

“Bogus claim of jurisdiction” - Congressional opposition to the ICC in the 2000s

Chaewon Heo*

DULWICH COLLEGE BEIJING, 101300, China

**Corresponding author email: ariel.heo26@stu.dulwich.org*

Abstract:

Despite helping develop the Rome Statute, when it came to signing the International Criminal Court (ICC), America stepped out. They argued that their forces were a major power in peacekeeping, and claimed to fear the indictment of their own servicemen. But was this really the case? By analyzing a meeting record between the Congress of Foreign Relations, this paper seeks to find the congressional opinion as to why they didn't sign the ICC. In taking into account both conservative and democratic views, the meeting records reveal that America refused to sign the ICC because they believed the Court was unreliable and lacked civil rights, as opposed to fear of indictment.

Keywords: ICC, America, Congress, Refusal

1. Introduction

In a public meeting at Nairobi, Secretary of State Hilary Clinton, expressed “great regret that we (America) are not a signatory [1]” on the International Criminal Court (ICC). Throughout history, multiple scholars have offered different reasons as to why America refused to join the ICC. The traditional story, agreed on by the majority, is that America feared the indictment of their own servicemen. However, the ICC was and still is a court filled with issues and biases. This essay will argue that although the traditional narrative could be true, the reason Congress opposed the ICC was because the court was not fully formed, and therefore unpredictable. I will use Congressional documents to analyze the issues Congress found with the ICC, their opinions, and why they were so adamant on their refusal to sign it.

2. Background

The International Criminal Court (ICC), formed in 1998 based on the Rome Statute, has the power to prosecute individuals all over the world. The prosecutors are given free rein to pick what cases they want to investigate, and the carrying out of sentences is conducted by the respectful States. Located in the Hague, the ICC currently has 124 countries in its membership. Interestingly, out of the 124 countries, America is noticeably absent. Why would the United States not want to participate in a court that has the power to try international criminals? Initially, the Clinton administration had signed the Rome

Statute, believing that a court with the power to prosecute individuals would “make a profound contribution in deterring egregious human rights abuses worldwide. [2]” However, contrary to the Clinton administration, the Bush administration, taking over office in 2001, rescinded the signature and made it clear that they would not be taking part in the court. Congress even went as far as to pass the American Service-Members' Protection Act, which would grant American servicemen immunity and prohibit government and agencies from assisting the ICC in any form.

3. Analysis

America's refusal to join a court that could potentially try and sentence individuals for international crimes has sparked a good deal of discussions amongst scholars. In his book *Defending the Society of States: Why America Opposes the International Criminal Court and Its Vision of World Society*, Professor Jason Ralph from the University of Leeds argues the US opposed the ICC because “it cannot control when and where international criminal justice is done. [3]” The US argued that because they will most likely provide the peacekeeping forces, their forces should not fall under Court jurisdiction. Similarly, in an article in *The Guardian*, Australian-British academic Geoffrey Robertson points towards fear of indictments of American soldiers as the main concern, saying that “It was the refusal to compromise on this point which caused the US to cast its negative vote [4]”. Along with arguing that America feared prosecution of their own soldiers, previous scholars also looked to pres-

idential administrations and their statements to judge the reason as to why America refused to join the ICC. But presidential administrations are not the only important place for the American government to debate international treaties: Congress has an equal role too. I will therefore be using Congressional reports to examine the concerns congressmen had regarding the ICC, and why they did not want to sign. I will use the hearing before the Committee of Foreign Relations on the ICC to argue that the main issue American Congress had with the ICC was that it was an international court that had jurisdiction to act on its own and lacked structure and rules.

The Chairman of this hearing and senator of the Committee on Foreign Relations, Jesse Helms, was referred by the New York Times as a “beacon of conservatism [5]”, opposing civil and gay rights. He proposed the American Service Members Protection Act 2000, a bill that would “bar any U.S. cooperation with the ICC so long as the United States has not signed and ratified the Rome Treaty [6]”. The act is proposed to “make certain that the United States does not acknowledge the legitimacy of the ICC’s bogus claim of jurisdiction over American citizens. [6]” Throughout the hearing, Helms repeatedly expresses his opposition with America joining the ICC, claiming the decision is against their will.

Senator Rod Grams, a cosponsor of the bill, has also had his own initiatives against the ICC signed into law. One which prohibits the ICC from using US funds, and another that ensures US citizens cannot be brought into the court. In his statement, Senator Grams repeatedly expresses concern about the ICC being an “obstacle”, and how it is not a legitimate court. A concern raised is that “Without checks, without balances, (the ICC is) accountable to no state or institution for its sanctions or its actions. [6]” As an international court, the ICC is an independent body separate from specific states. To Senator Gram, this makes the court seem unreliable and sketchy. By not needing to justify its actions to anyone, he believes the court has too much free will and could potentially end up corrupt. In modern day, the ICC has faced attacks over bias in judgement, specifically towards Africa. Statistics report that “nine of the Court’s ten open investigations (are) in Africa. [7]” This suggests that Senator Gram’s fears may not have been unfounded.

Senator Gram also expresses the concern that “The International Criminal Court (ICC) would be an obstacle to our attempts to deal with terrorism at home and abroad. [6]” Although this statement was made before 2001, America still had its own terrorism to worry about. An international court that America could not control nor have a say in the results of their jurisdiction taking over would undoubtedly worry congress. They could not trust an international

court, especially one that had countries such as China or Russia sitting on the board.

Both Jesse Helms and Rod Grams are known for being conservatives. It is no surprise, then, that they would both reject an international court, especially one that had the power to potentially trial Americans. President Bush, the leader of the nation at that time and responsible for rejecting the ICC, was also a Republican and well-known conservative. If you have a person such as Jesse Helms, “beacon of conservatism”, as your Chairman, the hearing will likely present an argument against the ICC.

However, there are others that were not conservatives in court speaking of the same ideas. Dr Jeremy Rabkin, a professor at Cornell University, believes the ICC cannot achieve much. He states that “It does not have an army. It does not have a police force. It does not even have a real subpoena power. [6]” He suggests that the ICC will have to rely on appealing to the masses, as they have no military force. Senator Gram also comments on the lack of civil rights in the court, mentioning that it couldn’t “offer defendants the right of trial by jury, protection against self-incrimination, (and) the right to confront and cross-examine prosecution witnesses. [6]” These further drives home just how underdeveloped the ICC was at the time, and perhaps still is.

In her statement, Professor Ruth Wedgewood echoes Dr Rabkin’s concerns. Claiming to be a “democratically ruled person [6]”, Professor Wedgewood, a Professor of Law at Yale University, professes “concerns about due processes [6]”, touching on how the ICC has no jury. In a later statement, Dr Rabkin conveys his concern as well. “There is no jury trial, which is a central tenet of American jurisprudence, the right to be judged by your peers. [6]”

Dr Rabkin and Professor Wedgewood both have certifications that qualify them as able scholars on international law. They both comment on the fact that the ICC lacks a jury and conveys their concern. In this hearing, politicians and professors have come forth with statements and decided the ICC lacks structure and is unreliable. They have rejected the idea of working alongside the ICC and believes that America should instead protect themselves from an international court.

4. Conclusion

America’s conflict with the ICC is still ongoing to this day. Just recently, the Biden administration placed sanctions on the court for attempting to arrest Netanyahu, Israel’s prime minister. Interestingly, Israel is also mentioned in the Congress record used above. During his statement, Professor Rabkin talks about the struggles Israel face with international law and goes on to compare America with Is-

rael: “Israel is constantly condemned at the U.N. Come to think of it, we used to be condemned a lot at the U.N. [6]” Yet it is no question that the ICC still is a court with biases and discrimination. In conclusion, the reason Congress opposed the ICC was that the court was unpredictable and not fully fleshed out.

References

- [1] Clinton, Hilary. *Transcript of speech delivered at the KICC, Nairobi, August 5, 2009* <https://nation.africa/kenya/news/world/clinton-says-she-regrets-us-is-not-a-member-of-icc-601754>
- [2] Clinton, Bill. “Statement on Signature of the International Criminal Court Treaty.” *Transcript of speech delivered at Washington, DC, December 31, 2000* https://19972001.state.gov/global/swci/001231_clinton_icc.html#:~:text=I%20believe%20that%20a%20properly,the%20months%20and%20years%20ahead.
- [3] Ralph, Jason G. *Defending the society of states: Why America opposes the International Criminal Court and its vision of world society*. Oxford: Oxford University Press, 2011.

- [4] Robertson, Geoffrey. “Comment & Analysis: America Won’t Help: The US is Opposing a New Court that could Try the World’s Mass Murderers.” *The Guardian (London)*, 2000, 1.
- [5] Holmes, Steven A. “Jesse Helms, Beacon of Conservatism, Dies at 86.” *The New York Times*, July 5, 2008. <https://www.nytimes.com/2008/07/05/us/politics/05helms.html>.
- [6] *The International Criminal Court: protecting American servicemen and officials from the threat of international prosecution: hearing before the Committee on Foreign Relations, United States Senate, One Hundred Sixth Congress, second session, June 14, 2000*. Bill, *The International Criminal Court: Protecting American servicemen and officials from the threat of international prosecution: Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Sixth congress, Second Session, June 14, 2000* § (2000).
- [7] Akenroye, Ayodele. “Looking Deeper to Understand African Governments’ Opposition to the ICC.” *openDemocracy*, April 3, 2017. <https://www.opendemocracy.net/en/openglobalrights-openpage/looking-deeper-to-understand-african-governments-opposition-to-icc/>.