# Rome's New Empire

In July 1998, at the end of the most blood-soaked century in human history, the nations of the world gathered in Rome under the auspices of the United Nations and voted to establish an International Criminal Court (ICC). This new tribunal, to be located permanently at the Hague, would be empowered to investigate, charge, and convict any person in the world who had carried out "genocide, crimes against humanity, war crimes, [and] the crime of aggression." With the announcement of the agreement, UN Secretary General Kofi Annan proclaimed that the court would be "a gift of hope to future generations and a giant step forward in the march towards universal human rights and the rule of law."

On the face of it, the ICC sounds like a good idea. But there is a problem with it: The idea of an international court empowered to try the citizens of various countries without their governments' consent is a systematic challenge to state sovereignty, the central principle on which the present international order rests. Not surprisingly, this is an idea that fits well with the agenda of the European Union, which is increasingly committed to undercutting the sovereign powers of independent states and transferring these powers to international institutions—and preferably to those located in Europe. This idea has proven more difficult to swallow for another group of states, which have a clear need to maintain their national independence and sovereignty in the face of European wishes to

the contrary—including the United States, Russia, Great Britain, India, and Israel, to name a few.

It was not until the terror attacks on New York and Washington a year ago that it began to become clear that the United States, which now has a war to fight, would not go along with the court, and in recent months President Bush has made disabling the ICC a foreign policy priority. In May 2002, the Bush administration announced it was withdrawing America's signature from the Rome statute, and in July the U.S. threatened to veto all future UN peacekeeping missions unless American soldiers were guaranteed immunity from prosecution. Over the summer, the administration launched a campaign to sign bilateral treaties with as many countries as possible committing the parties not to extradite one another's nationals to the ICC. To give this position the force of law, Congress passed the American Service-Members' Protection Act, which bans all government cooperation with the ICC, makes illegal any efforts to conduct or offer material support for its investigations, gives the president authority to deny military aid to any country refusing to sign a non-extradition treaty with the U.S., and even authorizes him to use "all means necessary" to free Americans held for trial by the court.

The Europeans, however, have not backed down. Having reached its statutory threshold of 60 ratifying states, the ICC officially opened for business on July 1, 2002, and its jurisdiction now extends to over 80 countries. Comprising 18 judges and an independent prosecutor, the new court will have the power to issue warrants, subpoena witnesses, and obligate member states to turn over evidence. The ICC, which is likely to begin hearing cases as early as next year, is now a fixture of the international landscape.

Instead of uniting humanity, however, the International Criminal Court has succeeded in doing the opposite. It has, in effect, created a new dividing line in the global arena between two competing conceptions of world order. On one side are those countries willing to cede significant aspects of their sovereignty by placing themselves under a world legal

framework dominated by Germany, France, Belgium, and the Scandinavian states; on the other are those nations, led by the United States, that continue to see sovereignty as the principal bulwark for national freedom and international stability.

Where should Israelis and Jews see themselves in this nascent clash of civilizations? A sober assessment of the court's powers and composition reveals that it is the Americans, not the Europeans, who have it right. The ICC is almost certain to become just as politicized as the many other international bodies created in a similar spirit over the past half century. Unlike those institutions, however, the ICC will enjoy wide powers of legal coercion that will make it a menace to democratic states seeking to defend themselves, and its presumptive superiority over elected national institutions will make it a threat to some of the fundamental principles on which free government is based. For democracies everywhere, accession to the Rome treaty represents a step backwards for accountable self-government and the rule of law. For small, embattled democracies like Israel, the results might be far worse.

To understand the problems posed by an International Criminal Court, it is important to recognize that this tribunal is nothing at all like ordinary courts operating under the rule of law. In the latter case, the aim is to enable human affairs to be guided by principles of right and wrong rather than the dictates of naked power—to keep man from "eating his brother alive," in the words of the Mishna. But since there has never been a society in which all citizens were fully dedicated to lawfulness, the rule of law presupposes the creation of an effective means of enforcement: Strict limits must be put on the power individuals can wield over one another, all "vigilantism" must be delegitimized, and the use of force must be invested in a central body charged with enforcing the law equitably. If the power of the state to investigate, convict, and punish offenders is consistently applied, individuals will be deterred from trying to impose

their will on one another, and will generally resort to more peaceful means. If not, they will quickly conclude that their justice system is inequitable, ineffective, or corrupt; instead of figuring out how to live by its rules, many will spend their energies seeking to be among those who act with impunity. For the rule of law to have any meaning, then, the presence of a court alone is never enough: Equally indispensable are a governmental structure that puts overwhelming powers of enforcement behind efforts to punish wrongdoers, and a system of accountability in which these bodies are inclined to carry out their duties as fairly and consistently as possible.

In the international arena, none of this exists. Although many scholars of international law are loath to admit it, it is impossible to speak of an equitable "rule of law" among nations. If only some "war criminals" are prosecuted while others are not, the question of who will be tried will be answered not by a roll of the dice, but according to the dictates of power politics: Which countries feel like furnishing evidence against a leader accused of war crimes, which will be willing to send their own soldiers to battle in order to oust him from power, which will agree to keep him in prison after his conviction. Ample proof of this was provided by the spotty record of the International Criminal Tribunal for the former Yugoslavia (ICTY)—a temporary court set up by the Security Council in 1993 to arrest and try war criminals in the Balkan conflicts. Though the purported success of this body was a major catalyst for creating the ICC, an account by Chuck Sudetic in the April 2000 issue of *The Atlantic Monthly* documented how French soldiers in Bosnia, anxious to protect their government from revelations of French wrongdoing that could come out during a high-profile war-crimes trial, systematically scuttled attempts to arrest even the most wanted Bosnian Serb leaders hiding in French-controlled territory. Such an outcome is no surprise, of course, given the way international tribunals like the ICTY and the ICC are built. So long as they are dependent on state enforcement agencies for their effectiveness,

international criminal law remains the rule of power under the guise of principle.

At the same time, everything in the ICC's makeup points to its subordination to the interests of power politics rather than genuine law. The most important decisions regarding the court, such as the appointment of its judges and prosecutor, the funding for its operations, and any amendments to its constitution, are in the hands of the Assembly of States Parties, in which every state that has ratified the treaty is entitled to one vote. At present, given the limited membership of the Assembly, its decisions are likely to reflect the views of the European states that dominate it—which have shown themselves increasingly willing to use the banner of human rights in order to attack democracies such as the United States and Israel, while at the same time ignoring far more serious abuses by other nations. As Jeremy Rabkin of Cornell University, a scholar of international law and one of the ICC's leading critics, argues in an upcoming issue of the *Lieden Journal of International Law*, such political considerations are likely to have a direct effect on the court's agenda:

> At the same time that European states were campaigning for ratification of the Rome statute, they repeatedly voted at the UN Human Rights Commission against U.S. efforts to question human rights abuses in China—because China threatened to cancel contracts for European aircraft if such inquiries were not shelved. It is quite unlikely that European governments would allow the ICC to take action against states that would retaliate on Europeans for such interventions….

Of course, if many more nations ratify the Rome treaty, giving full representation to the world's oppressive and lawless regimes, the politics of the Assembly of States Parties will cease to look like that of an expanded European Union and come to resemble that of the UN's General Assembly—a body that was also created in the interests of promoting justice among the nations, but which, because it gives equal standing to

tyrants as to lawful democracies, has long since deteriorated into a euphemism for hypocrisy and moral ineffectiveness.

And yet, there is one crucial difference between the ICC and the General Assembly. The designers of the United Nations understood the dangers inherent in a "democratic" international body, and therefore left all effective power in the hands of the sovereign states themselves, or, in exceptional cases, in the hands of the Security Council. The ICC, by contrast, will have the authority to demand the full cooperation of all member states. According to the Rome statute, all ratifying countries will have to hand over documents and information, arrest and extradite suspects, and provide witnesses if requested to do so by the court. According to Article 72, a state that believes divulging top-secret intelligence or forcing a high-clearance witness to testify would compromise its national security can petition the court to that effect—but the court, if unconvinced, can still "order disclosure; or, to the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances." Moreover, while jurisdiction is limited to crimes committed against the citizens of ratifying states or in their territories, there is no such limitation on the nationality of the alleged perpetrator, and therefore no person on earth is immune from prosecution—which means that if the court should feel like taking advantage of an American official's visit to London to issue a warrant for crimes allegedly committed by American troops operating in a member state, Britain would be obligated to arrest him and ship him to the Hague for trial.

Despite the court's inevitable politicization and its remarkable powers to brush aside the sovereign rights of states, its supporters maintain that it is still an important step forward in the struggle for international justice, since the very threat of punishment might succeed in preventing some war crimes from happening. As former U.S. President Jimmy Carter told CNN in April 1998, "Just knowing that the international criminal court is there, I think, would be a great deterrent among those who might be

inclined to perpetrate these kinds of crimes." Perhaps "good" states should be willing to give up on some of their sovereign rights, the reasoning goes, if the fear of prosecution will lead the "bad" ones to stop the killing.

Such a claim is untenable, however. Deterrence begins with fear, and while brutal dictators fear many things, legal proceedings by international bodies lacking independent organs of enforcement are unlikely to be one of them. Locked in a permanent struggle for survival, the average war criminal will probably view the prospect of trial and imprisonment as no worse than what his internal and external enemies have in store for him if he should lose his grip on power—a failure that would anyway have to happen before any trial could take place. As John Bolton, one of America's leading scholars opposed to the ICC (and today an under secretary of state in the Bush administration), put it in *The National Interest*:

> Deterrence ultimately depends on perceived effectiveness, and the ICC is most unlikely to have that. Even if administratively competent, the ICC's authority is likely to be far too attenuated to make the slightest bit of difference either to the war criminals or to the outside world. In cases where the West in particular has been unwilling to intervene militarily to prevent crimes against humanity as they were happening, why will a potential perpetrator be deterred by the mere possibility of future legal action?

Unless one can persuasively contend that the nations of the world are more likely to send their sons to die on a battlefield in a case where arrest warrants have been issued than in a case where no permanent international court exists to issue them, the ICC will have no effect on the calculations of such regimes. Which returns us to where we began: As long as the armies of the world are built for the protection of the nations that build them, and are not beholden to a single world government, a permanent international court contributes little to deterring war crimes,

even as it opens the door to endless litigation against officers and leaders of democratic countries involved in legitimate military operations.

For those democracies which have acceded to the Rome treaty, however, the ICC poses a more profound problem. By giving up some of their sovereign rights to a foreign tribunal that is not accountable to their own citizens, these countries in Europe and elsewhere have compromised on many of the basic tenets of democratic governance: That one should be legally bound to answer only to the laws passed by one's elected legislature and the rulings of one's democratically appointed judges; that the interests of national security, while never justifying crimes against humanity, nonetheless should be the sole responsibility of elected leaders, and not left to the judgment of unaccountable judges appointed by external regimes; that it is the task of government to protect citizens against foreign agents, whether they take the form of armed assailants or legal institutions. As Paul B. Stephan, a professor of law at the University of Virginia, has argued, any new intrusion of international law of the kind represented by the ICC "encroaches on democracy by taking off the table choices that democratic institutions, whether federal, state, or local, wish to make.... Each of these developments shrinks the realm of democratic public decision-making and makes it less likely that lawmaking will reflect the popular will." At a time when liberal, democratic regimes have given the world its greatest hope for the betterment of human governance, the ICC undermines that hope by undermining the foundations upon which democracy is built.

In Israel, the question of which side to take in the contest between America and Europe over the International Criminal Court has not been a simple one. On the one hand, memories of the role of the Nuremberg trials in punishing Nazi officials have made Jews generally sympathetic to the desire to punish war criminals; on the other, the displays of anti-Semitism at international gatherings such as the World Conference

Against Racism in Durban, South Africa, in September 2001 have served as a sharp reminder that the Jewish state can expect little in the way of fair play from international bodies. So, while Israeli political leaders with close ties to the European Union, such as former Foreign Minister Shlomo Ben-Ami, former Justice Minister Yossi Beilin, and Deputy Foreign Minister Michael Melchior, have championed the cause of Israeli participation, and even succeeded in December 2000 in convincing Israel's government to sign the Rome statute, most of Israel's leadership has grown suspicious of the European initiative. This past June, the national unity government of Ariel Sharon decided, by a near-unanimous vote, to withdraw Israel's signature. This decision was welcomed even by some of Israel's most dovish commentators, including the daily *Ha'aretz*, which argued that "At the heart of the ICC stand good intentions, but Israel cannot rely on them or think that it will get a fair trial. Israel's bad experience with many international organizations… raises the suspicion that the new institution will also be politicized and aimed at harming Israel."

Indeed, there is good reason to fear that the ICC will put Israel high up on its prosecutorial agenda. The Jewish state has long played the role of pinata for politicized international bodies like the General Assembly: Israel is small and diplomatically isolated, making it an easy mark for the self-righteous harangues of the nations; it boasts an open society, making the collection of evidence infinitely easier than in countries like Syria or North Korea; and it is mired in a prolonged military conflict on several fronts, creating a constant flow of events and rumors which form the substance of accusations. At times, the bias of these bodies succeeds in distorting beyond recognition the nature of the Arab-Israeli conflict. As Jeremy Rabkin has written, "To judge by international authorities… Israel is not just a country with some faults but is the world's most odious regime. The UN Human Rights Commission, for example, voted six condemnations of Israel in 2001 and eight condemnations in 2002, though no other state has ever received more than one condemnation in the same year." Indeed,

over the past two years, the Human Rights Commission has been a stunning example of anti-Israel bias, systematically ignoring acts of terror against Israel while issuing a string of caustic condemnations of the Jewish state. In October 2000, for example, just weeks after the Palestinian Authority launched the present terror war against Israel, the commission passed a resolution which made no mention of Palestinian atrocities, but instead decried "the disproportionate and indiscriminate use of force in violation of international law by the Israeli occupying power against innocent unarmed Palestinian civilians…. The deliberate and systematic killing of civilians and children by Israel constituted a flagrant and grave violation of the right to life and a crime against humanity."

Nor should the contents of the Rome statute give Israelis reason for comfort. Some of the "war crimes" listed are so vaguely worded that they can be applied to a wide variety of acts that are unavoidable in any real war—such as the clause barring "outrages upon personal dignity, in particular humiliating or degrading treatment." Others are tailor-made for restricting states that are fighting against terrorist groups, such as the ban on "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects… which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated"—which, when taken in the context of an ongoing battle against terrorists using densely populated civilian areas as cover, can be easily interpreted by a politicized court to address almost any serious Israeli operation. And then there is the as-yet-undefined category of "crimes of aggression" appearing in Article 5, which may open the door to interpreting nearly every pre-emptive move on Israel's part as an indictable offense.

But the clause most clearly targeted at Israel is the one that defines as a war crime "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies." This definition was reportedly inserted into the Rome treaty after an intensive campaign by the delegations from Syria and Egypt. Given that UN bodies

view Israel as an occupying power in every inch of the territory it captured in 1967, this provision would appear to make war criminals out of every Israeli leader, housing minister, building contractor, or even homeowner who contributes to the expansion of Jewish communities anywhere in Judea, Samaria, Gaza, or the Golan Heights, or in the northern, eastern, and southern neighborhoods of Jerusalem. Israel's attorney general, Elyakim Rubinstein, told the Knesset Committee on Law, Constitution, and Justice in June of this year that "The ICC is a great unknown for us…. We do not know what it will mean for Jewish settlement in Judea, Samaria, and Gaza, or in the neighborhoods of Jerusalem—it could well be that all new building in these areas will be considered a war crime." Alan Baker, the legal adviser to the Foreign Ministry, put the point more emphatically: "This document gives no one immunity…. Anyone involved in decision-making connected to settling citizens in conquered territory is liable to be arrested, beginning with the prime minister and down to the last citizen."

Israeli ratification of the treaty would make matters worse. In recent months, Israeli law-enforcement and military officials have found themselves forced to reassure jittery soldiers and pilots that their government will protect them from the reach of the ICC. But ratification would make any such protection a violation of international law, and it might not even hold up in Israel's courts, which in recent years have given significant weight to the obligations arising from such multilateral treaties. With the issuance of a warrant, Israel would be treaty-bound to arrest the accused—even a sitting prime minister—and extradite him to the Hague. Israel would also be obligated to hand over classified documents, such as war-cabinet discussions or top-secret intelligence briefs, which the court believed pertinent. Perhaps it is hard to imagine Israel, or any other healthy democracy, actually cooperating in such cases. But it is easy to imagine the international outcry and the real political damage that would result from non-compliance—a no-win situation that Israel's enemies would try to reproduce at every opportunity.

Given the dangers inherent in the court, Israel was surely right to withdraw its signature from the Rome treaty. Yet the ICC still represents a serious threat to the sovereignty of states, and it is safe to say that the clash between the American and European visions has only just begun. With time, defenders of the democratic way of life will come to understand the real problems of the International Criminal Court: That it is certain to become just as politicized as the many other comparable bodies created over the past half-century; that its invasive powers undermine bedrock principles of free and responsible democracy while limiting the ability of lawful countries to defend themselves militarily; and that its deterrent value against actual war crimes is illusory. The court's supporters in Israel and elsewhere undoubtedly see it as a victory for the cause of international justice and a step towards a more enlightened world. But we have been here before. By seeking to give up their hard-won sovereignty to an international tribunal, they have again fallen into the trap of confusing global politics with universal morality, and the results are a foregone conclusion.

David Hazony, for the Editors
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