

## **The Partial Rule of Law**

America's opposition to the ICC is self-defeating and hypocritical

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The American Prospect

October 1, 2004

Slobodan Milosevic is in the dock for war crimes, crimes against humanity, and genocide. For all the delays and procedural maneuvering, his trial marks a milestone in the extraordinary development of international criminal law from Nuremberg forward. In addition to the International Criminal Tribunals for the Former Yugoslavia and Rwanda, tribunals composed of national and international judges are operating in East Timor and Sierra Leone and being negotiated in Cambodia. And, if all goes as planned, Saddam Hussein will soon be tried in Iraq, by his own people, for national and international crimes.

From the role of U.S. Supreme Court Justice Robert Jackson at Nuremberg to U.S. leadership in creating and funding the Yugoslavia and Rwanda tribunals, the United States has been the indispensable nation in holding others to account. We have been the prime mover in transforming state liability into individual liability, a trend that will ultimately reshape the core premises of international law.

For the peoples of the world, however, and for many Americans, this proud record has been almost completely overshadowed by the almost visceral U.S. opposition to the International Criminal Court (ICC). We have not only rejected the treaty but have also carved out a zone of immunity for U.S. soldiers in every country with which we have decent relations. Congress even passed a statute that actually authorizes the U.S. military to invade The Hague to rescue any U.S. soldier (or soldier from any allied country). This has come to be known in many corners as the "Hague Invasion Act," occasioning an angry debate in the Dutch parliament and producing sarcastic media scenarios about Delta Force storming Dutch prisons.

It is tempting to pin this opposition on the Bush administration. The effort to destroy the ICC has certainly resonated far more with the right. But President Clinton made only one public speech in support of the court, before it was negotiated. He signed the Rome Treaty only at the literal last hour. No member of Congress has come to its defense. And in the negotiations, we held out for nothing less than exemption.

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So when exactly did the American conception of the rule of law come to mean one set of rules for others and another for ourselves? Somewhere around the time that we became afraid of the world, afraid to lead by example rather than by diktat.

The administration's opposition to the ICC, reflected in the Clinton administration's negotiating position (at the Pentagon's behest), was that we could not possibly risk having American soldiers tried anywhere but in American courts. We thus held out for, and won, the principle of complementarity, which grants jurisdiction over any defendant first to the courts of his or her own country.

Suppose that we had joined the ICC and were subject to its jurisdiction when the news broke of the crimes committed by U.S. troops at Abu Ghraib. Another ICC signatory could refer the case of these crimes to the ICC prosecutor, or the prosecutor could choose to investigate them on his or her own motion. But it would fall first to the U.S. military-justice system to investigate and try those responsible, as indeed we are doing.

The difference is that the U.S. government would have to demonstrate to the world -- including, of course, to the American people -- that it was both able and willing not to whitewash or ignore the crimes, and not to try only a few scapegoats if the trail of guilt led higher up the chain of command. This is just what the Pentagon claims to be doing.

So what is the problem? Why are we afraid to hold up our institutions as examples, to submit ourselves to the same rules we apply to others? Why can't we be confident that our own domestic political institutions will compel our military to do the job right? After all, the British are willing -- even when they are siding with us in an extremely unpopular global war. They do so precisely because of their own commitment to the rule of law, the commitment that is a foundational part of our common political heritage.

We are afraid "because they hate us." But reactions born of fear, and the accompanying determination to stand apart, help make such hatred a self-fulfilling prophecy.

Many liberals, including former policy-makers, don't get the significance of the ICC. They dismiss it as a specialist issue, of concern mainly to human-rights activists and international lawyers. But it is much more than that in the rest of the world. It is a tangible symbol of American hypocrisy. For a self-proclaimed champion of human rights and the rule of law, that is a serious problem.

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