

"End Imperial Impunity"

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By Gregory Stanton

In Rome on July 17, 1998, 120 nations voted to create a permanent International Criminal Court (ICC) to try war crimes, crimes against humanity and genocide. Only seven nations opposed the measure, including Iraq, China, Israel and the United States.

The ICC will be created when 60 nations ratify the Rome Statute, which is expected to occur in 2002. The ICC will be headquartered in The Hague, with 18 judges and its chief and deputy prosecutors elected by a majority of nations that have ratified the statute. Only nations that have signed and ratified may contribute judges and prosecutors. Eighty-nine nations have now signed the Rome Statute, including all of America's NATO allies. Five have ratified. The United States still refuses to sign.

This year, representatives of more than 100 nations have met three times at the United Nations to settle the rules of procedure and evidence. The latest preparatory session was held from Nov. 29 to Dec. 17.

The United States now acknowledges that the ICC will come into being with or without its signature. And it recognizes that the Rome Statute cannot be changed. Nevertheless, the United States used the August preparatory meetings to lobby for binding agreements that would alter the statute without formally amending it. The most dangerous of the U.S. demands is immunity for official acts of government officials. The so-called "like-minded states," which were in the majority, rejected this position as an obstacle to the ICC's effectiveness. But it is outrageous that the United States is advocating it at all.

The United States is concerned that the President or Secretary of Defense, or U.S. troops acting on their orders, could be charged with war crimes for future acts like the bombing of Cambodia, the mining of Nicaragua's harbors or the bombing of the Sudanese factory. The United States wants a binding agreement that official government acts will be immune from prosecution. The country accused of crimes would be the judge of whether the acts were official.

Such immunity for government officials would be a giant step backward for international law. Saddam Hussein could claim that his genocidal chemical warfare against the Kurds was an official act to protect national security. Even the Nazis could have claimed that their crimes were official acts.

Granting immunity to official acts would blast away the bedrock of international humanitarian law, the Nuremberg Principles, which hold that no person, whatever his rank, is immune from prosecution for crimes against humanity. The U.S. position would violate the Genocide Convention of 1948, the Geneva Conventions of 1949, and the Torture Convention, all international treaties that the United States has ratified. The U.S. position would destroy the purpose of the ICC, which is to render justice when national courts cannot or will not punish leaders who commit genocide, war crimes and crimes against humanity.

At a recent American Bar Association meeting, I pointed out the shortsightedness of the U.S. position to a State Department lawyer. He replied: "The president couldn't do his job very well from a jail in The Hague."

But multiple safeguards built into the Rome Statute would prevent indictments of American officials. The statute gives national courts priority. If allegations are made against a U.S. official, the ICC first must refer them to the U.S. government, and if the United States conducts a good faith investigation and finds them groundless, the ICC would lack any jurisdiction. Further, war crimes must be intentional, providing a defense against prosecution for accidental bombings. Finally, a majority of the U.N. Security Council, where the United States wields great influence, can take jurisdiction over a case away from the ICC.

The United States doesn't need "official acts" immunity to protect its servicemen or leaders from ICC prosecution. The situation is different for dictatorships. National courts have failed to punish leaders who commit massive crimes against their own people because those courts are controlled by the very same dictators who commit the crimes. Only an international court can bring tyrants such as Idi Amin and Pol Pot to justice. Does the United States want to create immunity from prosecution for the "official acts" of such dictators?

Further, ad hoc tribunals like those for Yugoslavia and Rwanda are no deterrent to future killers. They are slow, costly to establish and will create inconsistent international criminal law.

It is time for the United States to reassert its international leadership in the enforcement of human rights by rejoining its allies and signing the Rome Statute. The United States should support justice for all; not justice for all except government officials; not justice for all except the United States. The era of impunity for war crimes, genocide and crimes against humanity is over.

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