

## **Washington's ICC Stand Painful But Right**

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EU and US differences over the ICC have dismayed Balkan states, but Washington does have a point.

By Daniel Serwer in Washington (BCR No 439, 20-Jun-03)

With the United States and Europe still reeling from disagreements over Iraq, another tempest is brewing. Under pressure from Washington, including threats to cut bilateral military assistance, 42 countries worldwide have agreed not to surrender American citizens to the International Criminal Court, ICC, which boasts 139 states as signatories of its statute (90 of whom have ratified). The EU, angered by what it regards as US behaviour that undermines the court, is responding with high pressure of its own.

The clash between Europe and the US over the ICC causes dismay in many countries, especially in the Balkans. All the republics of former Yugoslavia have benefited both from US intervention and EU assistance. They all aim to join NATO and the EU. To choose between Washington and Brussels is painful.

As an American citizen who would prefer to see an ICC to which my country would subscribe, I too find this situation painful. But the fact is that no conceivable US Senate will ratify the court's current statute, because it is not subject to the authority of the UN Security Council, where Washington wields a veto. President Clinton, like President Bush, refused to recommend the ICC statute for ratification. The American government, like it or not, represents me in these matters - if it won't ratify, I should not be subject to the court's jurisdiction.

Europeans argue that the court has many safeguards against spurious indictments of US citizens, which are highly unlikely in any event. There is, they whisper, a virtual guarantee that no Americans will be transferred. But if that were the case, why would Europe object to the US using a provision of the court's statute (Article 98 allows agreements of the sort the US is requesting) to guarantee for sure that other countries will not surrender Americans to the ICC?

The reason is revealing. Europeans argue that the court is a central institution of the future world legal order, and that therefore its jurisdiction must be universal. This betrays their true agenda: to extend international authority over US citizens despite the views of their government. Europeans rightly object vehemently when Washington attempts such extraterritorial extensions of its authority, but they have been more than eager to reverse their usual position when the boot is on the other foot. To compound the hypocrisy, France has used a provision of the ICC's statute to exempt its own citizens, at least for the next seven years (Colombia has followed suit, as may other signatories).

Some in Europe misinterpret the US effort to exempt citizens from surrender to the ICC as reflecting a general unwillingness to abide by international law and order. This is wrong. America has accepted the International Tribunal for the Former Yugoslavia, ICTY - indeed, it is the Hague tribunal's strongest advocate. The issue is not whether US citizens are subject to international standards, but who has the authority to decide when they are subject and when they are not. The ICC, not having been created by the Security Council, should not be allowed to override the American government.

The scorecard in the Balkans so far is "advantage US". Bosnia, Albania, and Romania have already signed up with Washington. Macedonia - which feels mistreated by a Europe that refuses to call it by its proper name - will likely follow. Bulgaria will lose its hopes for a US military base if it goes with Europe, but

Brussels has even more to offer. Croatia, which needs US military assistance less than the others because it has already had so much over the past ten years, may ungratefully go with the EU, since that is where its bread is buttered for the future.

Serbia and Montenegro faces a particularly difficult choice. The US has only in recent months opened up bilateral military cooperation. To shut it down almost immediately would be a big loss for Belgrade. But Belgrade has ambitions to join the fast track for the EU - it would like to catch up with Croatia. This gives Brussels leverage. Unfortunately, both it and Washington are using their influence on the ICC issue, rather than getting Belgrade (and Zagreb) to arrest people already indicted by the ICTY for war crimes. The controversy over the new court is giving war criminals a “get out of jail free” card.

It is a shame that Europe and the US have forced the Balkans countries to choose between them. It would have been far better for Brussels to realise that subjecting American citizens to a court that their government rejects is inconsistent with the principles Europe espouses. Europe could still declare victory. After all, the Americans have been forced into signing agreements that are provided for in the ICC statute, thus implicitly suggesting that they accept the court as having real and legitimate authority from which Americans need an exemption.

The Americans will not give in. The legislation that requires a cutoff of military assistance to countries that fail to agree not to surrender Americans also includes a provision authorising the US president “to use all means necessary” to bring about the release of his citizens in the event that any are transferred. This is silly - a US rescue of alleged criminals jailed in The Hague is not going to happen - but it betrays the strength of conviction in the Congress that, apart from action by the Security Council, only Washington can make commitments on behalf of US citizens. On that the Congress is correct.

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