

**VIEWPOINT**

# It's Still Only a Dream

The ICC won't work because states will always act in their national interest

**Josef Joffe**

**W**HO'S AFRAID OF THE BIG BAD COURT? THE UNITED States. Not only has it refused to ratify the treaty that set up the International Criminal Court (ICC) in the Hague, but there is also a bill before Congress that would authorize force to rescue any American dragged before it. The Dutch are livid at this affront. They steam about the "Hague Invasion Law," and the wags among them cheer how smart it was "not to demolish those German bunkers left over from World War II." If the Marines ever waded ashore on the beach at Scheveningen, they would be frightened more by the nudists than the decaying pillboxes.

Should the U.S. worry? To get wound up, as have Republican strongmen Tom DeLay and Jesse Helms, is a bit unbecoming to the mightiest nation on earth. The ICC's brief does not look like a blueprint for world domination. In the pursuit of aggressors and other bad guys, the ICC claims jurisdiction only over nationals of countries that have joined the court, or over malfeasants who have committed their alleged crimes on the soil of member-states—and then only if their own judiciaries fail to prosecute.

For instance, since Iraq is not a member, the ICC could not go after an American pilot who had mistaken a nursery school for one of Saddam Hussein's palaces. Nor could the ICC prosecute a latter-day Lieut. William Calley. The original Calley was tried in a U.S. court for his alleged involvement in a massacre of Vietnamese civilians at My Lai. Once the national legal system kicks in, any future Calley is out of bounds for the hounds of the Hague. So why the American indignation? Let us expand the question. Why won't countries like Russia, China, India or Israel join the court? The answer is simple. These states are quite different from the 67 that have ratified the ICC. The U.S. is the one-and-only superpower; China, Russia and India are would-be global players, and Israel has not enjoyed a moment of real peace since its birth in 1948. For them, the use of force is either a fact of life or an ever-present possibility. No wonder they don't want foreigners to judge their military choices *ex post facto*.

"Objection!" the Haguians might retort. "We will deal only with the illegitimate use of force, with genocide or naked aggression." Hmm, what is "aggression?" When you attack first? Not necessarily. Pre-emptive attack is legitimate self-

defense when the other side blockades your ports and masses

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38

**VIEWPOINT**

troops on your border. The forerunner of the U.N., the League of Nations, spent years trying to define aggression. In fact, the very concept of an international criminal court rests on a wobbly premise. It assumes that the laws of war are as determinate as those about assault or murder in the domestic realm. Take two hallowed concepts of *ius belli*: proportionality of response and discrimination among combatants and civilians. In World War II, Allied bombers leveled German and Japanese cities, with hundreds of thousands of civilian dead. This was regarded as just because more "discrimination" would have prolonged the war and cost additional Allied lives.

Should MacArthur and Eisenhower have been tried? No?

What about those Western pilots who demolished bridges and power plants in Iraq and Serbia, who mistook buses for troop transports? What about the Israelis who fire rockets at the masterminds of Palestinian terror? Should they wait for an arrest warrant? The point is the lack of consensus on these life-and-death issues; hence, nations living in a harsher environment than Sweden or Belgium are loath to entrust the fate of their citizens to international judges. Conversely, we accept the verdicts of our national courts because

they enforce laws that represent a moral consensus codified by democratic parliaments.

But the ICC's frail legitimacy is not its worst flaw. The real problem is power. Take the Nuremberg Tribunal or the war-crimes tribunal for the former Yugoslavia. They worked because the Allies and NATO had won the war first. Without the prior verdict of raw military might, neither Hermann Göring nor Slobodan Milosevic could have been hauled into the dock. The ICC doesn't have that clout. It has neither troops nor police. For its borrowed power, it will depend on nation-states. Yet in the crunch, the major players will obey national interest, not universal morality. So the lofty dream of a law above the states will remain a dream. Is this too jaundiced a conclusion? It will be proved wrong when a Russian or a German general is handed over to the court. Meanwhile, DeLay and Helms need not lose any sleep over the ICC. ■

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**Justice, like that dispensed at the Nuremberg trials, needs military might**

KURT HUTTON—HULTON ARCHIVE