Courts and Consequences: The Impact of Terrorism on U.S. Participation in the International Criminal Court

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Constitutional issues and the objectives of U.S. foreign policy, especially regarding terrorism, dictate that the United States should not ratify the Rome Statute in its present form.

The past year has seen the ratification by the necessary number of states for official creation of the International Criminal Court (ICC) under the Rome Statute, and the ICC is currently undergoing preparatory meetings before it begins regular proceedings. The many arguments supporting U.S. ratification of the Rome Statute are widely varied, as are the arguments opposing it. The idea of international cooperation is certainly appealing and no one seriously opposes the idea of prosecuting persons responsible for the gross crimes included under the jurisdiction of the ICC. Indeed, most would hope that increased international cooperation could reduce the frequency of crimes such as genocide, rape, and torture and promote greater peace in the international system by requiring greater accountability. Yet, complex issues such as jurisdiction, state sovereignty, and constitutionality have made attempts at such international judicial cooperation especially difficult. The track record of past attempts is decidedly mixed, and many of the most significant advances in international criminal proceedings are

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2 The four offenses outlined in the Rome Treaty: genocide, crimes against humanity, war crimes, and aggression.
too recent to be judged effectively. Furthermore, progress towards consensus is hindered by extremists on both sides of the argument: on the one hand, those who argue that international law is dysfunctional and irrelevant and that U.S. sovereignty is incompatible with international organizations of any substance; and on the other hand, those who would assume away any constraints of constitutionality while arguing for U.S. participation in any international organization at any cost, decrying any unilateral U.S. action as morally wrong. As is usually the case, the truth lies somewhere in between.

Recent acts of terrorism have added a new facet to the U.S. debate. Supporters of the ICC have used terrorism as another justification for U.S. ratification of the Rome Statute. They argue that the ICC will promote peace and stability in the international system and help deter and react against all future acts of international criminal aggression, including terrorism. Furthermore, they argue that the U.S. refusal to support the ICC will only strain tensions with allies or would-be allies, making the fight against terrorism more unilateral and more difficult. Such arguments, however, are somewhat deceptive in that they emphasize only possible outcomes of U.S. participation or non-participation in the ICC while still overlooking the present fundamental difficulties in U.S. ratification. Just because the nation has recently been reminded of the horrors of terrorism does not mean that the United States should definitely participate in the ICC. Rather, constitutional issues and the objectives of U.S. foreign policy (especially regarding terrorism) dictate that the United States should not ratify the Rome Statute in its present form. Also, because of flaws in its organization and jurisdiction, it is highly uncertain if the ICC will in fact become an effective judicial body. Furthermore, arguments that the ICC will aid the war on terror are unclear and unsupported. Rather, it is very possible that the functions of the ICC

\footnote{For example: Nuremburg Trials, International Court of Justice, International Criminal Tribunals on the former Yugoslavia and Rwanda, World Trade Organization dispute settlement system, as well as many other bilateral and multilateral judicial tribunals.}
may actually obstruct the U.S.-led fight against international terrorism with or without U.S. ratification. A discussion of these issues highlights the need for more serious debate of alternative options for international judicial cooperation.

**Ratification Would Be Unconstitutional**

Much has been said regarding the constitutionality of ratification of the Rome Statute, so the following is only a brief review of the important constitutional concerns.\(^4\) One fundamental constitutional problem for the ICC lies in its assertion of "universal jurisdiction" over "territorial jurisdiction" in prosecuting acts committed in the United States by Americans. The other main problem is the possible prosecution of Americans for alleged crimes committed overseas, which would be unconstitutional because of U.S. participation in an ICC that does not meet the requirements of the Bill of Rights.

Ratification of the Rome Statute would allow ICC jurisdiction over acts committed in the United States by Americans and others on the basis of universality.\(^5\) Such jurisdiction is in direct contrast with the principle of territoriality, which has long been the basis of international legal authority. In *Girard v. Wilson*, the Supreme Court unanimously concluded that "a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender jurisdiction."\(^6\) In other words, the ICC would have no jurisdiction within the United States unless the U.S. vested judicial authority in the ICC. Such a court, however, is not authorized by the Constitution and therefore could hold no legitimate jurisdiction on U.S. soil according to the ruling in the landmark case of *Ex parte*

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\(^5\) Rome Statute, supra note 1.

Milligan. In this case, the Supreme Court ruled that the military tribunal of Lamdin Milligan, a Confederate sympathizer, had no legitimate judicial authority, but that all such authority was vested "in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish." Clearly, the ICC would not satisfy the Constitutional requirements of being ordained or established by Congress under Article III. Because the ICC does not satisfy these and other requirements, such as trial by jury or the Appointments Clause, it could never legitimately or constitutionally prosecute criminal offenses committed on U.S. soil by Americans.

Supporters of the ICC have argued that the ruling in Ex parte Quirin overturned the decision in Milligan. Lee Casey advances the Milligan argument by distinguishing it from the ruling in Ex parte Quirin. Specifically, he shows that Quirin does not, in fact, overrule or limit Milligan:

In Quirin the Court ruled that a group of men, recruited in Nazi Germany as saboteurs, could be tried and condemned by military commission. Such commissions are not "Article III" courts, and they are not bound by the Bill of Rights. They are also incapable of lawfully trying civilians—a rule required by Milligan and fully accepted by the Court in Quirin. In fact, the Quirin Court carefully distinguished Milligan, explaining that the accused in that case "was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents." The defendants in Quirin, however, were not civilians, but "unlawful combatants... subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." Such individuals, ruled the Supreme Court, are neither entitled to trial in the Article III courts, nor to the protections of the Bill of Rights.

This distinction between Quirin and Milligan makes it clear that the ICC, which would prosecute civilians as well as lawful and unlawful

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7 Ex parte Milligan, 71 U.S. 2 (1866).
8 Ibid., 121, quoting U.S. Constitution.
9 Ex parte Quirin, 317 U.S. 1 (1942).
10 Casey supra note 4, 853-4.
combatants, could not constitutionally have jurisdiction on acts committed within the United States by Americans.

Despite the "exclusive jurisdiction" of U.S. judicial authority over acts committed by Americans within its own territory, a strong argument can be made that the international community or State parties to the ICC can exercise "universal jurisdiction" for the offenses outlined in the Rome Statute, regardless of where they occur. Indeed, recently many states have used universal jurisdiction as the basis for their prosecution of criminal acts committed outside of their own territory. However, the legitimate use of universal jurisdiction is far more limited than ICC supporters claim. Historically, the only two generally accepted universal offenses have been piracy and slave trading. Both of these acts, however, take place on the seas, outside of jurisdiction by any single state. In nearly all other cases, territoriality has been favored over universality, even for the gross offenses of the Rome Statute.

Recent alleged uses of the principle of universality can be better understood in terms of preference for territoriality. For example, Spain's effort to extradite former Chilean dictator Pinochet from Britain was partly based on the fact that some of Pinochet's victims were Spanish nationals. The Nuremberg Trials and the similar trials in Japan at the end of WWII did not claim legitimacy by universality, but rather by the rights of the victors of Germany and Japan to legislate for the occupied territories. Similarly, the principle of territoriality explains why the United States can extradite American civilians to be prosecuted in non-Article III courts when their crimes were committed abroad or when their actions create a criminal effect in another country, as well as why the U.S. can exercise jurisdiction over acts committed abroad that directly affect American citizens and interests. Such evidence shows the importance of territoriality over universality in international law and in U.S. Constitutional law. Vesting power in the ICC to exercise universal jurisdiction to prosecute Americans for offenses committed on American

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11 The Nuremberg Trial, 6 F.R.D. 69 (1946), 107.
soil involving only other American citizens would, therefore, be unconstitutional and unprecedented.

ICC prosecution of Americans for alleged crimes overseas would also be unconstitutional should the United States ratify the Rome Statute. The Supreme Court ruling in *United States v. Balsys* suggests that U.S. involvement as an ICC State party would require Bill of Rights guarantees for prosecution of American citizens. The case specifically ruled that Bill of Rights guarantees are not required when an American citizen is prosecuted by a distinctly foreign court for crimes committed in other territories, making extradition legal in such cases. But U.S. involvement in foreign prosecution makes such prosecution "as much on behalf of the United States as of the prosecuting nation," making Bill of Rights guarantees necessary. Therefore, ICC prosecution of Americans overseas, if the United States were a State party, would require protections of the Bill of Rights. Many of these protections, however, are not provided for under the Rome Statute. For example, the Civil Law system of the ICC does not provide for trial by jury, as guaranteed by the Sixth Amendment. Similarly provided by the Bill of Rights and not guaranteed in the ICC are the provisions that trials be held "in the state wherein the crime shall have been committed," that the accused has a right to confront "the witnesses against him," and others. Since such protections are not available under the current ICC, the United States cannot constitutionally participate in such a court that could potentially prosecute Americans.

Finally, ICC proponents claim that U.S. Constitutional concerns have been addressed by the principle of "complementarity," meaning

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14 Ibid., 698.
16 Ibid. The right to confront witnesses excludes the possibility of anonymous witnesses and most forms of hearsay evidence. Both anonymous witnesses and virtually unlimited hearsay evidence have been allowed in the International Criminal Tribunal for the Former Yugoslavia, the model for the ICC. See also Michael P. Scharf, *Balkan Justice*, 7, no. 67 (1997): 108–9.
that the ICC’s jurisdiction is complementary to state jurisdiction. The Rome Statute includes measures which make cases inadmissible when the state that has jurisdiction is either already prosecuting or has investigated and decided to not prosecute. This, ideally, would prevent unnecessary prosecution by the ICC when the state with proper jurisdiction is already taking appropriate legal actions. However, the Rome Statute eliminates these limitations of jurisdiction if it is judged that a state “is unwilling or unable genuinely to carry out the investigation or prosecution” or when the decision to not prosecute “resulted from the unwillingness or inability of the state genuinely to prosecute.” The opportunity for supplanting national jurisdiction based upon potentially politically motivated or otherwise uninformed decisions by a non-reviewable ICC does not provide much of a safeguard for American constitutional concerns.

Certainly, many other well-informed arguments are being made for and against U.S. participation in the ICC with regards to constitutionality. This discussion highlighted only some of the better arguments being made against participation. Both inside and outside of courtrooms, many interpretations can be made of the Constitution with its accompanying case law. Because of this, the decision for U.S. participation in the ICC should probably not be made solely on the basis of constitutionality. Indeed, constitutional requirements do not exclude the possibility of institutionalized international cooperation in criminal prosecution. Yet, such constraints cannot simply be assumed away so as to expedite U.S. participation, even if at the expense of international cooperation in the short run. To do so would be setting a dangerous precedent for U.S. policy. Finally, acts of terrorism, from the past or in the future, do not change the fundamental constitutional conflicts surrounding ratification of the Rome Statute.

17 Rome Statute, supra note 1, art. 17(1).
18 Ibid., art. 17(2).
OTHER FLAWS IN THE ICC

Besides issues of constitutionality and regardless of U.S. involvement, the International Criminal Court faces other challenges that will affect its ability to effectively prosecute international crimes, including acts of terrorism. These include difficulties resulting from the ICC’s organization and guidelines and also the problematic overall mission of the ICC. Some of these problems are specific to prosecution of terrorism, while others apply to all potential areas where the ICC may prosecute.

First, perceptions of justice and fairness, which are the basis of any judicial system, are not the same across all societies. Even the Common Law of Great Britain and the United States is strikingly different than the Civil Law of Continental Europe. Still other judicial systems in Asian and Arabic nations are far different. Such variation produces a confused international perspective on the roles of judges, prosecutors, juries, and case law. Some of these differences have been gradually overcome by experience with previous international tribunals, but none of those experiences compare in scope and in depth to the proposed ICC. Though such confusion can be negotiated and clarified in preparatory commissions, it certainly still lends to the difficulty in establishing a legitimate and powerful International Criminal Court.

The organization of the ICC is also very prone to politicization. The selection of a prosecutor and judges by election of the Assembly of State Parties is likely to reflect the political competition evident in any and all situations where a position of authority and potential power might be obtained. Also, the prosecutor and others in the ICC will certainly be influenced by competing political and ideological notions when deciding whom and how to prosecute. Some have even argued that, as a result of political competition, “the ICC will be ‘captured’ not by governments but by NGOs and others with narrow special interests and the time to pursue them.”

politicization would not be surprising, given the record of other “independent” bodies of the UN system.

The potential for politics, however, is not necessarily a major cause for concern by itself. Experience has shown that the effects of politics are best contained within a system of institutionalized separation of powers and checks and balances. Some of the most severe criticism of the Rome Statute has focused on the lack of such institutions within the ICC. The Rome Statute does not include any possibility for review or reversal of ICC decisions by another independent body. The prosecutor and judges are left largely unaccountable and able to investigate and prosecute as they wish. The Security Council is explicitly left without oversight authority, and so the ICC is left accountable only to itself. The strongest mechanism of accountability in the Rome Statute is the possibility for the Assembly of State Parties to vote to remove the prosecutor or judges for “serious misconduct” or a “serious breach” of duty (majority vote for the prosecutor and two-thirds for judges). This, however, is an insignificant gesture of accountability compared to what most modern democracies deem necessary for their similar institutions. On this subject, Professor Alfred Rubin refers to Plato when he questions, “Who guards the guardians?” The potential for politicization combined with a lack of mechanisms for accountability creates even more uncertainty for potential legitimacy and effectiveness in the ICC.

Further criticism has focused on the problematic definitions of crimes in the Rome Statute and the uncertain future of other crimes that may be included. A definition for the crime of aggression has not yet been agreed upon for inclusion in the Rome Statute and will require a 7/8 vote by State parties for approval. The United States has argued against inclusion of this crime from the beginning on the premise that the UN Charter delegates the right to define aggression to the Security Council. Still other definitions suffer from

20 Rome Statute, supra note 1, art. 46.
vagueness or otherwise include details that the United States may not be able to accept. Furthermore, the Rome Statute allows for future prosecution of other crimes that can be included by two-thirds majority vote by the Assembly of State Parties. Though such flexibility is probably needed for an institution that wishes to function for an extended length of time, the uncertainty that this provision creates only further damages the legitimacy and effectiveness of the ICC and weakens any possibility for U.S. participation.

Although there are many problems with the organizational structure and guidelines directing the ICC, the most critical problem is its overall scope or purpose. Oddly enough, most of the discussion for and against U.S. ratification of the Rome Statute has dealt with issues that are negotiable, such as definitions of crimes and political accountability. In such discussions, the question of why the world needs an ICC is often forgotten. In the United States, conservatives have often written off the Rome Statute only because it would create a substantive international body that might require significant U.S. cooperation or even possible concessions of international authority. Some liberals, on the other hand, have often complained that it is a disgrace that the United States continues to stubbornly oppose an idea that the rest of the world, including our closest allies, support, leaving us in the small company of nations like Iraq. Both of these stances tend to overlook the question of whether or not the world system needs an ICC.

Along these lines, John Bolton observes that the purpose of the ICC is flawed because it tries to "transform matters of power and force into matters of law." Indeed, though there are similarities between the traditional offenses of criminal law and those listed in the Rome Statute, there are also fundamental differences. For example, genocide, aggression, crimes against humanity, and war crimes are

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22 Bolton, 62-3. Bolton specifically cites problems in the definition of genocide that would conflict with the definition that the U.S. Senate approved when it ratified the Genocide Convention in 1986.

23 Rome Statute, supra note 1, art. 9.

24 Bolton, 66.
usually carried out on a somewhat nationwide basis, and their effects are not appropriately measured in a monetary value or even in lives lost but in damage to society and to the human race. Can legal proceedings really deter these effects or even properly punish the guilty? If legal proceedings are appropriate, in what ways is the current system inadequate, and how does the ICC improve that? Alfred Rubin asks, "Would the effect of a conviction be to change the notion of victory in [a] battle?" It becomes difficult to see how an ICC could truly change much at all in the international system. Where crimes are truly a matter of power and force, law can do little. For the situations in which such criminals may be prosecuted, it seems the legal systems currently in place are able to manage. One hypothetical example might summarize the dangers of an ICC with unnecessary purpose and scope. If an ICC existed in the 1860s, how would it have affected the United States following the Civil War? Would leaders from the Confederacy and the Union be prosecuted and jailed by the ICC for brutal military action carried out by both sides? Such an outcome would seem very possible, given the atrocities of the Civil War and the likely unwillingness of a Lincoln administration to investigate or prosecute. How would such convictions affect the rebuilding nation? Undoubtedly, probable ICC actions would not reflect Lincoln's hope to "bind up the nation's wounds" with "malice toward none, with charity for all."

Possible Consequences of the ICC on Terrorism

How, then, does the issue of terrorism affect the prospects of the ICC? Is there a lack of good current options in prosecuting terrorists that would somehow make the ICC more appealing and legitimate? There are, in fact, many good options, especially given the global scope of terrorist activity. This is in direct contrast to claims that the ICC is a good option because terrorism is a global

25 Rubin, 67.
problem. Furthermore, the United States, which is leading the war on terror, is likely to use its influence and abilities to exclude the ICC from any participation in terrorist prosecution. It remains that the ICC will have a negligible role, if any at all, in aiding the war on terror.

The exception would be future terrorist activities that do not affect the United States but that affect nations that support the ICC. Yet, the nature of terrorism is such that almost no nation would ever purposefully give up jurisdiction to prosecute criminals that harmed their own people. Though terrorism is a global problem, each case is a unique tragedy to an individual nation. Not allowing those nations to prosecute, according to their own laws, the terrorists that caused them harm, would in no way aid the war on terror.

Though it is not likely, the only role left for the ICC with regards to terrorism would be possible prosecution of military officials from the United States and its allies for alleged crimes committed overseas in fighting against terrorism. Granted, this is an unlikely possibility, and critics of the ICC have expressed exaggerated fears of this kind of outcome. It is hard to imagine a situation in which a U.S. military official overseas could be guilty of a crime that falls under the jurisdiction of the ICC, and it is even more unlikely that the ICC would investigate and prosecute. However, it does remain a possibility.

The most likely effect the ICC could have on terrorism would be in affecting political situations that are the motivations of terror. The best example is Israel and Palestine. Leaders of both sides could probably be investigated and prosecuted should the ICC assert jurisdiction. Ideally, such legal action might improve the situation. Past experience in the Israeli–Palestine conflict, however, dictates that legal action would hardly solve anything, especially since the ICC has virtually no perceived legitimacy in that region. It is more likely to deepen the conflict, resulting in a possible escalation of terrorism. Indeed, much of terrorism in the world is motivated by such situations, and the prospects for improving those situations by ICC legal action are very uncertain.
First, it should be clear that the ICC is not the best legal response to terrorism. What, then, can be done to improve the prospects of the ICC? Certainly, increased international cooperation ought to be a goal for all nations. Though integrating domestic and international legal systems is a much more complicated task than integrating trade regulations, it is still not impossible. The current proposal in the form of the Rome Statute, however, is too flawed to be easily repaired. But just as planning for the UN Charter was benefited by learning from the mistakes of the League of Nations, lessons learned from disputes regarding the Rome Statute have paved the way for possible unprecedented progress towards a more effective and legitimate international criminal judicial organization. Indeed, even Henry Kissinger, a strong critic of the ICC, predicts that “in time, it may be possible to renegotiate the ICC statute to avoid its shortcomings and dangers.” Until then, the ICC should have no role in prosecuting terrorists.

Ultimately, legal action of any kind will not resolve the conflict with terrorism. Mark Drumbl, a proponent of international tribunals for prosecuting terrorists, admits that “trials . . . are not a panacea. The mere process of investigating crimes, holding trials, and gaveling accountability will not restore peace to war-torn regions nor pacifism to religious extremism.” Fighting terrorism is a matter of force and power, not of law. Terrorism is fought with international cooperation in gathering intelligence on and apprehending terrorist cells and leaders, in tracking and freezing terrorist funds, and in promoting peace and stability in those regions where terrorism thrives.

Even so, legal action is important—to appropriately prosecute criminals and to bring resolution to victim nations and individuals.

In such cases, there are already many good outlets for prosecution in domestic systems. Certainly, the United States would like to use its very capable domestic courts and military tribunals to prosecute terrorists that cause harm to Americans. In fact, most nations are capable of appropriate prosecution according to their own laws. Possible jurisdictional overlap between nations can be resolved on a case-by-case basis, as has always been the case. Extradition can occur just as usual. In the few nations with inadequate judicial systems, the UN has authority to provide assistance for domestic prosecution. Last of all, many have discussed the possibility of civil suits regarding terrorism, especially against those who fund or otherwise aid terrorists. All of these outlets, and others, are already in place and are advantaged by decades, if not centuries, of experience and backed by societies who wish for an end to terror. Even if the ICC were fully functional and more capable, it is hard to see a good reason to take away jurisdiction from domestic courts to prosecute terrorists. The composite argument, then, is that the United States should not ratify the Rome Statute or support any future ICC proceedings. To fight terror, the United States and other nations should cooperate and use all possible means of power and force to end terrorist activities. Where legal action is appropriate, jurisdiction should be left to domestic courts.