

RULE OF LAW: AN INTERNATIONAL CRIMINAL COURT IS STILL A BAD IDEA

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In "Headwind," a thriller by John Nance, a former U.S. president is doomed to a traveler's nightmare. Facing an international arrest warrant for a botched American raid on a Peruvian drug factory, he is forced to flee by air from country to country, never touching down for more than a few minutes.

The novel isn't available at the U.N. bookshop. But its underlying plot has been advanced, some would argue, by the U.N. signing ceremony last Thursday, announcing a new International Criminal Court with jurisdiction to pursue heads of state. The new court claims to exercise universal jurisdiction over the laws of war, as well as crimes against humanity, even against countries that haven't ratified the treaty.

Most of our NATO allies are joining the court. This may stem from the European belief that law is largely symbolic, and that military deterrence can be left to the Americans. With 220,000 troops deployed overseas, the U.S. has been more skeptical of the court and its claims -- and rightly so.

ICC enthusiasts fail to admit that the law of armed conflict is more indeterminate than they would like. There are indeed some clear-cut taboos acknowledged by all honorable members of the profession of arms. The enemy's soldiers must be permitted to surrender, so long as the circumstances are safe. Battlefield prisoners cannot be abused. But there are other questions in warfighting that are more contentious, especially against unconventional adversaries and with changing technology.

For example, the principles of "discrimination" and "proportionality" require that one distinguish between military and civilian targets, and avoid undue civilian harm. In World War II, bridges, ports, oil depots, refineries, and electrical plants were considered valid targets because they contributed to the war effort. But in Kosovo, one saw how the ground could shift. Yugoslavia sued in the World Court charging that NATO's attack on infrastructure unduly burdened civilians and was illegal. Other war crimes alleged included the Allied use of uranium-tipped weapons -- even though a jacket of depleted uranium is the standard way to penetrate the hard skin of tanks and armored personnel carriers -- as well as the scatter of unexploded ordnance. They even claimed that NATO planes were in the wrong for flying above 15,000 feet.

The U.S. eluded the Yugoslav suit on jurisdictional grounds, but the case is still pending against some of our allies. It is not surprising that Washington is reluctant to have its warfighting methods controlled by law professors and foreign magistrates appointed to a new international criminal court.

The standard U.N. answer is that there is nothing to fear, because of the buffer called "complementarity." This refers to the claim that the new criminal court can intervene only when

a country is "unwilling or unable genuinely" to handle the case on its own. But the U.S. is hardly likely to prosecute its own pilots for faithfully carrying out the air attacks assigned to them. Where there are good faith differences in warfighting doctrine, complementarity provides no protection against magistrates from abroad.

The court also may be asked to determine when it is legal to use force -- and what constitutes "aggression." Yet responsible states may feel morally compelled to rely upon new ideas of humanitarian intervention (e.g. Kosovo) and preemptive self-defense against weapons of mass destruction, despite the disapproval of academics.

All of this static was unnecessary. One original conception for a standing criminal court was to take cases referred by the Security Council (where the U.S. has a veto). But NGOs were insistent that big power politics had no relevance to international courts. They did not stop to ask, of course, how a ruling would be enforced without major powers willing to provide economic, diplomatic, and military support.

Like much in life, the court project started out innocently. Unable to agree upon a robust military response to the ethnic massacres in Bosnia and Rwanda, the Security Council acted to create two special-purpose criminal tribunals to punish the masterminds of the ethnic cleansing and genocide. Those courts have operated in the Netherlands and in Tanzania, with U.S. support, and have returned indictments against senior authors of the crimes, including Slobodan Milosevic.

It would have been better to gauge the performance of the ad hoc courts before proceeding further. These tribunals have gained only limited credibility on the ground among affected civil war factions, and committed some notable lapses in standards of criminal procedure. But enthusiasms are as common to international organizations as to Wall Street. Like the proposal for perpetual peace, the proposal for universal justice was too tempting to pass up, and the U.N. embarked on ill-fated negotiations.

The attempt to patch things up was blocked by the same hydraulics. Former Canadian foreign minister Lloyd Axworthy pressured the 1998 diplomatic conference to deliver a completed treaty after a hurried five-week negotiation. A manic scene on the final evening, where a complete treaty text was not yet available, saw the conference chairman accepting French and Russian requests for compromise language, but rejecting the central U.S. demand for protection against third-party jurisdiction.

So we are left at the present impasse. The Senate has warned that the court should not dream of arresting Americans when we have refused to join. The Bush administration may well "unsign" the treaty -- revoking the signature that Bill Clinton impetuously added in the waning days of his presidency.

At the U.N., the only hope for avoiding a Potemkin court lies in new prudence in the exercise of its powers. The principles of Westphalia may seem remote to "mundians" (to use Robert Lansing's phrase). But the world is dangerous -- and cudgels, as well as sensible norms, are necessary to protect the peace. The application of the law of war involves both military expertise and the moral responsibility of sovereign states.

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