

JUDGMENT WITHOUT DEMOCRACY

Madeline Morris
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The Iraqi government is as likely to prosecute Saddam Hussein for crimes against humanity as the Nazis were to prosecute Adolf Hitler. That is why the world needs a system for dealing with genocide and war crimes. A permanent International Criminal Court was brought into existence on July 1 at the Hague to fulfill this purpose.

Why, then, did the Bush administration, in May, renounce the 1998 treaty that forms the foundation for creating this court? Critics have blasted U.S. opposition to the court as unilateralist and uncaring in a world that seems to produce atrocities on a regular basis. Having been involved in prosecutions of international crimes in Rwanda, Ethiopia and the former Yugoslavia, I join with those who want to deal more effectively with the Pol Pots and Slobodan Milosevics of this world. But I doubt whether, in its current form, the International Criminal Court, or ICC, is the answer.

There are several principled and serious objections to the court. For one thing, although designed with the noblest of goals, the court lacks democratic legitimacy: Only one-third of the world's countries have become parties to the treaty that created the ICC, and yet the court claims the right to exercise prosecutorial authority over people from any country.

Why, then, have the protesters from Seattle and elsewhere who question the "democratic deficit" of the World Trade Organization and other international institutions not expressed similar concern over the ICC? The reason is fairly simple. The assumption is that if ICC jurisdiction entails any loss of democracy, it is negligible -- because the court's mandate is so narrow.

Unlike the WTO, the ICC, it is thought, is not intended to make law and policy. Rather, its mandate is simply to apply clear, existing international law. Since genocide, war crimes, and crimes against humanity are unquestionably crimes, there will be no democratic or undemocratic decision-making to discuss.

Not so. Although the general prohibitions of genocide, war crimes and crimes against humanity are unquestionable, applying that law to specific cases will be complex and fraught with politics. Crucial questions about the content and interpretation of the law are inevitable. For example, there is a war crime of causing "excessive incidental death, injury, or damage." Are countries therefore obliged to minimize collateral damage by using precision-guided munitions rather than much less expensive ordinary weapons? Or, relative to the war crime of "attacking civilian objects": What is the status of "dual use" targeting, where the target is a bridge, or television station, or electrical grid, that is partially in military use and partially in civilian use?

These and other questions that will arise involve areas where the law is indeterminate and the politics weighty. And this only describes the situation as it stands now. The ICC's domain will grow. For example, the ICC treaty provides that the crime of aggression will come within the ICC's active jurisdiction as soon as its member countries can agree on a definition of "aggression." So the next time NATO enters Kosovo on a "humanitarian intervention," the difficult question of whether this was an act of humanitarianism or of aggression may be decided by the ICC.

Similarly, since the constituting documents of the court also contemplate expansion of its jurisdiction to include terrorism, the question of who is a freedom fighter and who is a terrorist may now find its answer, in any particular case, in a court established by a group of 76 states. The inclusion of drug crimes and other offenses is also contemplated.

This allocation of decision-making power may be fine for the countries that are parties to the treaty creating the ICC. But it has not been agreed to by the other two-thirds of the world's countries that have not become parties to the treaty. Those countries will have no say in the decision-making done by the ICC. The people of those non-party states will not be represented in any way as the ICC makes law and policy, yet the ICC's purported authority over them will continue to evolve and expand.

One might argue that it's worth sacrificing our democratic values to prevent or reduce genocide, war crimes and crimes against humanity. But we must soberly confront the fact that recent international tribunals for the former Yugoslavia and Rwanda did little to halt the atrocities. Indeed, crimes continued unabated in both regions even while the tribunals were underway. Perhaps a permanent international court, rendering decisions over a period of years, would have greater effect.

Perhaps not. As heart-rending as the crimes are, and as deeply as we wish to stop them, we should think long and hard about endorsing a system we know to be undemocratic when its benefits remain so speculative.

The writer is a professor of international law at Duke University and director of the Duke Law Clinic for the Special Court for Sierra Leone.

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LETTER TO THE WASHINGTON POST

Madeleine Morris in her July 24 column, "Judgment Without Democracy" mischaracterizes the International Criminal Court and so reaches incorrect conclusions about it. In fact, the Court is a legal and proper expression of the sovereign will and power of the 76 countries that have ratified the Court's Statute to impose criminal justice on their own citizens or on persons who commit crimes on their territory. The ICC also implements the right of the Security Council to arrange for criminal trials (as in Yugoslavia and Rwanda) of persons whose acts are part of threats to international peace and security. Prof. Morris's question about the Court's democratic legitimacy concerning

persons outside of the sovereignty of the ratifying countries or of situations referred to it by the Security Council does not arise: the ICC simply cannot prosecute or try them.

Prof. Morris is also concerned about the application by the Court's judges of the laws of genocide, war crimes, and crimes against humanity. The Court's jurisdiction is only over gross, massive and deliberate atrocities, not debatable lesser incidents. The Court's Statute and supporting documents are detailed and specifically intended to reduce judicial interpretation to the minimum. The judges will not be able to "make law." The United States has twice joined in formal adoptions of the entire jurisprudence of the Court, pronouncing it fully compatible with the relevant laws used in our civilian and military justice system. There will inevitably be some case-by-case interpretation of details as there must be in any functioning court. For this and other reasons, the United States would do well to join the Court so that some of the judges can be American.

Aggression and other new crimes can only be added to the court by amending the Rome Statute through the votes of two-thirds and the ratification by seven-eighths of the states belonging to the Court. Since the Statute itself says that it is only the law of the Court, not general international law, these amendments would not apply to countries outside the Court.

The existence of the ICC is a done deal. It will start processing cases next year. The United States should be a leader in the final shaping of the Court. Its foundation, jurisprudence and basic processes give us all we need to protect our interests. Complaining from the sidelines while others act is futile and unworthy.

John L. Washburn
Convener

The American Non-Governmental Organizations Coalition for the International
Criminal Court