

MILOSEVIC, ET AL.: The ICC's Daunting Mandate

by Angela Edman

On May 6, 2002, the Bush administration shocked the world by committing an unprecedented act—the “unsigned” of a treaty on international justice. The International Criminal Court (ICC) was ratified on April 11, 2002, when the 60th country submitted its ratification at a UN celebration. The ICC was created with the idea that, although the International Court of Justice (or the World Court) is a strong institution which gives states the power to bring other states to court, it is not enough. Many times an individual leader, not an entire nation, is responsible for mass violations of human rights, particularly in the past 50 years—look at Pol Pot, Pinochet, and Milosevic. The standards of the ICC are based on the Geneva Conventions, the Universal Declaration of Human Rights, and other treaties of international human rights and humanitarian law. It only deals with the *gravest* instances of genocide, crimes against humanity, war crimes, and crimes of aggression.¹

Supporters of the ICC hope that, first and foremost, the very existence of an international judicial authority will deter leaders from committing crimes against humanity. Milosevic was able to oversee the displacement of over 800,000 Albanians from Kosovo and the genocide against Bosnian Muslims because he knew there was *no one to hold him accountable*. If a system were already in place that had the power to end impunity, potential war criminals may decide against the types of risky military action that have often resulted in mass deportation, destruction, and genocide.

During his landmark speech, U.S. Under Secretary of State Marc Grossman claimed that the ICC undermines the Security Council's mission of ensuring international peace and security. He said the ICC presents a formidable threat to U.S. sovereignty by putting U.S. soldiers who are conducting peacekeeping and humanitarian operations at risk of a politically motivated indictment from anti-American forces.²

There is no danger, however, of a U.S. soldier being tried at the ICC, because the ICC only deals with cases of perpetrators of war crimes on a massive scale—soldiers do not

have the power to orchestrate such acts. The prosecution will rely on the Doctrine of Command Responsibility³ to prove its cases. This is based on the idea that military and civilian leaders should be held accountable for the actions of their forces. A leader can be prosecuted with evidence that he issued commands which resulted in war crimes, but the difficulty comes in trying to prove “imputed criminal responsibility.”

Both Grossman and U.S. Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper stated that the United States prefers to support *ad hoc* tribunals, which do have the jurisdiction to prosecute crimes committed years ago. Theoretically, an *ad hoc* tribunal could be created to try former Secretary of State Henry Kissinger for alleged crimes committed in Chile, Cambodia, or Vietnam. However, a UN mandate states that once the ICC is permanently established, there will be no more *ad hoc* tribunals. As far as the possibility of the ICC interfering with U.S. peacekeeping or humanitarian missions, most humanitarian efforts do not result in crimes against humanity on a mass scale or genocide (this seems a bit counterintuitive).

In *Human Rights Horizons: The Pursuit of Justice in a Globalizing World*, Princeton University’s Richard Falk speculates that the most formidable obstacle to international justice is “the fragmentation of the world in terms of sovereign territorial states.”⁴ State sovereignty and power are currently given top priority. Yet the wars of this past century have demonstrated that state sovereignty crumbles in the wake of ruthless dictators. Because modern warfare steps outside the traditional state vs. state paradigm, a force larger and more all-encompassing than state sovereignty must exist to counter this phenomenon. Falk suggests the Universal Declaration of Human Rights.

In *Stay the Hand of Vengeance*, Gary Bass argues that war crimes tribunals are developments of liberal states. In response to the realist notion that states are forced to struggle for security because of the inescapable international system of anarchy, Bass contends that “liberal ideals make liberal states take up the cause of international justice, treating their humbled foes in a way utterly divorced from the methods practiced by illiberal states.”⁵ Liberal states do not wage war on each other. Bass theorizes that this is because liberal states have adopted the belief system of legalism, which is the “ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”⁶

Unsigning the treaty is a political act that sets a dangerous precedent. Because the United States is a hegemonic power, other states often act according to its standards. President Bush effectively announced that removing a signature from an international treaty is acceptable in order to have the freedom to commit acts that run counter to the purposes of the treaty. The implications are horrifying; imagine what would happen if a state leader decided that he or she no longer wishes to be constrained by the Genocide Convention or the Convention Against Torture.

One also cannot legitimately claim that there are no safeguards against politically motivated trials; they are built into the court’s statute. The Pre-Trial Chamber must examine the evidence before the indictment is issued. The accused is allowed to attend the pretrial hearings. State parties, victims, or the Security Council must inform the ICC of “situations”; they do not submit requests for investigation of individuals. The court decides

what individuals to indict after it investigates the reported situation. The prosecutor must always notify the state first, and accompany state leaders on the investigation. The prosecutor can only investigate alone when all state leaders refuse or are unable to go.

The 18 judges must all come from different countries, and represent a variety of legal systems. If a question ever arose about a judge's behavior, he would have to face the Assembly of States Parties, which is composed of mostly U.S. allies. The statute also outlines ample provisions to protect national security issues. If a state has reason to believe the disclosure of certain documents might threaten its national security, it can request a number of measures to protect itself.

There are several reasons why it is in America's self-interest to ratify the treaty. The court only has jurisdiction over the worst crimes, and the definitions of these crimes correspond to the U.S. Uniform Code of Military Justice. All suspects have the rights of due process of law, which correspond to the definition in the U.S. Bill of Rights. The court can only impose a maximum sentence of life imprisonment. U.S. service members will also be protected from the Status of Forces Agreements negotiated with countries where the United States is based. Even if a party did report a situation involving the United States, that party is immediately also subject to investigation.

Under the current system, U.S. soldiers are tried abroad in domestic courts where they are stationed. These judicial systems are much more dangerous for U.S. soldiers, because they follow no international judicial guidelines. A court based on international human rights and humanitarian law, composed of many U.S. allies, seems a lot more desirable. In this sense, the ratification of the treaty would be an exercise of sovereignty. If the United States ratifies the treaty, it will have the ability to work with other members to shape the laws of the court.

It seems clear that the United States is not in danger of politically motivated trials, especially after the Security Council resolution passed on July 12, 2002, which Canadian Ambassador Paul Heinbecker called a "sad day for the UN,"⁷ that granted all UN peacekeepers immunity for 12 months. But another far more pressing question remains the ICC. In "Are Good Intentions Enough? The Limits of International Justice," David Rieff provocatively states that well-intentioned international institutions and interventions sometimes actually relieve leaders of their political responsibilities, and contribute to the "disinclination of the great powers to engage in international policing."⁸ What if, instead of deterring potential war criminals from committing grave violations of the Geneva Conventions, the ICC gives leaders of the great powers an alibi for ignoring these situations altogether and foregoing any political action?

Rieff raises some very important issues that present possible problems far more serious than the remote risk of political trials of U.S. citizens in UN peacekeeping missions. He reasons that although international lawyers and international human rights organizations have everyone's best interest at heart, stopping a genocide is not a legal process; it is a political process, and the judicial powers of international courts can only be effective in punishing the perpetrators after the crimes have been committed.⁹ Rieff worries that the latest developments in international law are "in reality, creating the international legal structure of an international political structure that does not exist, and shows no likelihood of existing."¹⁰

In fact, Rieff argues that such abstention from political responsibility by national governments in the presence of international institutions happens quite frequently.¹¹ The humanitarian disaster that occurred in Rwanda is one example. The United States and Europe knew of the “cleansing” of the Tutsi population, yet nothing happened. Was the United States waiting for the United Nations, which stationed troops who took no action, or was the European Union waiting for the United States? Or was it simply in no one’s self-interest?

Another example that is much more pertinent to the ICC is the “ethnic cleansing” of Bosnian Muslims and Kosovar Albanians in the midst of the existence of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY was created in 1993, and the genocide of Bosnian Muslims did not end until the Dayton Peace Accords were negotiated in 1995. The mass murder and expulsion of Kosovar Albanians did not end until the NATO campaign in 1999.

World leaders sat around and watched as hundreds of thousands were slaughtered, because the existence of an international criminal tribunal that was supposed to deter war crimes did nothing but give the world an excuse not to act. It is not a far stretch to claim that this could very easily happen under the shadow of the ICC as well.

Samantha Power offers an effective point of opposition to Rieff’s arguments in “The ICC Can Serve the U.S.”¹² Power uses the examples of the massacre of Kurds in Iraq and the massacre of Muslims in Bosnia to show that foreign powers intervened once it was in their interest. When Saddam Hussein began his campaign to wipe out the Kurdish population, the United States did nothing, because intervening in Iraq would have presented a threat to U.S. interests, since Iraq at the time was our ally. But when Hussein invaded Kuwait, George Bush Sr. took military action to help the Kuwaiti citizens, along with U.S. oil interests. Power points out that Bush Sr. threatened the Iraqi administration with “Nuremberg-style trials,” but “no such court existed.”¹³ Perhaps Rieff would point out that the existence of such a court would not have prevented the atrocities committed against the Kurdish population, and this is entirely possible. But if such a court *had* existed, and U.S. or international troops were able to locate and arrest top Iraqi government officials, perhaps the imminent conflict with Iraq that the United States and the rest of the world now faces would be very different.

In her article, Power also refers to the Bosnian genocide. George Bush Sr. ignored the atrocities in Bosnia because no U.S. interests were allegedly at stake. But once the media publicized the Balkan atrocities, there was a public outcry for action. It was no longer acceptable for the United States to do nothing, because our citizens demanded action.

Power also states that the existence of the ICTY did nothing to prevent the genocide of Bosnian Muslims, but she reasons, "How could it? *Ad hoc* tribunals are slapdash creations that have to raise money, hire staff, establish rules, and earn credibility. All of this takes time."¹⁴ Perhaps if an international court had already been established, the outcome would have been different.

Sovereign nations act when it is in their self-interest. Power's strongest point is that it *is* in the U.S. interest to promote an institution that is permanent and has the power to deter war criminals. As she points out, as the United States allowed Milosevic's Serbs to continue to massacre Bosnian Muslims, the Muslim community began to mobilize. She states, "For the last two years of the Bosnian war, while indicted war criminals roamed free, Osama bin Laden's Al Qaeda and other militant Islamic groups used Bosnia as a training base."¹⁵ On September 11, the United States experienced crimes against humanity on its own soil. Unsigning the ICC treaty is another assertion of U.S. sovereignty, which is what the terrorists aimed to destroy.

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- 1 United Nations, Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 1999.
 - 2 Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, DC, May 6, 2002.
 - 3 United Nations, Amended Statute of the International Criminal Tribunal for the Former Yugoslavia, as Amended by Resolution 1329, November 30, 2000.
 - 4 Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York and London: Routledge, 1997).
 - 5 Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000).
 - 6 *Ibid.*, p. 38.
 - 7 Serge Schmemmann, "U.S. Peacekeepers Given Year's Immunity from New Court," *New York Times*, Saturday, July 13, 2002.
 - 8 David Rieff, "Are Good Intentions Good Enough? The Limits of the New World of International Justice," *McGill Law Journal* 46 (2000), pp. 173-177.
 - 9 *Ibid.*, p. 175.
 - 10 *Ibid.*, p. 177.
 - 11 David Rieff, "A New Age of Liberal Imperialism," *World Policy Journal* 16, no. 2 (1999), pp. 1-9.
 - 12 Samantha Power, "The ICC Can Serve the U.S.," *The Wall Street Journal*, July 11, 2002.
 - 13 *Ibid.*
 - 14 *Ibid.*
 - 15 *Ibid.*