The International Criminal Court and the U.S. War on Terrorism: Does It Help or Hinder?

Alan R. Lewis

Follow this and additional works at: https://scholarsarchive.byu.edu/byuplr

BYU ScholarsArchive Citation

Available at: https://scholarsarchive.byu.edu/byuplr/vol17/iss1/3
The International Criminal Court and the U.S. War on Terrorism: Does It Help or Hinder?

Alan R. Lewis†

Although the International Criminal Court initially appears to be a potential step forward in the war on terrorism, it will more certainly be a setback in terms of American sovereignty and constitutionally guaranteed civil liberties and rights.

Admittedly, the international community struggles with producing an adequate legal response to terrorism. The world’s mixed critique of America’s campaign in Afghanistan reveals the lack of an internationally accepted approach to apprehending and prosecuting terrorists. Such inconsistencies between states have allowed terrorists to successfully avoid prosecution and given the international community an incentive to create a global approach to the war on terrorism.

The recently created International Criminal Court (ICC) appears to resolve, at least in part, this terrorist dilemma. David Scheffler, head of the U.S. delegation to the United Nations negotiations on the ICC, has stated that “the terrorist assaults of September 11, 2001 on the United States were crimes against humanity that probably would have fallen within the jurisdiction of the ICC had the Court existed on that date.”† Although the ICC initially appears to be a potential step forward in the war on terrorism, it will more certainly be a setback in terms of American sovereignty and constitutionally guaranteed civil liberties and rights. The trade-off is unacceptable.

† Alan R. Lewis graduated in the spring of 2002 with a degree in American studies. He will be studying international law at Columbia Law School this fall. Though a native of Chicago, he is currently working as a marketing consultant in Thousand Oaks, California.

AMERICA'S SOLUTION TO TERRORISM?

While the debate over U.S. involvement in the ICC is anything but settled, a new line of criticism has arisen. American proponents of the ICC assert that "the Bush Administration dealt a sharp blow to its own war on terrorism . . . in rejecting the ICC." However, critics also realize that the ICC offers legitimate advantages to any nation seeking to apprehend and prosecute terrorists.

These advantages begin with the ICC's promise to surmount the deficiencies of ad hoc tribunals, since "as a permanent entity its very existence will be a deterrent, sending a strong warning message to would-be perpetrators." Furthermore, a permanent court should be able to apply an undeviating, uniform standard of justice, binding on all nations, regardless of political disagreements.

The case for the ICC is further strengthened as the U.S. has recently flagged terrorism as one of the nation's gravest threats. Former U.S. Secretary of State Warren Christopher stated: "President Clinton has rightly identified terrorism as one of the most important security challenges [America faces] in the wake of the Cold War." As scholars increasingly assert that international terrorism can be effectively combated only through a globally unified effort, U.S. objections can easily be misinterpreted as petty. However, the war on terrorism will never become more important than the unavoidable constitutional and U.S. policy conflicts that the ICC engenders. Regrettably, the ICC not only fails to explicitly guarantee a substantial list of constitutional rights, but it also

---

2 Ibid.
6 Krohne, 160.
creates new legal dilemmas regarding the issues of jurisdiction, legal vagueness, and a usurpation of UN Security Council prerogative.

**ICC History**

The International Criminal Court (ICC) became the world's first permanent international court on 1 July 2001, after its charter was ratified by the required sixty nations. However, the vision of an international court was first conceived after the creation of the Nuremberg and Tokyo tribunals and resurged when the UN conducted two temporary international tribunals to prosecute individuals from Yugoslavia and Rwanda for war crimes. The logistical difficulties of these ad hoc trials worked to increase global pressure for a permanent court, resulting in the International Law Commission submitting an ICC draft statute to the UN General Assembly in 1994. Final changes were made to the draft during the Rome Conference that concluded 17 July 1998.

Citing the need to remain an influential party in the creation of the ICC, the United States—under the Clinton Administration—became a signatory party to the Rome Statute on 31 December 2000. In 2002 the U.S. Senate rejected an attempt to ratify the statute after the Bush Administration raised strong objections.

So long as the Bush Administration remains hostile to U.S. participation in the ICC, American law will remain unaffected by the extreme impact that such participation would deliver. As the war on terrorism increasingly buttresses the compelling case for the ICC, it is terrorism that may ultimately be to blame for the unacceptable consequences that the U.S. legal system would endure if the nation were ever to become a party to the court.

---


9 Scheffler, 48.
One of the predominant concerns with the ICC statute is the Court's potential for interfering with state affairs by infringing on an individual nation's sovereignty. The Court's answer to this fear is the doctrine of "complementarity." The Court is to complement the existing judicial system of any given nation, intervening only when a "state is unwilling or genuinely unable to carry out the investigation or prosecution." The ICC itself must arbitrarily determine unwillingness by judging whether a nation has unfairly shielded the accused, exercised unjustified delay, or if the nation's judicial proceedings have not been "conducted independently or impartially." Thus the doctrine of complementarity—though meant to dispel worries of a runaway court—"is an open invitation for the court to examine each decision by the United States not to pursue some alleged offense by its military or civilian officials." Allowing the ICC to determine if any judicial proceeding meets its own ambiguous standard of impartiality grants the court "the power to override the U.S. legal system and pass judgment on our foreign policy action." Recognizing the ICC's jurisdiction would thus require the unacceptable compromise of U.S. sovereignty within our own judicial system through "the erection of an international authority with substantive power over individual Americans in general . . . represents a profound surrender of American sovereignty—the right to self-government."

---

11 Ibid.
14 Casey and Rivkin, s.
Another danger of the ICC is its inherent lack of accountability. In the United States, two other powerful branches of government check the Supreme Court. All of the Supreme Court's decisions can be overridden through amendment by legislators elected by American citizens. No such system of checks and balances exists within or around the ICC. Furthermore, "no action taken by the American people, or their elected representatives, could alter in any way a decision of the ICC." U.S. interests would simply be marginalized as one among dozens of nations and "viewed with suspicion by many states, and with outright hostility by more than a few."15

The ICC also threatens to circumvent and override the established preeminent role of the UN Security Council. The Charter of the United Nations "imposes obligations that 'shall prevail' over those under any other international agreement."16 The Charter also created the UN Security Council upon which the U.S. sits as one of five permanent members whose veto can quickly halt Security Council action. The Council is charged with determining "the existence of any threat to the peace, breach of the peace, or act of aggression and shall . . . decide what measures shall be taken." ICC opponents argue that "all matters of interest to the ICC fall within the jurisdiction of the Security Council; therefore, the Council would have prior review before a matter is referred to a judicial process" such as the ICC. By granting itself jurisdiction over matters that already fall under the purview of the Security Council, the ICC threatens to deny the permanent Council members of their right to veto, thereby treading on the Council's domain in some cases and bypassing the Council in all of them.17

The ICC also has great potential for "jurisdictional creep."18 Many advocates of the court have already tried to expand the ICC's purview to issues of human rights violations, drug trafficking, and

15 Casey and Rivkin, 5.
16 Amann, 383, referring to UN Charter, art. 103.
17 Ibid., quoting UN Charter, art. 39.
18 Dempsey, 1.
Nevertheless, the immediate potential for jurisdictional creep is found in the vague and stretchable language of the ICC's statute.

In the text of the Rome Statute, the ICC is given jurisdiction over four areas of offence: “the crime of genocide, crimes against humanity, war crimes and the crime of aggression.” The definitions of all four offences are replete with ambiguities and sweeping language that potentially allows for ICC judges and prosecutors to engage in a jurisdictional free-for-all.  

Article Six of the ICC statute identifies one definition of genocide as “causing serious bodily or mental harm to members of [a] group.” Article Seven defines crimes against humanity as “intentionally causing great suffering, or serious injury to body or to mental or physical health,” and persecution in the form of “any deprivation of fundamental rights.” Article Eight includes as part of the war crimes definition, “committing outrages upon personal dignity, in particular humiliating and degrading treatment.” The potential for dispute over this definitional language is daunting as the world has yet to agree upon the precise meanings of personal dignity, degrading treatment, fundamental rights, and what constitutes serious mental harm.

Defining the crime of aggression was such a controversial topic at the Rome Conference that signatory parties, many of whom fear the sweeping potential of this category in particular, placed the issue on hold. Current proposals for defining aggression have thus far included blockading ports by armed forces—such as that employed by President Kennedy in the Cuban Missile Crisis—and confiscation of property. This wording would “have direct implications for the United States, which continues to freeze Libyan assets.”

---

19 Ibid., 4.
20 International Criminal Court Statute, art. 5.
21 Wilkins, 3.
22 International Criminal Court Statute, art. 6.
23 Ibid., art. 7.
24 Ibid., art. 8.
26 Dempsey, 5.
In 1998 Lee A. Casey and David B. Rivkin presented a prepared statement before the Senate Foreign Relations Committee, outlining major constitutional objections to U.S. involvement with the ICC on the grounds that “Americans brought before this court would not enjoy the basic guarantees of the Bill of Rights.” Their argument called for outright rejection of U.S. participation in or sanction of any judicial body bereft of explicit constitutional principles familiar to Americans. ICC proponents counter that such rights are implicitly inferred in the statute. However, trusting textual inference would force the U.S. to accept on good faith that the ICC will hold itself to a higher standard than the Founders were willing to trust our own government to do, since they saw fit to explicitly outline the rights of the accused in an effort to protect U.S. citizens from abuses of power. Such good faith is unwise and unwarranted, as the panel of ICC judges will largely be comprised of judges from countries that recognize no such guarantees—countries like Cambodia, Afghanistan, Mongolia, and Tajikistan.

A second constitutional objection is raised against the possibility of the U.S. conceding any degree of judicial authority whatsoever as “the judicial power of the United States is vested in the Supreme Court, and in lower federal courts as may be established by Congress.” In the case of *Ex parte Milligan*, the Supreme Court clarified that only a U.S. court can exercise this power. This decision held that “every trial involves the exercise of judicial power,” and the military tribunal that tried Milligan, a U.S. citizen, therefore could not legally assume any degree of power from the U.S. judicial system.

In *Reid v. Covert*, Justice Hugo L. Black affirmed that “the United States is entirely a creature of the Constitution. Its power
and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." On another occasion, the Supreme Court similarly remarked that "it would not be contended that [the treaty power of the U.S. government] extends so far as to authorize what the Constitution forbids."

Furthermore, constitutional rights beginning with "the right to a speedy and public trial, by an impartial jury" are conspicuously absent from the Rome Statute. Not only will a panel of judges—the majority of whom will not be American and could thus harbor bias against American defendants—decide cases in the ICC, but also UN judicial proceedings in the past have subscribed to a different definition of what constitutes a speedy trial. While a defendant in the U.S. has a right to be brought to trial within seventy days, the UN Yugoslav Tribunal Prosecutor has argued "that up to five years would not be too long to wait in prison for a trial."

The Sixth Amendment to the Constitution also guarantees that all trials take place in the state and district where the crime occurred. Justice Joseph Story explains, "The object of this clause is to secure the accused party from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighborhood; and thus subjected to the mere verdict of strangers, who may feel no common sympathy, or who even cherish animosities, or prejudices against him." The ICC would fail to offer such a guarantee while trying U.S. citizens, miles from their homeland, in a courtroom of foreign citizens.

The Sixth Amendment also provides that an accused person has the right "to be confronted with the witnesses against him." The Yugoslav Tribunal, an accepted model for the ICC, adopted

31 Reid v. Covert, 354 U.S., 5–6, quoted in Casey and Rivkin, 2.
32 Casey and Rivkin, 8, citing De George v. Riggs, 133 U.S. 258 (1890).
33 U.S. Constitution, amend. 6.
34 Casey and Rivkin, 3, quoting Prosecution Response to the Defence Motion for Provisional Release 3.2.5., ICTY Case No. IT-95-14/1-PT, 14 January 1998.
37 U.S. Constitution, amend. 6.
38 Casey and Rivkin, 3.
a provision known as Rule 75, which indicates that the court can “order appropriate measures for the privacy and protection of victims and witnesses,” allowing some witnesses to remain anonymous to the defendants and their lawyers.39 “When witnesses are granted anonymity . . . [and] cannot be cross-examined or charged with perjury,” the consequences of a lie will be ‘particularly grave in proceedings [like those of the Yugoslavia tribunal] where verbal testimony rather than material proof is the basis for conviction.’”40

Another concern is the ICC’s potential for circumventing the Fifth Amendment right prohibiting double jeopardy. If the ICC “gets to invalidate national trials by deciding what constitutes an ‘effective’ or ‘ineffective’ trial, the international court will exercise a type of judicial review power over national criminal justice systems,”41 thereby potentially subjecting an individual acquitted by a U.S. court to a second trial.42

Finally, the ICC statute does not incorporate the constitutional protection against excessive bail, nor does it “exclude ‘hearsay’ evidence that does not fall within a recognized exception to the general role.” The Yugoslav Tribunal, after which the ICC is partially modeled, allowed for “both anonymous witnesses and extensive hearsay evidence.”43

**Conclusion: Hindrance Despite the Help**

Terrorism—marked by its unpredictable barbarism—creates fear in its potential victims. This fear in turn breeds the desperation which allows for the compromise of once nonnegotiable principles. This is exactly why U.S. proponents of the ICC find themselves willing to surrender national sovereignty to a court accountable to no one, with a charter that fails to

---

41 Dempsey, 3.
42 Amann, 387.
43 Casey and Rivkin, 3.
guarantee many of our constitutionally explicit safeguards. The ICC fails to provide guarantees against the undesirable possibilities of double jeopardy, excessive bail, permitting hearsay evidence, and deliberately drawn-out trials. Acknowledging ICC jurisdiction would grant the Court judicial powers that the Constitution forbids.

Even the text of the ICC Charter is legally defective, plagued by vague language that allows for jurisdictional creep and assumption of unexpressed powers. Undoubtedly, the ICC offers legitimate assistance to the international war on terror. However, apparent progress in the war on terrorism will yield no true progress if it also requires a retreat in the name of freedom, civil rights, and self-government for the U.S. Joining the ICC for the seductive purpose of prosecuting terrorists would simultaneously allow terrorism to take an unacceptable toll on American law and founding principles. Thus the ICC can be seen only as a hindrance to U.S. interests regardless of the little help it may represent.