

The International Criminal Court; Court is no threat to us

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It is time to debunk some of the misleading information on the International Criminal Court that has appeared in the media mostly as a result of the Bush administration's campaign against the ICC.

The procedures of the ICC contain more guarantees than the American criminal justice system. They provide for every right guaranteed in the U.S. Constitution except for a jury trial.

More than three-fourths of countries do not have trial by jury. The ICC panel of three judges is as much a guarantee of fairness as lay jurors. Unlike some provisions of U.S. law, the ICC does not have "secret evidence" and provides for right to counsel under all circumstances, which the U.S. has recently abridged under the guise of the war on terrorism.

Concerns about a runaway prosecutor are out of place because any indictment has to be confirmed by a panel of three judges, subject to appeal before a panel of five judges. It would therefore require, in addition to the prosecutor, at least five runaway judges for an unfounded prosecution.

The prosecutor and the judges are selected by the Assembly of State Parties, which represents, at this time, 75 governments, including all European Union countries and all NATO allies except Turkey. The likelihood that all these countries will lose their good sense and elect judges and a prosecutor who are anti-American is nonsense.

Because the United States is unlikely to engage in genocide and crimes against humanity, the only concern is that some members of its military might commit war crimes.

But under ICC statutes, the U.S. can opt out of war crimes prosecutions for seven years. France has done so, and so can the U.S. Even if the U.S. does not opt out, the Law of

Armed Conflict is well-established in the Geneva Conventions, and the same norms are part of the Uniform Code of Military Justice.

There is no question that targeting and killing civilians is prohibited, as is torturing and killing POWs and the sick and injured in the field and at sea. Protected targets, such as hospitals and civilian installations, cannot be attacked. Those who commit such crimes violate not only international law but also U.S. law, and they are subject to U.S. prosecution.

So, what's new or different with the ICC?

If U.S. personnel commit such crimes, the law requires their prosecution. Because the jurisdiction of the ICC is secondary to national criminal jurisdiction, a U.S. investigation or prosecution bars the ICC from exercising its jurisdiction. Therefore, there is no logical basis to fear that U.S. military personnel will be prosecuted by the ICC if the U.S. follows its own laws.

The only fear derives from a perverse logic, namely that the U.S. will cover up war crimes and subvert U.S. law by not properly investigating or prosecuting those who may have committed such crimes. The ICC might make that difficult. Under these conditions, the ICC prosecutor may seek to bring U.S. military personnel to trial.

Is this what the administration is really concerned about?

Even if this were to occur, the U.S. still could initiate its own investigation and prosecution, barring the ICC from exercising its jurisdiction. So where is the realistic risk of vexatious or unfair prosecutions?

The arguments offered by the administration in opposition to the ICC and the many articles written in the media supporting these positions are misleading. The real reason is that in military operations, mistakes happen, and the U.S. does not want to expose itself to embarrassment by investigating and revealing these mistakes.

Past errors

Consider, for example, the bombing of the Chinese Embassy in Belgrade during the Kosovo war. It was a mistake, but one the U.S. would not want to admit publicly. Certainly, it would not want to reveal how it occurred.

Selection of military targets, particularly with respect to aerial bombardment, involves decisions based on information from various intelligence sources. Some of them may be faulty or insufficient and result in error. This would embarrass the agencies involved.

Such a case was the bombing of a shelter in Baghdad during the gulf war that killed several hundred civilians. Intelligence from satellite imagery revealed the shelter had been built as a military command and control post, a valid military target. But the lack of human intelligence on the ground prevented confirmation of that, thus resulting in human tragedy.

More recently, in Afghanistan, the U.S. bombed a wedding celebration, killing dozens of civilians. While this attack is still under investigation by the military, it appears that the firing of rifles as part of the festivities was mistaken for firing against flying aircraft. On its face, it appears unreasonable that the firing of rifles would be confused with anti-aircraft or missile fire against an aircraft at several thousand feet altitude.

These and other examples are clearly mistakes, but they can sometimes give rise to questions about responsibility for the error. That is what is at stake, the chance that an error could lead to a prosecution.

The U.S. military has a choice: to cover up such mistakes or determine whether individual responsibility exists and whether an apology or compensation is due to those who suffered the consequences of such errors. A cover-up for such errors violates U.S. law, and the ICC may make it difficult.

Should that be a reason to oppose it?

Following law protects U.S.

The ICC is not a threat to U.S. military operations abroad if they are conducted in accordance with international and U.S. law. This is the conclusion of other major powers that also contribute to such operations. Britain and France, as part of the 75 countries that have already ratified the ICC, have concluded that the benefits of the court outweigh whatever detriment may exist. Can it be that only this administration has insights about ICC dangers that so many allies and friends lack?

The international community is grateful to the U.S. for its role in the preservation of peace, and it is not likely to target the United States with unwarranted efforts to prosecute its military personnel. But it is also not willing to give it carte blanche to conduct military operations without regard to the same laws to which the U.S. is holding others accountable. The problem is not with the ICC, but with our double standard.

Since World War II, more than 250 conflicts worldwide have produced estimates from 70 to 170 million casualties. The major perpetrators have benefited from impunity. It behooves the U.S. to support the goals of international criminal justice and to end such impunity. To prosecute those who commit genocide, crimes against humanity and war crimes is certainly valuable enough for the U.S. to support the ICC, even though it may at times have to answer embarrassing questions.

We cannot be the leader of the world only by virtue of having the mightiest military power. We must also provide moral leadership and support international criminal justice without double standards.