



What Happened to the International Criminal Court and the Rule of Law? Part II

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CRIMINAL JUSTICE

By Robert Sanger

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Introduction

Last month, in the *Criminal Justice* column, we talked about the Rule of Law in domestic and international law. We discussed the legacy of the Nuremberg trials where Justice Jackson had set a precedent in dealing with perpetrators of war crimes and crimes against humanity. That precedent involved avoiding the worst aspects of victor's justice. The political, military, medical and industrial leaders who engaged in crimes against humanity were tried in a court of law. And that court, the Nuremberg Court, would accord the accused the presumption of innocence, due process of law and judges who attempted to appear independent.

As we also discussed, the United Nations finally established a permanent court to deal with war crimes. The International Criminal Court or ICC, was created in June of 1998 by the Rome Statute. The Statute - really a treaty - was signed on to by 140 nations and over 100 nations are actual members of the Court. President Bill Clinton signed the original treaty in 1998. However, President George W. Bush took office and immediately rescinded Presidential approval. The treaty was never ratified by the Senate and the United States is not a party to it. In fact, President Bush not only denied funding and refused to allow the Court to sit in the United States, he forced over 100 nations to sign "Bilateral Immunity Agreements" under which each such

country acknowledged that it would not receive aid if it participated in bringing an American before the ICC.

Despite the outright hostility of the United States, the ICC has continued to function in its permanent facilities in the Hague. There are several cases pending in the ICC pre-trial and, as of this writing, the Court is still in the middle of its first actual trial, that of Congolese militia leader, Thomas Lubanga Dyilo. But there are some new developments.

The International Criminal Court Today

On March 4, 2009, the International Criminal Court issued a warrant of arrest for the President of the Sudan, Omar al-Bashir.^[1] He is charged with war crimes and crimes against humanity. This is the first case in which the ICC has brought charges against a sitting head of state. The United States still is not a member of the Court but, with this development, eyes are on our government to see if the Obama Administration will take a more supportive role.

In response to the issuance of the warrant for the Sudanese President, the Obama Administration, while acknowledging that the United States is not a member of the ICC, suggested it is supportive of the Court's efforts.^[2] There have been favorable remarks made by members of the Obama Administration prior to this as well but no statement, as of this writing, from the top. Under the circumstances, President Obama will have to deal with the United States' position on the ICC sooner rather than later.

It is time for the President of the United States to once again sign the Rome Treaty. It is more than ironic that Justice Jackson, on behalf of the United States, created the groundwork for an international court of criminal justice and that the United States has not wholeheartedly endorsed the embodiment of his principles. The ICC actually surpasses the standards set in the Nuremberg trials. The ICC is a permanent court, not a court created as the result of the one side or another winning a war. It is also truly international. It is not comprised of judges from victor nations but by truly international and fundamentally independent judges.

The ICC has four basic categories of crime it can prosecute: genocide, crimes against humanity, war crimes and initiation of wars of aggression. To date the ICC has commenced investigations into four general areas: Northern Uganda, the Democratic Republic of the Congo, the Central African Republic and Darfur. The Court has issued public arrest warrants for thirteen people, now including Omar al-Basir; seven of them remain free, two have died, and four are in custody.

The ICC Provides Due Process

The Rome Statute provides for a number of procedural safeguards and allows for pre-trial hearings on the admissibility of evidence and challenges to the jurisdiction of the Court. A plea of *ne bis in idem* is recognized which is, essentially, a plea of double jeopardy as to a conviction or acquittal before the ICC or even another tribunal as long as it was not designed to avoid ICC jurisdiction.

The Statute specifically calls out many general principles of criminal law that are familiar to American criminal practitioners. For instance, there is a requirement of *mens rea* and a definition of the defense of insanity, intoxication and mistake of fact. There is a provision that mistake of law is generally not a defense. Article 33, rejects the “Nuremberg Defense” that the person was “just following orders” of a superior unless there was a legal obligation to follow the orders, the person did not know they were illegal and the orders were not manifestly unlawful.

Punishment can include imprisonment. However, since most Western nations reject the death penalty, including all belonging to the European Union, there is no capital punishment. Nevertheless, the threat of imprisonment for officials in high government office is fairly daunting.

The Rome Statute does not call for a jury trial. It calls for its proceedings to be generally public and even has a web cam feed for proceedings to be televised over the internet. Defense lawyers are given the tools to do their jobs in representing the individuals and in attacking jurisdictional and procedural flaws. All in all, the Rome Statute and the procedures of the ICC incorporate the fundamentals of the Rule of Law, the Nuremberg principles and many of the details found in the Anglo American systems of criminal justice.

The Future of United States Involvement with the ICC

Whatever happened in the past, the United States will find it difficult to join in the condemnation of war criminals in other countries while refusing to submit, not only to the jurisdiction of the Court, but to the basic Rule of Law. History does repeat itself - it has been said that the first lesson of history is that we do not learn from the lessons of history. The United States has recently engaged in the kind of *hubris* - outrageous arrogance - that has accompanied the downfall of so many world powers. Croesus had to try to conquer the Persians, the Persians thought they could conquer the Greeks, both Napoleon and Hitler thought they could fight two

front wars. All of them fought wars of aggression and slaughtered people in their path.

It is a lesson of history that *hubris* on the part of the leaders and their followers overcomes the sense of justice and the Rule of Law. The citizens of a country rally behind their leaders as they wage wars of aggression and as they gradually take away the rights of the enemies and the citizens themselves. Is that what we have done? Can a new President -- sworn to transparency in government and to restoring our place in the international community - bring us back from the dangerous and arrogant journey that we have embarked on? Time will tell.

Conclusion

International law - the Rule of Law - is here to stay. It is the hope of the future to avoid wars and maybe someday a war we cannot win. But, in order for that to work, international law needs the authorization and the moral and financial support of the leading countries of the world. Can we do it? We will keep a good thought!

[1] *New York Times*, March 3, 2009.

[2] AP story, March 4, 2009