivated prosecutions of American nationals (which are technically viable now even despite American rejection of the Court) would become less probable if the United States gave up its blatant hostility towards the International Criminal Court and instead worked with the international community on such issues (Scheffer, 1999). Also, if under some circumstance an American national actually committed a crime so atrocious that it fell under the ICC's jurisdiction, the United States government would already be working on bringing such a person to justice, whether in a civil court or a military tribunal (Scheffer, 1999). Although the ICC's Office of the Prosecutor had received over 240 requests to investigate the invasion of Iraq and Abu Graib scandals, the Office determined that the nature and scope of these crimes did not warrant ICC jurisdiction (Moreno-Ocampo, 2006). The United States can worry all it wants to about American soldiers being investigated or prosecuted for atrocities, but the aforementioned safeguards would prevent this from ever coming to fruition. The cost of membership in the International Criminal Court is relatively minimal for the United States.

Limited Foreign Policy

Another fear prevalent among American policymakers is that, by way of the prosecution of American soldiers, membership in the International Criminal Court would constrain America's foreign policy options. Influential government officials like Senator Rod Grams, Chairman of the Senate Foreign Relations Committee Jesse Helms, diplomat David Scheffer, and UN Ambassador John Bolton have criticized the Rome Statute as "dangerous" and the ICC as likely to "pass judgment on our foreign policy actions" (Amann & Sellers, 2002; Bolton, 2001;

Scheffer, 1999). The worry is that simple actions fulfilling the US's critical role as a military, peacekeeping, and humanitarian force will be politically labeled as aggressive or atrocious by resentful weak states (Bolton, 2001). Critical foreign policy actions like deploying troops to Afghanistan to fight terrorism, providing humanitarian relief after the earthquake in Haiti, and sending American peacekeepers on a UN mission in East Timor would put American soldiers and commanders at risk of prosecution and therefore would cause the US government to not act in these situations. However, this argument assumes that the United States is the only state fighting wars, contributing peacekeepers, or assisting with relief efforts. Sarah Sewell and Carl Kaysen (2006) write:

Our allies [í] consider themselves to have global responsibilities. They deploy forces beyond their borders and participate in a broad range of peace operations and interventions. They, too, have weaker enemies that often seek advantage through asymmetrical responses ranging from terrorism to political campaigns designed to undermine the legitimacy of the leading powers' actions. [í] The United States was not exceptional in its initial reservations; it was exceptional in its ultimate conclusion that the Court wasn't worth joining.

American allies like Great Britain, Canada, Japan, and Australia do not seem to suffer from the inability to follow foreign policy goals; no case has been opened in any of these countries and neither have any developed isolationist foreign policy goals or refrained from peacekeeping and humanitarian efforts. While the United States might be particularly vulnerable because of its waning soft power and reputation for exceptionalism, the critical maneuver to bolster its international reputation involves submitting to the ICC's jurisdiction and working multilaterally to achieve its foreign policy goals.

Resource Entanglement

A secondary concern of the United States with regard to joining the ICC is the entanglement of and loss of control over resources. As President George Washington warned in his famous Farewell Address of 1796, "Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor or caprice?" Just as the United States was wary of committing the lives of its citizens to its allies' assistance in World Wars I and II, it now fears the obligations that submitting to the International Criminal Court would impose. Such is evident in the American government's reluctance to use the "g-word" to describe the events unfolding in Rwanda in 1994; such a rhetorical choice would oblige the United States under the Genocide Convention to commit troops and money to ending the genocide (Power, 2001).

Concerns exist over how to contribute financially and militarily and also over how to handle classified national security information (Scheffer, 1999). On the latter, should the United States be able to withhold intelligence necessary as evidence for a certain trial in order to maintain national security secrets? In the end, the Rome Statute's authors concluded "yes" and wrote Article 72, which gives national governments the ultimate control over information critical to security interests ("Rome Statute", 2002). However, if potential crimes like terrorism and aggression come under the jurisdiction of the ICC at the Review Conference or later in the future, could not a nation like Iraq shield certain officials from prosecution by refusing to hand over all intelligence and information about the planning and execution of the Kuwait invasion? The answer to this concern would likely involve national jurisdiction over these crimes that

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would maintain the classified nature of national security intelligence but achieve the same end goal of justice.

To address financial and military contributions, the Rome Statute details how national governments will finance the majority of the Court's operational fees, but the document falls short of budgeting for enforcement costs like supplies and personnel. The United States would likely avoid the entanglement of its citizens' lives in the same way it always has: by paying for others to play. While the United States contributes by far the largest portion of the United Nations' peacekeeping budget at 27.17%, our great military nation is not even in the top twenty contributors of uniformed personnel to peacekeeping operations (Fact Sheet, 2010). The United States would likely benefit more from the shared resources of others, especially through intelligence sharing, while significantly shielding its own resources from foreign entanglement.

Rule of Law

A critical benefit that US membership in the International Criminal Court would bring is the establishment of true accountability and rule of law. Currently because of the United States' exceptional tendencies, other individuals and nations around the world also believe they can be exceptions (Chayes, 2008). Paul W. Kahn (2003) explains, "An embarrassment, because the United States appears to be exempting itself from rules of the game that it believes should apply to others. This is singularly inappropriate when the game involves allegations of crimes against humanity, genocide, and war crimes." Though the United States' military and peacekeeping forces are indeed "uniquely exposed to politically motivated prosecutions" (McKay, 2003-4) because of their expansive sphere of influence and the American tendency for interventionism, as Sewall and Kaysen (2006) maintain, American involvement would be such a symbolic step in the direction of international rule of law. While we cannot simply create a "kangaroo court" (Helms qtd. in Amann & Sellers, 2002) and expect its mere presence to intimidate leaders into obeying the law, US membership in the ICC would no longer allow criminals enjoying impunity to claim the same immunity from the law as the US enjoys currently. Goldsmith (2003) points out, "The most salient class of human rights violators during the past century," rather than American government or military officials, "has been oppressive leaders who abuse their own people within national borders." If the United States were to succeed in eliminating all non-party jurisdiction, the International Criminal Court could prosecute neither these oppressive national leaders nor even non-party states like Iraq or Yugoslavia were they to slaughter American citizens (Szasz 1998-9). The United States should reevaluate the message its current policy is sending to the international community.

In addition, a stronger international legal regime that legitimately threatens prosecution will place much more accountability on government and military officials. As Michael Scharf (2001) reflects, "The experience with the Yugoslavia Tribunal has shown that, even absent arrests, an international indictment has the effect of isolating rogue leaders, strengthening domestic opposition, and increasing international support for sanctions and even use of force." For example, though the African Union has banded together in solidarity supporting Sudanese President Omar Al-Bashir against the International Criminal Court's pending arrest attempts, several African nations including Uganda and South Africa have asserted that if the alleged mass murderer enters their nations, he will be arrested immediately (Dealey, 2009). As Sewall and Kaysen (2006) note, "Even if the Court cannot reach criminals, its indictments would affect them. Indicted individuals would fear traveling abroad to shop, seek medical treatment, raise funds, or otherwise enhance their personal and political standing." Nations in support of

international justice but unwilling to take concrete action can seek to isolate criminals politically, diplomatically, economically, or even just socially. More importantly though, American membership in the Court would send the clear signal to the international community that impunity will not be tolerated and that international peace and security will be restored. Whether the United States has to physically send troops in to arrest leaders or if it simply denies entry into its territory for medical treatment, American legitimacy would bolster the ability of the International Criminal Court to enforce the rule of law and create a sense of accountability.

Regional Development and Security

An important potential benefit, and more importantly a cost the US is now perpetuating itself, comes from the link between US assistance to developing nations and regional security. Currently, the United States' hostile stance is not only undermining the legitimacy and effectiveness of the ICC but also its greater goals of international peace and security. By cutting foreign aid to countries who refuse to sign immunity agreements, withholding American citizens from UN peacekeeping missions, suspending trade and military assistance for certain countries (Elsea, 2006; McKay, 2003-4), the United States is both delaying justice and rehabilitation to victims of atrocity and also bolstering instability by creating safe havens for criminals and preventing economic and political development. Sewall and Kaysen (2006) explain:

The United States is affected in some measure by the dissolution of responsible government structures and the spread of violence worldwide. The effect can be multidimensional, affecting American trade and investment, military security and access, or political objectives. Mass atrocities almost always have wider regional security repercussions such as expanded armed conflict, massive refugee flows, and arms trafficking and organized criminal activity. Crises fueled by gross violations of international law will continue to occupy American attention.

As Ambassador Clint Williams noted in 2007, our nation's greatest attack was suffered not at the hands of a strong, successful army but rather from a weak, failed state: Afghanistan. It is therefore critical that the United States view its international aid and development policies as part of its security strategy.

Thus, the United States possesses a critical choice when defining its policy toward developing nations, especially regarding bilateral agreements. Currently, failure to sign American bilateral aid agreements prevents fragile and potentially corrupt nations such as Guatemala, Serbia, Iraq, Libya, and the Sudan from formally receiving military or economic aid without specific Presidential exemption (Kelley, 2007). As long as the United States ignores the impact its hostile actions have on the greater international community, our world will continue to be plagued by threats from terrorism, civil war, mass rape, aggression, and other equally atrocious crimes. And if its current policy were not detrimental enough, in 2004 Congress passed the Nethercutt Amendment, which would further amplify the effects of the American Servicemembers Protection Act by allowing economic as well as military aid cuts (DiCicco, 2009). As a result of this amendment, Jordan would lose \$250 million in governance and political reform aid despite the nation's constant support and help in Iraq's democratization and reconstruction; Mexico would lose \$11.5 million in rule of law and anti-corruption programs despite the nation's efforts at civil society and border security; and Kenya would lose \$8 million in development and infrastructure projects despite the nation's anti-terrorism pledge and its military commitment in Darfur (The Nethercutt Provision, 2005). Thankfully, President

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Obama did not renew the Nethercutt Amendment in 2009, a critical step in ending US hostility to the Court and renewing aid to developing countries (DiCicco, 2009).

If the United States reverses its policy of wanting to see the ICC wither and collapse, it will be able to lead the multilateral efforts, aid and development projects, peacekeeping missions, and even military operations that are necessary for justice and eventually peace and security. Look no further than the International Criminal Tribunal for Yugoslavia's impact: Remigius Chibueze (2003) theorizes, "Today, American soldiers in Bosnia and indeed all over the world are safer because the leading Bosnian Serb racists and their like in the former Republic of Yugoslavia are either in hiding or in prison, instead of inciting their followers to violence against US peacekeepers." Instead of furthering the poverty that breeds resource conflicts or allowing the political and civil unrest that breeds terrorism, the United States can effectively contribute to the solution.

American Soft Power

In addition to strengthening the legitimacy of the International Criminal Court, American membership would improve our own soft power and international reputation, serving our national security interests. In order to effectively promote peace and security throughout the world, the United States must not be seen as an exceptional or unilateral bully; military and economic might are not enough to maintain American hegemony (Chibueze, 2003). Leonard (2007) explains the international relations theory surrounding this conclusion:

If one considers the ICC, with its liberal agenda, within the framework of a Coxian understanding of world order, it is empirically defensible to view the Court as the institutionalization of the liberal hegemonic order. The question that this article must now address is why the hegemonic state, and, in many ways, the primary author of the liberal hegemonic order, refuses to support the institutionalization of its ideational hegemony?

American cooperation and multilateralism on human rights and international justice is critical to its effective implementation of national security policy (Chibueze, 2003). According to some, membership in the ICC is an "acid test" or the ultimate symbol demonstrating US commitment to certain values (Sewall & Kaysen 2006). Even the ICC's Chief Prosecutor Luis Moreno Ocampo declared that the United States was missing out on a "potential weapon in the war against terrorism by refusing to cooperate with the ICC" (McKay, 2003-4). For example, some European nations have refused to extradite suspected terrorists to the US because of its unreliability on international obligations (Chayes, 2008). Such soft power benefits can be difficult to see tangibly, but the heightened coordination and reputation stemming from a genuine commitment to important values and ideals is just as important in achieving national security goals as military might or economic prosperity.

Shaping the Court's Future

One final added benefit that may or may not directly affect American national security is the ability of the United States to shape the court from the inside. When President William J. Clinton signed the Rome Statute days before the December 31 deadline in 2000, he made sure to emphasize to government officials as well as the American public that he signed the document to stay "in a position to influence the evolution of the court" (Amann & Sellers, 2002). While compromise after compromise aimed at satisfying US requests amended the original 1994 ILC proposal into what is now the Rome Statute, the United States got its way on a majority of issues

(Brown, 1999; Bassiouni qtd. in Chibueze, 2003). However, the final version gave up on the goal of reaching consensus between conflicting nations and instead favored expediency over effectiveness (Newton, 2002). American adherence to the Rome Statute would allow the reluctant nation to help nominate, select, and dismiss ICC Judges and Prosecutors, participate in efforts to define the crime of aggression or any potential new crime of ICC jurisdiction, (Sewall & Kaysen, 2006) draw up the many necessary instruments, [] and participate in the initial staffing of the Court, the Prosecutor's Office, and the Registry, as well as the ASP and its organs (Szasz, 1998-9). For example, amidst allegations of NATO international legal breaches during the 1999 Kosovo intervention, the International Prosecutor at the Yugoslavia tribunal was sympathetic to its Western Europe contributors and refused to see charges (Scharf, 2001). Though the United States should not and most likely would not seek to directly influence the tribunals, a friendly stance of cooperation would allow the US to check abuses and pursue its own national security. The United States will be in a better position to shape the Court to its own security interests if it can indeed play a role in the upcoming revisions imminent at the Kampala Review Conference.

Policy Recommendations

With the First Review Conference have recently concluded on June 15 in Kampala, the international community and particularly the United States must decide on the future direction of the International Criminal Court. At the conference, the Assembly of States Parties discussed several issues of concern: stock-taking of the complementarity doctrine to achieve national justice, the Court's overall effectiveness in prosecuting crimes and implementing trials, exempting nations from war crimes, and the most contentious issue—the addition of new crimes (Koh & Rapp, 2010). At the beginning of the conference, the Assembly of States Parties could proceed in one of two directions—either the normative one or the rational ones—based on the outcome of Kampala. In the normative approach, the ASP would loosely define the crime of aggression and stipulate that the ICC could prosecute such a crime without a Security Council declaration of a state's act of aggression. This approach would also add crimes like WMD use, drug trafficking, and terrorism to the Rome Statute in order to express an international norm against these acts; allow the Prosecutor to issue more arrest warrants before completing one full trial; and reject critical assistance and input from the United States to maintain its independence. Needless to say, the United States would not join this International Criminal Court.

On the other hand, the rational approach would require that the international community pick the brains of American policymakers and consider not only the moral and legal issues but also the political ones that influence not only US policy toward the ICC but also the ICC's overall effectiveness. Though it would indeed be in the national security interest of the US to join the Court for the aforementioned reasons—political accountability, regional stability, soft power, and influence over the Court—it will take either a lot of persuading or a little bit of compromise to gain US support. The latter is the more effective approach; even the Judge Sang-Hyun Song, the Court's President, has called the institution "a judicial institution operating in a political world" (Goldston, 2010). James A. Goldston (2010) continues:

It is essential to be guided by "the law" and "the evidence." But [] the prosecutor may have to consider other factors as well in deciding how to proceed. These might include the need to demonstrate the court's viability (for example, by charging at a level or in a manner that prevents states from simply ignoring the

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court's orders); its efficacy [1]; its efficiency (by limiting the number of charges, and thereby the length of trials; or its independence.

It is essential to the International Criminal Court's effectiveness that it become not simply a developing world court but rather an international court, influenced not only by the need for legal justice but also by the political effectiveness that only the developed world can provide.

Thus the United States and the international community chose correctly in the approach taken at Kampala. First, the United States sent an "interagency delegation" to the Conference designed to "resume engagement with the court, the states parties, observer nations, and many private organizations involved in international criminal justice" (Koh & Rapp, 2010). As one delegate notably expressed to the US delegation, the United States was viewed again, "with respect to the ICC, as part of the solution and not the problem" (Koh & Rapp, 2010). This solution served to protect both the interest of the United States and the mission of the Court. At the Conference, the Assembly of States Parties succeeded in amending the Rome Statute to include two newly defined crimes—state aggression (perpetrated by an individual) and use of certain weapons (poison weapons, asphyxiating gases, and expanding bullets)—but chose to delay these crimes' entry into force until another review conference in 2017 ("Review Conference", 2010; Koh & Rapp, 2010). In addition, referral of this crime must follow "an exclusive Security Council trigger" except if the Prosecutor meets four specified criterion that exhibit reasonable basis for prosecution ("Review Conference", 2010; Koh & Rapp, 2010). The international community also succeeded in strengthening the doctrine of complementarity to emphasize national justice efforts by the United States, the European Union, and other partners (Koh & Rapp, 2010). What is critical to understand about the outcome of this conference is that it sets a precedent for sustained engagement and compromise between the United States and the Court. While states parties have compromised with the United States on the crime of aggression and Security Council influence, the United States government has chosen not to renew the Nethercutt Amendment and aided the Court by voting in the Security Council to refer the case of Darfur to the Prosecutor.

Whether or not the United States chooses to join the International Criminal Court, this new precedent of engagement with the Court will serve both national and international security interests. The International Criminal Court needs an active and supportive United States in order to effectively prosecute crimes, foster an international rule of law, and bolster international peace and security; meanwhile, the United States needs a constructive relationship with the international community, and especially the ICC, in order to ensure political accountability to the law, create regional security in developing areas, renew its waning soft power, and achieve influence on the Court's future. While it is indeed in the long-term national security interest of the United States to submit to the International Criminal Court, the largely exaggerated short-term concerns will continue to weigh heavily on American policymakers' minds until the International Criminal Court proves that it is willing to take then necessary steps to be an effective and rational court rather than a kangaroo court worthy of nothing more than "to wither and collapse." The goal of the Assembly of States Parties should be to widen its capabilities by compromising to gain US submission rather than to widen its aims by idealistically adding on new crimes before the existing ones have been effectively prosecuted; such a strategy will eventually prove the Court's effectiveness and legitimacy. And the goal of the United States: to join the International Criminal Court, as further isolation and antagonization will prove detrimental to both its national security objectives and the international fight for justice.

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