

WHEN JUSTICE FOR ALL ISN'T FAIR

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The International Criminal Court is coming, and soon. By April 11, 60 countries will almost certainly have ratified the 1998 Rome Statute of the ICC -- the number needed to bring the court into existence. The cheering can be heard already. As the first permanent international court capable of prosecuting individuals, the ICC has been hailed by U.N. Secretary General Kofi Annan, for one, as "the missing link in the international legal system." It is certainly distinct from both the International Court of Justice (ICJ), which handles civil suits between states, and the temporary tribunals for Rwanda and the former Yugoslavia. The United States, however, doesn't see the new court so optimistically. Instead, it sees flaws and hazards -- and the prospect of sustained legal and diplomatic battles once the court is up and running.

There are many problems with the Rome Treaty. The most immediate one, for Americans, is the danger of its being used as a political instrument against us. But the most profound flaw is a philosophical one: The concept of "international" justice underpinning the ICC project is more apparent than real. Although there is global agreement on several substantive legal norms -- such as the rule against attacking civilians -- there are few notions of justice and procedural fairness that genuinely transcend national frontiers.

Even the two most closely related legal systems -- the "inquisitorial" civil law system of continental Europe and the "adversarial" common law system of the United States, Britain and other English-speaking countries -- feature different visions of criminal justice. Civil law relies on the probity of highly trained jurists who can be trusted to be fair. Judges participate in criminal investigations, and many of the proceedings they manage take place in secret. Common law, by contrast, assumes that justice requires a neutral judge, along with zealous advocacy by prosecutors and defense lawyers, in an open and public trial. Like our Constitution, it is designed to function regardless of the personal virtue of those involved.

Few practitioners of one system have much confidence in the other's merits. Civil lawyers see common law through the lens of the O.J. Simpson circus; common lawyers think "Spanish Inquisition" when they watch civil law in action. Neither stereotype is accurate, but the tension between the two systems is real enough. And this is true even though the two legal traditions grew out of the very same "Western" ingredients -- Roman law, Germanic custom, Greek philosophy and Judeo-Christian morality.

The world, of course, is wider than the West. In much of Africa, the Middle East and Asia, for example, the Islamic sharia, administered by religious leaders and punishing "crimes" like adultery with death, holds sway. Yet the ICC's judges and prosecutors will come from all the world's legal traditions, bringing their own notions of what is just. The likely result will be a legal tower of Babel.

Even if a uniform understanding of fairness and justice could be imposed, disagreements remain over the meaning of even accepted substantive norms. For example, the well-established rule against the deliberate military targeting of civilians is being subjected to strikingly different interpretations in the current Middle East conflict. Similarly, some nations have challenged the

legality of the U.S. campaign in Afghanistan, effectively maintaining that international law requires zero "collateral damage." Such disparities in the basic understanding of international law will make it enormously difficult for the ICC to function effectively.

Another key problem is the ICC's lack of democratic legitimacy. As is normal for international treaty organizations, the ICC's judges and prosecutor will be chosen by the states that ratify its statute. However, the court will have authority over individuals, not states, and the representative nature of the ICC's "Assembly of States Parties" is dubious. If the United States joined, it would have a single vote in this institution -- the same representation as such undemocratic states as Nigeria, Iran and the Sudan. The ICC States Parties do not share values or expectations of the sort necessary to any governmental system, let alone a judicial one.

Even in the United States, with its long tradition of legal and constitutional government, politically contentious judicial decisions ranging from privacy issues and affirmative action to the 2000 presidential election regularly divide the public. Judicial decisions rendered outside a strong polity and a familiar legal culture would fare even worse.

A case in point is the U.N.'s ad hoc tribunal for the former Yugoslavia, where former Serbian dictator Slobodan Milosevic has successfully challenged the court's legitimacy -- at least in the view of many Serbs. Such problems will be amplified at the ICC. Significantly, the existing international courts are less troubling on this score. The ICJ, while an authoritative interpreter of international law, is essentially an arbitration mechanism through which states can settle their disputes. And the ad hoc tribunals, while presenting legitimacy issues, are at least temporary in duration, limited in geographic scope and were established to address near-Hobbesian breakdowns of civil society.

The prosecution of national leaders is inherently political, and there are at least two sides to every political conflict. One may be right and the other wrong, but it is in the nature of international institutions to find fault on all sides, thus proving their "objectivity." This was the case when the Yugoslav tribunal's prosecutor investigated NATO leaders in 1999, after NATO's air war against Milosevic. No indictments were brought, but only because the prosecutor thought there was insufficient evidence available implicating high-level officials -- not because she believed there had been no crimes.

From America's perspective, the greatest practical danger of joining the ICC regime would be that the court, driven by members who may resent American global preeminence, could seek to restrain the use of U.S. military power through prosecutions of U.S. leaders. The ICC judges would be free to do this since they would be the final arbiters of their authority. Obviously, this problem is more acute now that the United States has begun prosecuting a potentially long and arduous war against terrorism. Although the possibility of international prosecution has not deterred men like Milosevic or Saddam Hussein, it could inhibit the democratically elected leaders of law-abiding states. The effect of that would be to weaken deterrence and encourage aggression.

Nevertheless, there are some who honestly believe that the United States would be better off joining the ICC, since the court is about to be established anyway and because, as a party, at least the United States would have some influence. As noted, however, that influence would be limited to a single vote. Moreover, it is only by spurning the ICC club and vigorously contesting the ICC's right to go after the officials of non-state parties that the United States can safeguard its interests.

A recent legal decision by the ICJ confirms that view. The case involved a Belgian arrest warrant against Congolese Foreign Minister Abdulaye Yerodia Ndombasi. Belgium had charged

Yerodia with war crimes based on 1998 speeches inciting "racial hatred." To do so, it relied on a 1993 Belgian law asserting "universal jurisdiction" over such offenses.

Congo sued, and the ICJ ruled with record speed that Belgium's actions violated the "firmly established" rule that high-ranking state officials enjoy immunity from the jurisdiction of other states. The court noted, however, that this immunity belongs to the state, not the individual, and that it can be waived, specifically quoting the waiver provisions of the Rome Statute as an instance where a non-national court could prosecute government officials. Thus, as long as the United States -- or any other country -- does not ratify that treaty, its officials will enjoy immunity from the ICC's jurisdiction.

Overall, the real issue is not whether the United States ought to obey international law; it should. The question is whether that law can, or should, be enforced outside national legal systems that have generally functioned well. Individuals guilty of war crimes must be held accountable, but this goal ultimately can be accomplished only through a combination of legal, economic, diplomatic and military means -- the resources commanded by sovereign states, acting unilaterally or in concert. Thus, whenever courts in a given country are found wanting, it would be entirely appropriate to subject that country to diplomatic and economic pressure. In the most extreme cases, a solution may be found in the Nuremberg model, where a criminal regime was first removed by military force and then brought to account. Significantly, genocidal campaigns in Bosnia and Kosovo were halted only through the robust use of military force, not through international legal efforts. These are difficult issues of statecraft, and there are no judicial shortcuts.

Fortunately, the Congo v. Belgium decision provides Washington with a unique opportunity to defang the ICC. As a first step, the United States should end any speculation that it might be cajoled into ratifying the Rome Statute. The best way to do this would be for President Bush to repudiate the treaty by removing the U.S. signature. Given the stakes involved, the United States could also declare that it will not use its own statutes to prosecute foreign heads of state. An assertive U.S. campaign may even convince those state parties that have joined the ICC to withdraw. Stripped of its universal-jurisdiction mantle, the ICC may either just collapse under its own weight or be recast as an organization of states that have abdicated to each other portions of their sovereignty. The former would be preferable, but the United States can also live with the latter.

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