

A court without laws

*The folly of the International Criminal Court*

By Robert Brickman

*“Americans have a responsibility to keep accountability and government in the hands of the people, a sacred right which should never be surrendered.”*

Many aspects of modern warfare surprise and shock those who witness it in all of its glory and horror. From assault rifles which fire multiple rounds per second, to nuclear weapons capable of delivering the equivalent of millions of tons of TNT in a single warhead, to precision laser-guided missiles launched from thousands of miles away that land within a meter of their targets, the technical innovation of war and the increasing demonstration of the progress of man through his weapons has eclipsed even the most imaginative mind. However, twentieth century man will be remembered not for the incredible power of his weapons, nor the precision with which these weapons are delivered, nor even the technical innovation required to produce them. Rather, the twentieth century will be forever remembered as a time of unequalled barbarism in warfare; according to Mark Lattimer of Amnesty International, war causes the death of nine civilians for every soldier killed. Estimates for civilian deaths as a result of criminal behavior in twentieth century wars number in the millions. Ranging from the Turkish massacres of Armenians, to Hitler's organized and methodical gas chambers for Jews, to the thousands murdered and relocated by Slobodan Milosevic and Saddam Hussein, civilians seem to have no course of action that can either protect them from a potentially gruesome fate or bring their tormentors to justice. The increased vulnerability and exploitation of civilians in modern war is what separates it from prior eras.

What, then, can be done to stop horrible acts of violence from being committed against defenseless groups by state and military leaders throughout the world? The answer for many came on July 1, 2002, as the international community ratified the Rome Statute of the International Criminal Court, creating a body for the prosecution of individuals suspected of committing genocide, crimes against humanity, war crimes or the crime of aggression. Spearheaded by Europe with the backing of much of the international community and the United Nations, this court professes universal jurisdiction over those suspected of these despicable crimes. While no one would argue against holding perpetrators accountable for their actions, the question arises as to whether this body is capable of doing it. Those who believe in the court argue that it represents a new, concerted effort by the entire international community to standardize and institutionalize the prosecution of war criminals around the world. This is not the case.

In truth, this “solution” is likely to cause more problems than it purports to solve. The International Criminal Court (ICC) as it exists currently will likely be nothing more than an international sideshow which, much like the United Nations, will be shanghaied by nations seeking political convictions of United States citizens rather than staying true to the stated purpose of holding dictators and generals accountable for their crimes. Some say this is unwarranted paranoia, and that the suspicion of political prosecutions is completely unfounded. They say that numerous checks and balances ensure that there would be no politically motivated conviction of a United States citizen. Upon closer

examination of the facts, the record of internationalism combined with institutionalism tells a different story.

The United Nations began as an international body formed in the wake of bloody conflict to peacefully mediate disagreements between nations and provide a wider blanket of security to the nations of the world. Originally, a mere 51 nations, mostly from the Western world, were signatories to the organization. They felt that the virtues of democracy and self government, values that stemmed from the Enlightenment, would peacefully and objectively resolve disputes among member countries. However, as the number of nations, new and old, continued to be added to the roll of the United Nations, it took a decisive turn away from its original *raison d'etre*. More and more, the countries allowed entrance to the United Nations and the bully pulpit it provided did not reflect the values on which the UN was initially founded. Suddenly, of the more than 100 national signatories, the free and democratic nations numbered in the thirties while the number and influence of dictatorships, monarchies, and other totalitarian regimes grew decisively. It was during this time that the General Assembly's annual tradition of passing resolutions condemning and denouncing Israel began. These sentiments against Israel and, in effect, the West, reflect the political and ideological motivations of their supporters, rather than a real breach of international law. In effect, the UN was hijacked by a coalition of states motivated by petty hatreds.

Today, according to UN membership, there are 191 states in the world. According to information from the US State Department, roughly 60 of these nations are free democracies. Almost a full two thirds of the nations in the world do not respect the rule of law in their own countries. Nations such as North Korea, Rwanda, Cuba and scores of others are currently holding political prisoners and dissidents from their own population without due process. If these nations do not serve justice for their own people, in their own nations, how can America be assured that they will practice fairness and impartiality when trying international defendants?

Another troublesome fact results from this democracy discrepancy: the vast majority of the world is not free and opposes American values. From how many countries do we hear the cry of "the great Satan" or "death to America?" Ranging from the Middle East, to Africa, to East Asia, to parts of Europe, states around the world would like to use the ICC as a tool to prosecute an internationally "legitimate" campaign against America. To those who ponder what the odds are of representatives from such virulent anti-American countries as Libya, Iran or Syria being appointed adjudicators in the trial of an American, consider this: slated since January to chair the United Nations Disarmament Commission this coming May will be Iraq, a country which violated 12 years of disarmament resolutions and sanctions. In 2001, with the efforts of China, Russia, and Cuba, among others, the United States lost its seat on the International Human Rights Commission, a seat it had held since 1948. This, compounded with the fact that Sudan, Uganda, Sierra Leone and Togo, all countries with atrocious human rights records, were all voted into the commission, elucidates that these international organizations can be co-opted and used against other nations for no other reason than petty politicking.

What are these political reasons? Many are given, including the refusal of the U.S. to vote for the land mine resolution and the withdrawal of the U.S. from the Kyoto Protocol of global warming. French President Jacques Chirac has even made statements vaguely implying that had the U.S. signed the Kyoto Protocols, agreement on action against Iraq would have been more likely. Can international justice possibly be served when it is clear that the foreign policy of nations is based upon genuine resentment of America?

It is not idle paranoia that drives American concerns. These types of actions have taken place before, at the Yugoslav War Crimes Tribunal, for example. Although this tribunal was established solely to investigate crimes committed during the 1991-1995 Yugoslav conflict, and despite the fact that NATO's air war against Serbia was fought purely for humanitarian reasons and all agree it was conducted with the highest degree of precision then utilized in warfare, prosecutors began an investigation into the civilian deaths that resulted from the NATO air campaign. This undertaking was an investigation politically motivated by international humanitarian rights activists along with Russia and China. Fortunately for the American airmen who risked their lives so others could enjoy freedom, the investigation did not result in indictment. This was not because there was no violation in the Court's eyes, but because "[i]n all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offenses." The idea of prosecuting American servicemen for a campaign of liberation against a dictator who himself was tried by the tribunal is reason enough to disband the ICC.

Nations of the world seek to assure Americans that such objections are unfounded by stating that according to Article 17, section 1a of The Rome Statute of the International Criminal Court, the Court would have no jurisdiction over cases where the accused had been "investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." Unfortunately, the nebulous language, including the vague meanings behind the words "genuinely," "unwilling," and "unable," gives a great degree of discretionary power to the court. Ariel Sharon's indictment by the International Court of Belgium, despite a full Israeli investigation into the wrongdoings during the 1982 invasion of Lebanon, is an example of an international court simply ignoring another state's sovereign right to investigate its own people.

Moreover, the ICC's interpretation of a nation's willingness to investigate its own leaders will inevitably hurt the United States. The ICC states that it will take into account the independence and impartiality of the investigations undertaken by the state in question to determine its willingness to prosecute its own war criminals. The United States would never pass this test considering the President is both the Chief Executive and Commander-in-Chief. This makes him both the chief law enforcement officer and the head of the military. The result is that both the people prosecuting and investigating war crimes and the people being prosecuted and investigated for these crimes work for the same person. The President can thus not investigate himself and the ICC will have

constant jurisdiction over Americans. What would stop any nation or group of nations that wished to indict with impunity an American citizen for political reasons?

Clearly, there are nations around the world interested in seeing America's power and position relative to themselves weakened. Creating a court that would allow political convictions of Americans based on this motivation and not conclusive guilt is not only contrary to American interests, but contrary to the very idea of justice.

All these fears aside, the ICC fundamentally and explicitly violates the Constitution. Were a United States citizen to be brought before the ICC, he would not have the rights secured by the Bill of Rights that many in this country take for granted. The right to a speedy trial, for instance, would not necessarily be applied in the ICC. Though the Court's bylaws say that defendants shall be tried without "undue delay," Hague prosecutors for the International Criminal Tribunal for the Former Yugoslavia have stated that anywhere from one to five years is not considered undue delay. This practice clearly mocks the systematic presumption of innocence which remain an integral part in the trial of an American. In the U.S., a prisoner cannot simply be held without trial. If a federal defendant is not brought before a jury in three months, he must be released. Other inconsistencies such as the right to a jury trial, the right to face one's accuser, the ban of double jeopardy and the inadmissibility of hearsay evidence all point to one larger problem: by ratifying the Rome Statute and becoming party to the ICC, the citizens of the United States relinquish a portion of their inalienable rights.

Alexis de Tocqueville once wrote, "[h]e who punishes the criminal is . . . the real master of society." If America were to ratify and involve itself with the ICC, then it would be ceding a portion of its sovereignty and the right to self-rule for which so many men have fought and died. The ICC may sound appealing in theory. However ample evidence suggests it is not an entity to which the U.S. should cede its sovereignty. If other states wish to yield their rights to an international body composed primarily of dictators and oppressive regimes, that is their prerogative, but Americans have a responsibility to keep accountability and government in the hands of the people, a sacred right which should never be surrendered.