

Unauthorized Authority  
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The American Legion Magazine

October 2002

Volume 153, Issue 4

[http://www.legion.org/publications/pubs\\_mag\\_index.htm](http://www.legion.org/publications/pubs_mag_index.htm)

The year is 2003. American soldiers in Afghanistan become embroiled in a border firefight with Iranian troops. Later, the American unit's commander - a colonel - is vacationing in Germany. While sightseeing, he is snatched off the street by local police. The colonel soon finds himself in prison in the Netherlands. President Bush demands the colonel be released, but Dutch officials insist he instead stand trial in a world court for war crimes. An incensed President Bush prepares to invade The Hague.

Bizarre as it may seem, such a scenario is conceivable, and U.S. officials are now mulling the possible consequences of a new foreign war-crimes court that claims jurisdiction over American citizens. That new chamber, the International Criminal Court, is based in The Hague. Americans most likely to be targeted for ICC prosecution are those entrusted with our national defense: government officials, along with our soldiers, sailors, airmen and Marines.

"No one is exempt," says Adele Waugaman, media liaison for the Coalition for the International Criminal Court, an ICC support organization. "Not even the president."

The court has stirred considerable controversy in the U.S. government. Rep. Henry Hyde, chairman of the House Committee on International Relations, has declared the United States must never ratify the treaty establishing the ICC. Defense Secretary Donald Rumsfeld has called the court's claims "illegitimate."

"Unsigning" the Treaty. The ICC has long been a work in progress. The idea for such a court was first raised after World War II. Discussions began in earnest, though, in the early 1990s when U.N. member states sought to create a permanent institution to prosecute people accused of genocide, war crimes and crimes against humanity.

At first, the United States actively participated in forming the court. "We did this because there truly is a need to prosecute people who mastermind atrocities," says David Scheffer, who was President Clinton's U.S. Ambassador at Large for War Crimes. "The age of impunity for those masterminds must end."

Scheffer and others worked for years to negotiate a treaty establishing the ICC. Points of contention included vulnerabilities of U.S. servicemembers, politically motivated prosecutions and the definition of "aggression."

The latter issue was particularly important, Scheffer says. "If there's one crime the United States would be charged with politically, it would be the crime of aggression."

As the Clinton presidency came to a close, the treaty still contained elements unacceptable to the United States. Clinton declared that he did not recommend that his successor submit the treaty to the U.S. Senate to be ratified. But on Dec. 31, 2000, Clinton dispatched Scheffer to sign it. "He did it because we felt that the best way to advance our interests was to remain part of the process," Scheffer says.

The Bush administration took a far different stance.

"If we remain party to the treaty, we lend credibility to an institution that is heavily prejudiced against our interests," says a Senate staff member who wishes to remain anonymous. "Our best course of action is to distance ourselves from that court as much as possible. We need to turn our backs."

In May, President Bush did just that. He announced that the United States would withdraw its previous signature; we were, in effect, "unsigned" the treaty.

The United States also threatened to withdraw from U.N. peacekeeping missions if American troops are not given a one-year exemption from the court. Rumsfeld and Vice President Dick Cheney reportedly want to seek a permanent exemption.

Nevertheless, more than 60 other nations have ratified their own signatures, thereby putting the treaty into effect. The ICC came into being July 1.

No Accountability. The ICC is designed to work on a case-by-case basis. The court moves into action when a member nation files a complaint against an alleged war criminal. The court then issues an arrest warrant, which all member nations are bound to honor. At some point, the accused is arrested, turned over to authorities at The Hague and put on trial.

The treaty is particularly popular in Europe, where most nations have signed on. The ICC also has been endorsed by a number of non-government organizations such as Amnesty International and Human Rights Watch.

The main selling point is that the court targets genocidal monsters. "We're going after the Pol Pots and the Hitlers of the world," Waugaman says.

Supporters predict the ICC will act as both a deterrent and a judicial response to war-related crimes. William Pace, an official with the Coalition for the International Criminal Court, has called the treaty "a symbol of the triumph of law over violence and brutality." Others have termed it "the most significant advance in international law since the founding of the United Nations."

However, critics charge that the ICC is beset with overwhelming problems. Opponents say the court has no history, no precedents, no tradition of great legal minds, no single binding body of law and no accountability.

Critics continue to question the court's definition of terms such as "war crimes," "genocide" and "crimes against humanity." Experts in international law have pointed out that the 1999 NATO bombing campaign over Yugoslavia, for instance, could qualify as a war crime. A major oil spill at sea might be couched as a crime against humanity.

Furthermore, critics charge, it is uncertain the court can deter atrocities. The United Nations and NATO, for example, set up a war-crimes tribunal and launched a bombing campaign to combat excesses by the Slobodan Milosevic regime in Yugoslavia. Afterwards, the Belgrade leadership only increased its attempts at "ethnic cleansing."

"Why we should believe that bewigged judges in The Hague will prevent what cold steel has failed to prevent remains largely unexplained," said John Bolton, speaking to Congress in 2000 before he became undersecretary of state.

ICC supporters point to the successes of the Nuremberg trials that followed World War II. But where Nuremberg - implemented at the scene of the crime by a conquering power - succeeded, other tribunals have not. A tribunal to prosecute war crimes proceeded to a certain point and then stalled. The Yugoslavia tribunal in The Hague bogged down because of the gleefully defiant antics of Milosevic.

Elsewhere, lofty purpose has come to embrace the inexplicably mundane. The European Court of Human Rights routinely rebukes national governments over such matters as workers' pensions or mail delivery. How will cases unfold at the ICC?

Since even the judges have not yet been chosen, no one is certain about the cases, other than to say that they probably will occur in great number. An ICC official told The American Legion Magazine that by next spring, the court expects a backlog that will exceed the its 100-occupancy prison.

This raises yet another question: are there, in truth, more than 100 Hitlers and Pol Pots currently wreaking havoc on ICC-member nations? "Of course not," says the Senate staff member. "So you have to ask: what are they really aiming for?"

Jeremy Rabkin, an international law expert and professor of government at Cornell University, warns that the court is aimed at countries that send their troops abroad - specifically, the United States.

"Keep this in mind," Rabkin says. "We are not part of the treaty, yet we are still within their gunsights."

That leads to what opponents say is the ICC's most basic flaw: the court claims a seemingly boundless authority. Any member nation may file a complaint against an "offender." Any non-member nation that asks to join the treaty for the purpose of a single case also is welcome to get onboard.

The court's wide-ranging claims are pegged to an old concept known as the Law of Universal Jurisdiction. That law granted broad powers of jurisdiction to individual nations for the sole purpose of prosecuting stateless pirates who roamed the high seas. Modern war criminals, though, do fall under state authority - an authority the ICC would circumvent.

"The core function of government is enforcing government law," Rabkin says. "What this treaty says is the power to make and enforce criminal law can be detached from constitutional law."

In the United States, that issue alone is monumentally important. "We follow our own Constitution," says the Senate staff member. "Not the laws of a foreign court." Furthermore, "our troops follow the U.S. chain of command."

Coming Crisis? The treaty's threat to American soldiers has so alarmed American lawmakers that Congress passed legislation this summer specifically repudiating foreign claims over U.S. troops. That legislation, the American Servicemembers Protection Act, empowers the president to dispatch American troops abroad only if allies guarantee they will not use the ICC to encroach on U.S. authority over its own people. Additionally, the legislation authorizes the president to use military force to liberate any American detained anywhere on behalf of the ICC.

The ICC's supporters are not happy about the American Servicemembers Protection Act.

"It's an in-your-face threat to many of our friends and allies around the world," Scheffer says. "It's literally a declaration of war against the court."

Others maintain that the court itself is the antagonist.

Former Secretary of State Lawrence Eagleburger was so outraged by the terms of the ICC that two years ago he simply told Congress, "This treaty ought to be junked."

Clearly, the opposite has happened. Only time will reveal the consequences.

Rabkin predicts a crisis. The scenario involving the Iranian firefight is one possibility. Any enemy could conceivably raise "nuisance" charges against American forces and their commanding colonel. "A colonel would suit the court's needs," Rabkin says. "He's high enough in rank to be important, yet low enough that they would think they could get away with it."

Two years ago, Sen. Jesse Helms, R-N.C., told his own Foreign Relations Committee to prepare for such an event. "The day is not far off," he said, "when American servicemen and officials will face indictment by an international criminal court."

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