



## The ICC and the Transatlantic Conflict

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### Introduction

The International Criminal Court (ICC), the first transnational legal body, has its roots in the 'Rome Statute', signed on July 1, 1998. It is intended to hold individuals accountable for the four core crimes of genocide, war crimes, crimes against humanity, and the crime of aggression. To take effect, the ICC treaty needed to be ratified by at least 60 states; despite the strong objection of the current U.S. Administration, this number was reached in April 2002. Shortly before, the Bush Administration had announced that it did not intend to ratify the Statute, and moreover, that it considered itself as released from any obligation arising from the American signature of the Rome Statute, given by former President Bill Clinton on December 31, 2000. This withdrawal, unique in the history of international relations, provoked harsh criticism in the international community and from the member states of the European Union in particular.

The fundamental gap between the European and American position on the ICC issue has greatly aggravated transatlantic conflict. The main difference between the two positions involves the question of whether 'Universal Human Rights Jurisdiction' constitutes an infringement on American national sovereignty. Within this issue, the debate centers on prosecutorial powers, the question of immunity, the risk of politically motivated prosecutions and the rights of the accused in trial procedures. Each of these topics will be explored in this analysis.

Underlying the ICC case is a transatlantic clash of ideologies centering on two fundamentally different interpretations of national sovereignty. Whereas the European Union considers the ICC as an expansion of its national sovereignty and its sphere of influence, the U.S. views it as an infringement on its constitutional rights (Macpherson & Kaufman, 2002, p. 220). The EU fears a possible 'double standard' in international human rights law if U.S. citizens would be granted unconditional immunity,

while the U.S. on the contrary opposes 'automatism' in ICC jurisdiction as a result of its universality.

### Prosecutorial Powers

A major concern of U.S. officials since the beginning of the Court negotiations in 1994 has been the ICC prosecutor's ability to check state decision-making in order to prevent states from committing genocide or crimes against humanity (Washburn, 2002). As the investigations can start without a referral from either the UN Security Council or a state, opponents to the ICC assumed that the prosecutor could attempt to influence domestic policy-making and violate sovereignty rights (Macpherson & Kaufman, 2002). Therefore the U.S. sought guarantees that only the UN Security Council should have the power to start investigations, because such rights in the hands of a "less-than-impartial prosecutor" (Macpherson & Kaufman, 2002, p. 220) would not be compatible with American constitutional safeguards. The appointment of ICC judges through nomination by the Assembly of States was also criticized, since these nominations could be politically motivated. The American delegation to the Rome Conference stressed that the ICC prosecutor's "ability [...] to bypass the Security Council would undermine the settled system of international governance and the U.S. role in that system" (Amann, 2002, p. 3). This American argument was based on Articles 7[1] and 24[1] of the Charter of the United Nations, which guarantee the SC the "primary responsibility for the maintenance of international peace and security" (Amann, 2002, p. 3). Currently, the United States plays a key role within the Security Council, as it is one of the five permanent members with the right for absolute veto. The ICC is, in this view, a threat to that primacy.

The European response to the American fear of excessive prosecutorial power was to point to the safeguards and checks and balances implemented in the Rome Statute itself. The "unaccountable prosecutor" (Bolton, 2002, p. 2) was, in the eyes of the EU negotiators, no more than a theoretical worst-

case scenario. They argued that “the investigations of the ICC prosecutor can be stopped by a vote of two judges within the ICC’s Pre-Trial-Chamber” (Amann, 2002, p. 4). Furthermore, the accused state itself has “the right to challenge the jurisdiction of the Court and its admissibility of a case” (Lee, 2002, p. 3). John Washburn points out in support for this position that the limits for the ICC prosecutor are tight. “It can determine only whether an act was in fact pursuant to a particular plan or policy”(Washburn, 2002, p. 2).

Regarding the American fear of politically motivated nominations of ICC prosecutors, the EU took the standpoint that the US was consciously overemphasizing that “non-democratic state parties” (Amann, 2002, p. 4) could try to use the institutional framework of the ICC as an arena for their hostile actions. The EU stressed that the large majority of the member states of the Assembly of States are stable democracies which have excellent relations with the US. Historical precedence and the record of international institutions like the UN give no evidence of scenarios like the ‘unaccountable prosecutor’.

As to the US fear that the ICC is a challenge to the primacy of the Security Council, the EU emphasized the central role of the UN SC under the present ICC Statute (Macpherson & Kaufman, 2002). Article 13(b) rules that referrals made by the Security Council must be accepted by the ICC prosecutor, if all permanent members and a majority of the nonpermanent members of the SC agree upon them. Lee emphasizes that the right of referral can even be used as an instrument for the Security Council in managing future international crises: the ICC can replace the costly and time-consuming ad hoc tribunals set up by the SC such as those in Yugoslavia and Rwanda (Lee, 2002). The obvious ineffectiveness of the ad hoc tribunals to cope with mass atrocities like the Rwanda Genocide, Lee argues, make the call for a permanent law enforcement mechanism even more urgent. “Eight years after the genocide and six years after prosecutions at both national and international level, more than ninety-five percent of the prisoners are still waiting for trials in overcrowded detention centers”(Lee, 2002, p. 8). A permanent institution like the ICC would, to a large extent, solve the problem of ineffective Security Council tribunals. This claim can be based upon the higher degree of effectiveness of permanent legal bodies compared with ad hoc institutions which have to struggle with high transaction costs every time they are set up. Moreover, the affinity of the permanent institution is considerably higher.

Furthermore, the “Singapore Compromise” (Sewall, 2000, p. 63), a last minute attempt to mediate between the US and the EU positions in this problem, suggested that the American request for a subordination of the ICC under the authority of the Security Council could be transformed into the right for the UN body to delay ICC investigations and initiate a commission to examine the legitimacy of the ICC measures. Article 16 of the current Statute gives the Security Council “a form of collective control” (Macpherson & Kaufman, 2002, p. 221), confirming that the permanent members of the SC have the right to “postpone an investigation for up to 12 months on a renewable basis” (Macpherson & Kaufman, 2002, p. 221).

## The Question of Immunity

The U.S. also insisted that existing international treaty law prohibits the ICC from exercising jurisdiction over nationals of states which have not ratified the Rome Statute, including the U.S. (Sewall, 2000). American head delegate David Scheffer told the Senate, “the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court, even if the United States has not agreed to be bound by the treaty” (Sewall, 2000, p.214). This argument is a direct challenge of the principle of universality as established in the Rome Statute. US Opponents to the ICC call this universality a ‘jurisdictional overreach’, and argue that two problems arise from it.

First, the Rome Statute incorporates crimes that are not recognized as crimes of universal jurisdiction under customary international law, particularly the as yet undefined core crime of ‘Aggression’ (Macpherson & Kaufman, 2002). Second, according to the US, universal jurisdiction cannot be subject to a treaty-based collective international court. Legitimacy for US overseas action derives only from domestic sources like “the United States’ constitutional structures and democratic principles” (Patrick and Forman, 2002, p.47), never from a treaty-based collective. The American understanding of state sovereignty in this respect is one of unilateral universal jurisdiction, that is, “a State has jurisdiction to unilaterally prescribe, adjudicate and enforce laws. This amounts to firstly establishing its laws with regards to persons, secondly applying these laws to these persons in criminal proceedings and finally inducing or compelling compliance or punishing

non-compliance with these laws” (Strapatas, 2002, p. 2). These rights cannot be delegated to international bodies.

Proponents of the Court like Bickley mark these American arguments as weak. He notes that an implementation of the US conditions in the ICC Statute would “prevent the prosecution of Saddam Hussein for War Crimes committed by his forces in Kuwait unless he consented” (Macpherson & Kaufman, 2002, p. 223). Other scholars highlight that the American stance runs counter to the US self-created precedent regarding several international crime definitions, like terrorism and hijacking.

Yet one important weakness in the arguments of the European Union regarding the question of immunity remains: the question of the as yet undefined crime of aggression.

## **Crime of Aggression - The risk of politically motivated prosecutions**

US ‘Under Secretary for Arms Control and International Security’ John R. Bolton calls the definition of aggression “excessively elastic” (Bolton, 2002, p. 2). The ICC could become a “political forum” (Sewall, 2000, p. 213) to challenge political decisions from high US officials, and non-democratic states may initiate politicized prosecutions. As member states of the ICC are represented in the Assembly of States under the principle of ‘One Nation - One Vote’, the likelihood of such scenarios is seen in Washington as very realistic.

The American argument against a criminal definition of aggression is often referred to as the ‘exceptionalist debate,’ meaning that the US deserves exceptional treatment because of its unique role in international peacekeeping operations. The US fears that preemptive military actions such as the air strike on the Al Shiffa pharmaceutical plant in Sudan will be interpreted as aggression. After the US attacked the plant in Sudan on August 20, 1998, “the president of Sudan called for international prosecution of the U.S. officials behind the air strike” (Sewall, 2000, p. 213). He labeled the air strike a crime of aggression and war crime. Because of fears that US service members could be prosecuted for similar operations, the US wanted the “right of veto to prevent any of its own nationals being brought to trial” (Macpherson & Kaufman, 2002, p. 221).

However, the EU refused to grant the US veto power, stating that the crimes under ICC jurisdiction were crimes against humanity, which

deserve treatment as absolute universal crimes. The EU pointed out that exemptions were counter-productive to the goals of the ICC and would set a dangerous example undermining the authority of the Court.

There are several views concerning the current debate over the crime of aggression. Some argue that this Crime will never be defined, because of its sensitivity and the lack of consensus for a common definition under the ICC Statute. And there are those, like Dr. Claus Kress (Kress, 2002), who maintain that, based on customary international law, aggression will be regarded as the type of war initiated by Hitler. There is no evidence, according to Kress, that military actions of type ‘Kosovo 1999’ or ‘Afghanistan 2001’ could ever be included into the crime definition of aggression, especially considering the national interests of the large majority of the Assembly of States. As a definition of the Crime of Aggression has to be adopted with a two-thirds majority within this body, Kress sees the US concerns to a certain extent devitalized (Kress, 2002).

Regarding politically motivated prosecutions initiated not by a hostile state party but by a biased prosecutor, Amann adds that under the principle of complementarity, the ICC judges cannot approach a case as long as a national jurisdiction is “willing” to precede it. Some ICC supporters, such as Amnesty International, claim that the United States would ensure its national interests if it would enact national human rights legislation identical or similar to the ICC jurisdiction into the American Constitution, because the more “US laws conform to those of the ICC, the more the US legal system can deal with cases that might interest the ICC, and thus shield US nationals from international prosecution” (Amann, 2002, p. 10).]

## **The rights of the accused in trial procedures**

Some American law experts see in the ICC Statute the risk of unfair trial proceedings, because it lacks fundamental U.S. constitutional safeguards such as the right to trial by jury and protection against double jeopardy. Also missing are alternatives to prosecution. The US argues that the failure of the ICC to “acknowledge the legitimacy of local amnesties,” which are a tool of truth commissions, cannot be accepted (Macpherson & Kaufman, 2002, p 222-24). But this standpoint is not universal in America. One representative of the American Bar Association announced in a congressional hearing that the “Treaty of Rome contains the most comprehensive list of due

process protections which has so far been promulgated” (Amann, 2002, p.5).

There is also no reason why the lack of a right to trial by jury necessarily precludes US participation in an ICC court. Numerous examples in US legal practice show that there is already variance permitted in the rules of procedure. American military courts are not restricted to the guidelines of the civilian procedures, and furthermore, the US has historically cooperated with international military tribunals, even when procedural differences existed. “US courts also have rejected US nationals’ claims that the Constitution forbids their surrender to foreign courts that follow procedures unlike those in the United States” (Amann, 2002, p. 10). These examples suggest that “as long as the ICC’s practices meet minimum standards of fairness, they should not prevent US participation in the international court” (Amann, 2002, p.11). Additionally, Article 53 of the Rome Statute vests the ICC prosecutor with the power to decline a case, where “a prosecution is not in the interests of justice, taking into account all circumstances” (Macpherson & Kaufman, 2002, p 224), which may be interpreted as allowing the ICC to grant or recognize amnesties.

## Conclusion

The US position on the ICC Statute claims that it violates certain aspects of the American constitution, mainly concerning prosecutorial powers, immunity, the risk of politically motivated prosecutions and the rights of the accused in trial procedures. However, these objections are based on a basic ideological rift between the US and the European countries over the idea of state sovereignty.

The US definition of state sovereignty is based only on domestic legitimization, while the EU definition includes also the delegation of sovereign rights to international legal bodies. The US understanding is best described with the words of John Marshall, former chief of Justice of the United States, who said: “The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute ...” (Amann, 2002, p. 9). This implicates that “no International Court has the right to override US law in the trial of US citizen” (Macpherson & Kaufman, 2002, p. 220). The EU definition of state sovereignty is shaped by a ‘dualism’ between supranational jurisdiction and legislature, and intergovernmental national decision-making. This was proven in the negotiations on the ICC, when all member states of the European Union

adhered to a definition of state sovereignty grounded on Absolute Universal Jurisdiction.

## Necessary policy steps

The following policy recommendations which would improve the situation pragmatically are taking for granted that both sides, even in times of extraordinary transatlantic tensions have a natural interest to continue to cooperate. This assumption stays valid even in case of ideological and conceptual disagreement like we have seen in the ICC dispute. However, all pragmatic steps will have to focus first on improving the transatlantic relationship in general, especially since the open confrontation about the Iraq war in 2003 has destroyed several channels of mutual understanding. Reinvention of effective transatlantic communication on the basis of “lowest-common-denominator policy” (Moravcsik, 2003, p.81) is therefore crucial. Moravcsik suggests striking a new “Transatlantic Bargain”. As in most of its history, the Western Alliance should again clearly distinguish between core cooperation and other, controversial issues. Informal issue-related work summits could help in this respect moving beyond superficial accusations on both sides. An early warning system for crisis management centering in something like a ‘Transatlantic Council’ could produce decent diplomatic agreement or at least understanding before both sides battle their problems in the media.

After a revitalization of the transatlantic communication channels, both the US and the EU must take several steps to promote an atmosphere of mutual trust. This will demand concessions on both sides. First, the US should amend its US Federal Criminal Code (Title 18) and the Uniform Code of Military Justice (Title 10) to ensure that they incorporate all ICC-defined crimes. This would demonstrate the commitment of the US to the fight for international human rights and, secondly, ensure that all possible ICC crimes could be investigated domestically under the principle of complementarity. Additionally, the US should limit its claims for immunity to the as yet undefined crime of aggression, and cease its efforts to pressure governments into Article 98(2) International Agreements, which is a bilateral agreement between the US and any foreign government that US citizens will not be surrendered to ICC jurisdiction under any circumstances. This agreement is unreasonable when ICC jurisdiction covers the worst crimes against humanity, and undermines the position of the US in its insistence on

immunity in the case of aggression. Only Americans under the guidance of the US government, such as soldiers and diplomats, should gain immunity. Finally, states making bilateral agreements with the US should be excluded from the right to protect their national citizens before the ICC, meaning that EU member states must restrict themselves from demanding exemptions. The EU on the other hand should engage in dialogue with Washington about the crime of aggression. A work-summit could introduce a new formula for a crime definition, which would not hinder the US to engage into preemptive invasions if they are clearly marked by their humanitarian intention and backed by the international community. If no compromise can be reached, EU officials should promote an exclusion of this crime definition from the Rome Statute. In this way, Washington could rethink its position to join. Moreover, the EU should encourage the newly elected 1<sup>st</sup> ICC prosecutor, Argentine lawyer Luis Moreno Ocampo, to engage in intense dialogue with Washington, in the hope to destroy the idea of the ‘unaccountable prosecutor’. In particular, the courts’ principles of complementarity with national legislation can play a crucial role to convince Washington that as long as American legal institutions are engaged in investigations, the ICC will not take over jurisdiction.

The ICC is as much an example of an ideological rift as it is a conceptual rift between the European Union and the United States of America. The ‘new realism’ in US foreign policy since September 11<sup>th</sup> will constantly overlap with and confront the EU’s attempt to transfer its own framework of binding multilateral agreements onto the level of the international community. Therefore we have some evidence that the key problems we have seen in the case of the ICC (such as the definition of state sovereignty) will also hinder or even block necessary coordinated policy steps in the future. A new Transatlantic bargain, as suggested by Moravcsik, should therefore focus rather on viable and institutionalized conflict management than on continuing to evoke the spirit of shared transatlantic values.

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