

## Casey Paper

### The Case Against Supporting the International Criminal Court

Lee A. Casey<sup>1</sup>

The United States should not ratify the ICC Treaty. There are two fundamental objections to American participation in the ICC regime. First, U.S. participation would violate our Constitution by subjecting Americans to trial in an international court for offenses otherwise within the judicial power of the United States, and without the guarantees of the Bill of Rights. Second, our ratification of the Rome Treaty would constitute a profound surrender of American sovereignty, undercutting our right of self-government – the first human right, without which all others are simply words on paper, held by grace and favor, and no rights at all.

With respect to the Constitutional objections, by joining the ICC Treaty, the United States would subject American citizens to prosecution and trial in a court that was not established under Article III of the Constitution for criminal offenses otherwise subject to the judicial power of the United States. This, it cannot do. As the Supreme Court explained in the landmark Civil War case of *Ex parte Milligan* (1866), reversing a civilian's conviction by a military tribunal, "[e]very trial involves the exercise of judicial power," and courts not properly established under Article III can exercise "no part of the judicial power of the country."<sup>2</sup>

This rationale is equally, and emphatically, applicable to the ICC, a court where neither the prosecutors nor the judges would have been appointed by the President, by and with the advice and consent of the Senate, and which would not be bound by the fundamental guarantees of the Bill of Rights. In fact, individuals brought before the ICC would only nominally enjoy the rights we in the United States take for granted.

For example, the ICC Treaty guarantees defendants the right "to be tried without undue delay." In the International Criminal Tribunal for the Former Yugoslavia (an institution widely understood to be a model for the permanent ICC), and which also guarantees this "right," defendants often wait more than a year in prison before their trial begins, and many years before a judgment actually is rendered. The Hague prosecutors actually have argued that up to five years would not be too long to wait IN PRISON for a trial, citing case law from the European Court of Human Rights supporting their position.<sup>3</sup>

Such practices, admittedly, have a long pedigree, but they mock the presumption of innocence. Under U.S. law, the federal government must bring a criminal defendant to trial within three months, or let him go.<sup>4</sup>

By the same token, the right of confrontation, guaranteed by the Sixth Amendment, includes the right to know the identity of hostile witnesses, and to exclude most "hearsay" evidence. In the Yugoslavia Tribunal, both anonymous witnesses and virtually unlimited hearsay evidence have been allowed at criminal trials, *large portions of which are conducted in secret*. Again, this is the model for the ICC.

Similarly, under the Constitution's guarantee against double jeopardy a judgment of acquittal cannot be appealed. Under the ICC statute, acquittals are freely appealable by the prosecution, as in the Yugoslav Tribunal, where the Prosecutor has appealed every judgment of acquittal.

In addition, the ICC would not preserve the right to a jury trial. The importance of this right cannot be overstated. Alone among the Constitution's guarantees, the right to a jury trial was stated twice, in Article III (sec. 2), and in the Sixth Amendment. It is not merely a means of determining facts in a judicial proceeding. It is a fundamental check on the abuse of power. As Justice Joseph Story explained: "The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people."<sup>5</sup> It is "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." That said, the exclusion of jury trials from the ICC is not surprising, for that Court invites the exercise of arbitrary power by its very design.

The ICC will act as policeman, prosecutor, judge, jury, and jailor – all of these functions will be performed by its personnel, with nothing but bureaucratic divisions of authority, and no division of interest. There would be no appeal from its judgments. If the ICC abuses its power, there will be no recourse. From first to last, the ICC will be the judge in its own case. It will be more absolute than any dictator. As an institution, the ICC is fundamentally inconsistent with the political, philosophical, and legal traditions of the United States

ICC supporters suggest that U.S. participation in this Court would not violate the Constitution because it would not be "a court of the United States," to which Article III and the Bill of Rights apply. They often point to cases in which the Supreme Court has allowed the extradition of citizens to face charges overseas. There are, however, fundamental differences between United States participation in the ICC Treaty Regime and extradition cases, where American are sought for crimes committed abroad. If the U.S. joined the ICC Treaty, the Court could try Americans who never have left the United States, for actions taken entirely within our borders.

A hypothetical, stripped of the emotional overlay inherent in "war crimes" issues, can best illustrate the constitutional point here: The Bill of Rights undoubtedly impedes efficient enforcement of the drug laws – also a subject of international concern. Could the federal government enter a treaty with Mexico and Canada, establishing an offshore "Special Drug Control Court," which would prosecute and try all drug offenses committed anywhere in North America, without the Bill of Rights guarantees? Could the federal government, through the device of a treaty, establish a special overseas court to try sedition cases – thus circumventing the guarantees of the First Amendment.

Fortunately, the Supreme Court has never faced such a case. However, in the 1998 case of *United States v. Balsys*, the Court suggested that, where a prosecution by a foreign court is, at least in part, undertaken on behalf of the United States, for example, where "the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character . . ." then an argument can be made that the Bill of Rights would apply "*simply because that prosecution [would not be] fairly characterized as distinctly 'foreign' The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation. . .*"<sup>6</sup>

This would, of course, be exactly the case with the ICC. If the United States became a "State Party" to the ICC Treaty, any prosecutions undertaken by the Court would be "as much on behalf of the United States as of" any other State party. Since the full and undiluted guarantees of the Bill of Rights would not be available in the ICC, the United States cannot, constitutionally, sign and ratify the ICC treaty.

\* \* \*

ICC supporters also have argued that the U.S. should sign and ratify the Rome Treaty because the Court would be directed against people like Saddam Hussein and Slobodan Milosevic, and not against the United States. Here, as pretty much everywhere, the past is the best predictor of the future. We already have seen this particular drama staged at the Yugoslav Tribunal. Even though that Tribunal was established to investigate crimes committed during 1991-1995 Yugoslav conflict, and even though NATO's air war against Serbia was fought on entirely humanitarian grounds, and even though it was conducted with the highest level of technical proficiency in history, the Hague prosecutors nevertheless undertook a *politically motivated* investigation – *motivated by international humanitarian rights activists along with Russia and China* – of NATO's actions based upon the civilian deaths that resulted.

At the end of this investigation, the prosecutors gave NATO a pass not because, in their view, there were no violations, but because “[i]n all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offenses.”<sup>7</sup>

Significantly, in their report the prosecutors openly acknowledged the very elastic nature of the legal standards in this area, further highlighting the danger that the United States will be the subject of such politically motivated prosecutions in the future: “[t]he answers to these question [regarding allegedly excessive civilian casualties] are not simple. It may be necessary to resolve them on a case by case basis, *and the answers may differ depending on the background and values of the decision-maker*. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.”<sup>8</sup>

These are, in fact, “will build to suit” crimes. Whether prosecutions are brought against American officials will depend entirely upon the motivations and political agenda of the ICC.

In response, ICC supporters claim that we can depend upon the professionalism and good will of the Court's personnel. One of the ICC's strongest advocates, former Yugoslav Tribunal Prosecutor Louise Arbour has argued for a powerful Prosecutor and Court, suggesting that “an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith from improper purposes.”

The Framers of our Constitution understood the fallacy of this argument probably better than any other group in history. If there is one particular American contribution to the art of statecraft, it is the principle – incorporated into the very fabric of our Constitution – *that the security of our rights cannot be trusted to the good intentions of our leaders*. By its nature, power is capable of abuse and people are, by nature, flawed. As James Madison wrote “the great difficulty lies in this: you must first enable the government to control the governed; and in the next place *oblige it to control itself*.”<sup>9</sup> The ICC would not be obliged to control itself.

\* \* \*

It is also often asserted that the principle of “complementarity,” found in Article 17 of the Rome Treaty, will check the Court's ability to undertake prosecution of Americans. This is the principle that prohibits

the ICC from taking up a case if the appropriate national authorities investigate and prosecute the matter. In fact, this limit on the ICC's power is, in the case of the United States, entirely illusory.

First, as with all other matters under the Rome Treaty, it will be solely within the discretion of the ICC to interpret and apply this provision.

Second, under Article 17, the Court can pursue a case wherever it determines that the responsible State was "unwilling or unable to carry out the investigation or prosecution." In determining whether a State was "unwilling" the Court will consider whether the national proceedings were conducted "independently or impartially." The United States can never meet that test as an institutional matter. Under the Constitution, the President is both the Chief Executive, *i.e.*, the chief law enforcement officer, and the Commander-in-Chief of the armed forces. In any particular case, both the individuals investigating, and prosecuting, and the individuals being investigated and prosecuted, work for the same man. Moreover, under command responsibility theories, the President is always a potential – indeed, a likely, target of any investigation. The ICC will simply note that an individual cannot "impartially" investigate himself, and it will be full steam ahead. As a check on the ICC, complementarity is meaningless.

\* \* \*

Finally, it's important to understand exactly what is at stake here. Today, the officials of the United States are ultimately accountable for their actions to the American electorate. If the United States were to ratify the ICC Treaty this ultimate accountability would be transferred from the American people to the ICC in a very real and immediate way – through the threat of criminal prosecution and punishment. The policies implemented, and actions taken by our national leaders, whether at home or abroad, could be scrutinized by the ICC and punished if, *in its opinion*, criminal violations had occurred. As Alexis de Tocqueville wrote, "[h]e who punishes the criminal is . . . the real master of society."<sup>10</sup> Ratification of the ICC Treaty would, in short, constitute a profound surrender of American sovereignty – our right of self-government – the first human right. Without self-government, the rest are words on paper, held by grace and favor, and not rights at all.

That surrender would be to an institution that does not share our interests or values. There is no universally recognized and accepted legal system on the international level, particular in the area of due process, as the Rome Treaty itself recognizes in requiring that, in the selection of judges, "the principal legal systems of the world," should be represented. Moreover, although a number of Western states have signed this treaty, so have states such as Algeria, Iran, Nigeria, Sudan, Syria and Yemen. According to the U.S. State Department, each of these states have been implicated in the use of torture or extra-judicial killings, or both. Yet, each of them would have as great a voice as the United States in selecting the ICC's Prosecutor and Judges, and in the Assembly of State Parties.

This is especially troubling because, as the ICTY Prosecutor conceded, who is and who is not a war criminal is very much a matter of your point of view. And I'd like to give give you a fairly poignant example that I learned of, actually, while practicing before the ICTY.

In this case there was a young officer, 20 or 21 years old, who commanded a detachment of regular soldiers, along with a group of irregulars. Irregulars are, of course, always a problem. I think everyone pretty much agrees that, for example, the worst atrocities in Bosnia were committed by irregulars. At

any rate, these irregulars were clearly under the officer's command when they all ran into a body of enemy troops.

There was a short, sharp firefight. A number of the enemy were killed or wounded, and the rest through down their arms and surrendered. At that point, the officer entirely lost control of the situation. His irregulars began to kill the wounded and then the rest of the prisoners -- with knives and axes actually.

After a good deal of confusion, the officer managed to form up his regulars around the remaining prisoners, but about a dozen were killed. Now, under our system of military justice, the perpetrators would be prosecuted, but the officer would very likely not be. He gave no order for the killings, and took some action to stop it.

However, under the command responsibility and "knowing presence" theories now current at the ICTY, the ICC's model, this officer is guilty of a war crime. The fact that he did make some attempt to prevent the killing would certainly be taken into account, but very likely as a matter of mitigation at sentencing.

At any rate, this is a real case. It didn't, however, happen in Central Bosnia, or Kosovo, or Eastern Slavonia, and the individuals involved were not Serbs, Croats, or Muslims. As a matter of fact, it happened in Western Pennsylvania. The soldiers were English subjects, at the time, and the irregulars were Iroquis Indians; their victims were French. The young officer was, as a matter of fact, from the county in which I live -- Fairfax, Virginia. And, for those of you who are students here at the University, his name -- Washington -- will grace each of your diplomas.<sup>1</sup>

War is, inherently, a violent affair and the discretion whether to prosecute any particular case in which Americans are involved should be kept firmly in the hands of our institutions, to be made by individuals who are accountable to us for their actions. The ICC is inconsistent with our Constitution and inimical to our national interests. It is an institution of which we should have no part.

---

<sup>1</sup>. Lee A. Casey Bio – Mr. Casey is a partner in the law firm of Baker & Hostetler LLP, based in Washington, D.C. His practice areas include administrative, environmental, and federal constitutional, as well as public international and international humanitarian law. Mr. Casey has served in various capacities in the federal government, including in the Office of Legal Counsel and the Office of Legal Policy at the U.S. Department of Justice. The Office of Legal Counsel is responsible for advising the Attorney General and the White House on issues of constitutional law and statutory interpretation. The Office of Legal Policy served as a strategic "think tank" for the Reagan Justice Department. Mr. Casey has also served as Deputy Associate General Counsel at the U.S. Department of Energy. He has been an Adjunct Professor of Law at the George Mason University School of Law, Arlington, Virginia, and has published many articles on the subject of international criminal law and the International Criminal Court.

<sup>2</sup>. 71 U.S. 2 (1866).

<sup>3</sup>See *W. v. Switzerland*, Series A, No. 254 (1993) (4 years of pretrial detention accepted); *Neumeister v. Austria*, Series A, No. 8 (1968) (up to seven years not too long to try a criminal case.)

<sup>4</sup>Speedy Trial Act of 1974, 18 U.S.C. § 3161 (U.S. Attorneys' Manual: "The case will be dismissed if the government cannot start the trial within 70 days from the return of the indictment or the initial appearance of the defendant. 18 U.S.C. § 3161.").

<sup>5</sup>Joseph Story, Commentaries on the Constitution of the United States 656-657 (Carolina Academic Press ed. 1987).

<sup>6</sup>524 U.S. 666 (1998).

<sup>7</sup>*Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, June 8, 2000, ¶ 90.

<sup>8</sup>*Report to the Prosecutor, id.*, ¶ 50.

<sup>9</sup>*The Federalist* No. 51 (James Madison) (Jacob E. Cooke ed. 1961).

<sup>10</sup>See 1 Alexis de Tocqueville, *Democracy in America* 282-83 (Reeve trans. 1948 ed.), *quoted in Reid v. Covert*, 354 U.S. at 10 n.13.

<sup>11</sup>For a description of the incident at "Jumonville's Glen," see Fred Anderson, *Crucible of War* 5-7 (2000).