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February 5, 1999

The International Criminal Court vs. the American People

by Lee A. Casey and David B. Rivkin, Jr.

Executive Summary #1249

On July 17, 1998, in Rome, a treaty was adopted creating a permanent International Criminal Court (ICC) under the auspices of the United Nations. If 60 countries ratify this treaty, a court in the Netherlands will have the power to try and punish individuals for violations of certain international humanitarian norms. Some of these offenses are so broadly defined that Americans--indeed, citizens of any nation--could be subject to penalties of up to life imprisonment for actions never before considered punishable on the international level.

The powers of the ICC outlined in the Rome treaty are an open invitation to abuse. Cases could be brought before the court based upon the complaint of any country that ratified the treaty (an "ICC States Party") or the initiative of the ICC's prosecutor--an international independent counsel. Once indicted, the defendant(s) would be tried by a bench of judges chosen by the States Parties. As an institution, the ICC would act as police, prosecutor, judge, jury, and jailer. These functions would all be performed by ICC staff, or under their supervision, with only bureaucratic divisions of authority. The ICC would be the sole judge of its own power, and there would be no process to appeal its decisions, however irrational or unjust those might be.

In Rome, the Clinton Administration rightly refused to sign the ICC treaty because it could not obtain even minimum safeguards to prevent this court from being used as a political tool against the United States. The Administration's decision, however, came late in the process and apparently was motivated by fears that prosecutions might be brought against U.S. peacekeepers overseas, not by the belief that a permanent ICC is fundamentally flawed.

In fact, the participation of the United States in this treaty regime runs counter to U.S. national interests. Moreover, U.S. participation would be unconstitutional because it would subject individual Americans to trial and punishment in an extra-constitutional court without affording them all of the rights and protections the U.S. Constitution guarantees.

Unfortunately, merely refusing to join the Rome treaty will not protect Americans from the ICC's reach. In an astonishing break with the accepted norms of international law, the Rome treaty would extend the ICC's jurisdiction to the nationals of countries that do not sign and ratify the treaty. Because of this unprecedented and unlawful attempt to assert power over the citizens of non-party states, it is not sufficient for the U.S. government merely to reject the treaty.

The existence of such a supranational court is a threat to the security of U.S. citizens both at home and overseas. The United States should use all of its considerable resources to prevent the ICC from being implemented. Specifically, Congress and the Administration should:

1. **Inform** other countries that ratifying the ICC treaty will negatively affect their relations with the United States.

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2. **Condition** non-military assistance to a country on its rejection of the ICC treaty.
3. **Make plain** that a country's ratification of the ICC treaty will result in a reassessment of U.S. troop deployments in that country.
4. **Renegotiate** treaties and agreements governing the rights and responsibilities of U.S. military personnel stationed overseas so that no host state may surrender U.S. nationals to the ICC.
5. **Demand** that Americans serving in multilateral peacekeeping operations, if accused of criminal actions, be turned over to U.S. courts for trial and be exempt from ICC jurisdiction.
6. **Renegotiate** extradition treaties to specify that individuals extradited from the United States cannot, under any circumstances, be then extradited or otherwise transferred by the requesting state to the ICC for prosecution.
7. **Prevent** any U.S. funding from going to support the ICC.
8. **Prevent** cases from coming before the ICC that would establish precedents for investigation, trial, and conviction--if necessary, by vetoing any attempt by the U.N. Security Council to refer a matter to the ICC.

The purpose of these steps is twofold. First, they would provide American civilians and U.S. military personnel certain basic protections against the possibility that they would be brought for judgment before a court that does not meet the minimum due process standards guaranteed in the U.S. Constitution. Second, they would make it clear that, in the view of the United States, the ICC is an *illegal and illegitimate* institution that violates the principles of self-government and popular sovereignty, as well as the accepted norms of international law.

The fundamental rights secured by the Constitution--rights successfully defended by Americans on battlefields around the world--can be summed up as follows: The American people govern themselves, and they have a right to be tried in accordance with the laws enacted by their elected representatives and to be judged by their peers and none other. The Rome ICC treaty, in concept and execution, is utterly antithetical to these rights. It should be opposed by the United States with all the vigor it has mustered, throughout its history, to fight similar threats to the fundamental values of the Republic.

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