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Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court

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ASSAULT ON SOVEREIGNTY: THE CLEAR AND PRESENT DANGER OF THE NEW INTERNATIONAL CRIMINAL COURT

GUY ROBERTS*

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INTRODUCTION: THE DREAM CONFRONTS
REALITY

“How long will you keep killing people?” asked Lady Astor of Stalin in 1931. Replied Stalin, “The process would continue as long as was necessary” to establish a communist society.¹

For decades, international lawyers, diplomats, and statesmen have worked to create a permanent international court to prosecute war crimes and crimes against humanity. Efforts to create such a court, however, floundered on the rocky shoals of the Cold War. The end of the Cold War rekindled the hope such a court could actually become a reality. Indeed, that hope became reality in July of 1998 when most of the nations of the world met in Rome and voted on a statute that would create a new International Criminal Court (“ICC”). Proponents hailed the new court as “a giant step forward” in furtherance of human rights and the rule of law.

The United States, as well as most countries of the world, long supported the concept of a permanent, sitting international criminal court. Indeed, the Clinton Administration emphasized its support for the concept on numerous occasions before the Rome Conference convened.² And yet, at the conclusion of the Conference, the United States, along with six other states, voted against the establishment of

1. R.J. RUMMEL, DEATH BY GOVERNMENT 79 (1994).

2. See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 12-14 (1999) (discussing the United States' role in supporting and drafting the statue for the ICC prior to the Rome Conference).

the new court.³ Many condemned the United States for doing so, calling it an abandonment of the rule of law and the pursuit of justice.

This essay will explain that the proposed ICC is fundamentally flawed and suffers from the unintended consequences of making justice and peace harder to achieve. Simply put, it will not stop the next Lenin, Stalin, Hitler, or Pol Pot. Instead, it will likely rob nations of their sovereignty, impose new standards of law based on the whim of activist judges, and eliminate other more viable options for achieving peace and social justice. Nations that embrace this court should do so only after careful review and after acknowledging that they are, in effect, agreeing to cede their sovereignty over their own court systems and notions of justice to a supra-national tribunal. The new court will pass judgment on the practice of nations and inevitably force them to adhere to concepts of international law either previously rejected or inconsistent with the customary practice of nations. This essay argues the International Criminal Court puts at risk the ultimate objective of peace at the unacceptable cost of a nation's sovereign rights.

I. THE LIGHT THAT FAILED: THE GENESIS OF THE ICC

In the civilized world's box of foreign policy tools, [the International Criminal Court] will be the shiny new hammer to swing in the years ahead.

—David J. Scheffer, U.S. Representative to Rome Conference⁴

War crimes trials, or attempts to create them, are not new. The genesis of war crimes tribunals, and the long-stated goal of establishing an international criminal court, is the liberal democratic belief in universal rights not bound by geography, borders, or

3. See Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, 1998 ASIL INSIGHTS, available at <http://www.asil.org> (stating that U.S., China, Iraq, Israel, Libya, Qatar, and Yemen opposed the Rome Statute, while twenty-one other states abstained).

4. David J. Scheffer, *International Judicial Intervention*, FOREIGN POL'Y 34, 51 (1996).

cultures.⁵ In addition to the current tribunals for Yugoslavia and Rwanda, there are at least five other instances in recent history where states debated the efficacy of such efforts.⁶ Following the Nuremberg and Tokyo trials, the newly constituted United Nations ("U.N.") created an International Law Commission ("ILC") to examine the possibility of establishing a permanent international criminal tribunal.⁷ In the 1950s, the ILC produced two draft statutes, but the tensions of the Cold War resulted in little progress and no serious interest in such a court.⁸

In 1989, the U.N. delegation from Trinidad and Tobago reintroduced the idea of establishing an international tribunal to address the growing worldwide threat of international drug trafficking.⁹ The ILC submitted a draft to the U.N. General Assembly in 1994. Subsequently, in 1996, the U.N. General Assembly allowed the establishment of a Preparatory Committee to work on the

5. See generally, STANLEY HOFFMANN, DUTIES BEYOND BORDERS: ON THE LIMITS AND POSSIBILITIES OF ETHICAL INTERNATIONAL POLITICS (1981) (exploring the nexus between morality and international affairs); ROBERT L. HOLMES, ON WAR AND MORALITY (1989) (assessing role of morality in international relations and arguing that no modern warfare is morally justifiable); JAMES T. JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY (1981) (discussing codification of "just war" theory in international law).

6. See generally GARY BASS, STAY THE HAND OF VENGEANCE (2000) (recounting historical attempts to try war criminals). Other less well-known cases include the United States and British setting up war crimes trials after the Spanish-American War and the Boer War, respectively. These include the abortive treason trials of Bonapartists in 1815; the botched trials of German war criminals after WWI, to include an attempt to try the Kaiser; attempts at prosecuting some of the Young Turk perpetrators of the Armenian genocide; the Nuremberg trials of Nazi war criminals; and the prosecution of Japanese war criminals at the Tokyo international military tribunal. *Id.*

7. See Benjamin B. Ferencz, *International Criminal Courts: the Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203, 225 (1998) [hereinafter Ferencz, *Legacy of Nuremberg*] (discussing the impetus for creating a permanent international criminal court); see generally BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE (1980) (detailing the historical development of the ICC).

8. See Ferencz, *Legacy of Nuremberg*, *supra* note 7, at 218 (setting the historical context for the establishment of a permanent international criminal court).

9. *Id.* at 225.

creation of an international criminal court.¹⁰ Two years later, the committee, with the participation of over ninety countries and numerous nongovernmental organizations (“NGOs”), submitted a revised ILC draft statute.¹¹ Despite the fact that there were large areas of disagreement over the complex one hundred sixty-seven page draft statute (there were approximately fifteen hundred sections or parts that remained in dispute), the U.N. General Assembly nevertheless agreed to convene a conference in June 1998 to negotiate and approve a statute to create a new international criminal court.¹²

In just five weeks during the summer of 1998, one hundred sixty of the world’s nations gathered in Rome to debate, refine, and agree on a final implementing statute for an international criminal court.¹³ At the beginning, it did not appear the delegates could agree on the numerous unresolved issues, let alone finalize a statute to establish the court. By the end of the conference, significant disagreements over jurisdictional issues, definitions of crimes, the role of the Security Council, and referrals to the court continued to separate the delegations.¹⁴ Last minute deals and behind-the-scenes maneuvering resulted in a document few delegations fully read or understood. Further, unlike other treaty conferences of this magnitude, the procedural rules were changed to allow voting instead of the usual agreement by consensus.¹⁵ Despite the concerns over many aspects and specific details of the proposed court, a large number of like-

10. See *id.* at 226 (explaining the evolution of the ICC).

11. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Preparatory Committee, 61st Meeting, at 2, 168, U.N. Doc. A/Conf. 183/2/Add.1, (1998), available at <http://www.un.org/icc> (proposing a draft statute and draft final act on the establishment of the ICC).

12. See Press Release, United Nations, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, L/ROM/22 (July 17, 1998), available at <http://www.un.org/icc/pressrel/lrom22.htm> (detailing the unresolved issues in the Rome Statute).

13. See *id.* (noting events of the Rome Conference).

14. See Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT’L L. 2, 4 (1999) (discussing contentious issues of Rome Conference).

15. See *id.*

minded states—aided and abetted by thirty-three intergovernmental organizations and a coalition of roughly one hundred twenty-four NGOs—resolved at all costs to have the conference agree on an ICC, even if all the details could not be worked out in time.¹⁶ Objections and concerns over moving too fast were brushed aside in an almost religious zeal. The U.S. delegate to the Conference described it this way:

The process launched in the final forty-eight hours of the Rome Conference minimized the chances that these proposals and amendments to the text that the U.S. delegation had submitted in good faith could be seriously considered by delegations. The treaty text was subjected to a mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the like-minded group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 a.m. on the final day of the conference, July 17. This “take it or leave it” text for a permanent institution of law was not subjected to rigorous review . . . and was rushed to adoption hours later on the evening of July 17 without debate.¹⁷

These like-minded state delegations were so desperate and determined to create an international criminal court they were prepared to agree to the draft statute no matter what the defects or potential problems. Certain provisions were never openly discussed, and no nation’s delegation had time to undertake a rigorous review of the final full text.¹⁸

Reflecting on these last minute, middle of the night maneuvers by ICC zealots reminds one of Bismarck’s often quoted aphorism: “[i]f you like laws and sausages, you should never watch either one being made.”¹⁹ Whether such maneuvers reflect a principled method for

16. See Scharf, *supra* note 3 (explaining that groups actively participated in the conference while only states were allowed to vote, but noting many states adopted verbatim the arguments and statements of these groups).

17. See Scheffer, *supra* note 2, at 20; see also Press Release, *supra* note 12 (showing that Israel and Singapore expressed similar concerns as the United States with respect to the last minute frenzy by some delegations to ratify the statute, despite its deficiencies).

18. See Scheffer, *supra* note 2, at 20 (describing the inadequate review and negotiation process of the draft statute prior to its ratification).

19. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 190 (Library of Congress,

treaty construction is arguably debatable. This holds particularly true with regards to the creation of a new international tribunal that is fundamentally flawed and will have extraordinary powers with the capability of dictating its will to independent and sovereign states.

II. THE CASE FOR THE COURT – POINT AND COUNTERPOINT

FIAT JUSTITIA ET PEREAT MUNDUS (LET JUSTICE BE DONE, THOUGH THE WORLD PERISH)²⁰

Justice in the life and conduct of the state is possible only as it first resides in the hearts and souls of its citizens.²¹

The Secretary General of the U.N. called the establishment of a permanent ICC “the promise of universal justice.”²² Human rights activists and proponents of war crimes tribunals proclaimed a wide array of lofty objectives for the ICC. These include, but are not limited to, the claim that such tribunals will bring justice, establish peace, establish new international norms for the betterment of all, and ultimately outlaw war altogether. Many NGOs accept such sweeping claims as a kind of orthodoxy, despite the absence of any supporting empirical evidence. On the contrary, the notion that war crimes trials are always appropriate should raise skepticism for many reasons. For example, due process may interfere with substantive justice through technical acquittals and delays in punishing the guilty. Also, foreign-imposed trials may cause a nationalist backlash, as is currently in evidence in Serbia. Or, a moralistic insistence on punishing war crimes may make it impossible to deal with bloodstained leaders who, however repulsive, have the capacity to end a war. This essay proffers that when politics is linked to law,

Congressional Reference Division ed., 1989).

20. Motto of the Holy Roman Emperor, Ferdinand I (1503-1564), COLUMBIA WORLD OF QUOTATIONS (1996), available at <http://www.bartleby.com/66/96/21998.html>.

21. Dr. H. B. Alexander, Inscription over the 10th street entrance of the U.S. Department of Justice Building, Washington, D.C.

22. Kofi Annan, *Advocating for an International Criminal Court*, 21 FORDHAM INT’L L.J. 363, 366 (1997).

crucial flexibility is lost—with potentially catastrophic results.

ICC advocates argue that the benefits of war crimes tribunals in general, and the ICC in particular, outweigh these potential costs and any perceived flaws in the ICC itself.²³ They argue that war crimes tribunals will achieve peace and justice in six key ways: (1)purging threatening enemy leaders; (2)detering war criminals; (3)rehabilitating former enemy countries; (4)individualizing blame for atrocities rather than condemning an entire ethnic group; (5)establishing the truth about wartime atrocities; and (6)averting retribution. Upon closer examination, however, there is little evidence to support these contentions. Conversely, to the extent that one can give weight to any of them, the costs far exceed the perceived benefits. Only the hopes of those who see the current international state-centric system as obsolete and an obstacle to world peace support these “justifications.”

A. PURGING DESPOTS, MADMEN, AND OTHER INTERNATIONAL PARIAHS

Granted, purging threatening leaders can be an important part of reforming a conquered country, but it oftentimes requires a serious military commitment to ride out the nationalist backlash set off by foreign-imposed justice. Additionally, it is never enough just to target the leaders. For public attitudes to shift, criminal leaders must be tried—their aura of mystery shattered by showing their weakness and stupidity, and their prestige deflated by the humiliation of standing in the dock. However, this only works in a situation such as post World War II (“WWII”) Germany, where there was an absence of any opposition to the trials and, ultimately, a national renunciation of Nazism. If the opposition remains strong and the intent is (or is perceived as being) punitive rather than rehabilitative, then there is less likelihood of success. Backlash and the potential of attacks on occupying soldiers become significant concerns as the trials

23. See generally Press Release, United Nations, Secretary-General Says Establishment of International Criminal Court Is Major Step in March Towards Universal Human Rights, Rule of Law, L/ROM/23 (July 18, 1998), available at <http://www.un.org/icc/pressrel/lrom23.htm> (praising the creation of the ICC and noting that it will “have unquestioned authority and the widest possible jurisdiction”).

themselves are perceived as nothing more than show trials.

In Bosnia, the ad hoc war crimes tribunal is an example of how a decision to detach war crimes from the underlying political reality advances neither the goal of a political resolution nor the goal of punishment for war criminals. Unlike Nuremberg, in Bosnia, there are no clear winners and no clear losers. Indeed, in many respects the war in Bosnia is no more over than it is in other parts of the former Yugoslavia. Thus, the future status of the warring parties, their respective politico-military postures, and their levels of political support are far from clear. Their prior leaders, or those closely associated to them, are still in power and likely to remain so for the foreseeable future.

Significantly, there is no agreement—among any of the parties inside or outside Bosnia—about how the Yugoslav tribunal fits into the overall political disagreement and its potential resolution. Indeed, Bosnia is a case study of how insisting on making legal process a higher priority than the political resolution of a dysfunctional society can adversely affect both the legal and political sides of the equation. It is far from clear that war crimes trials will result in the expiation of wartime hostilities. Press reporting over the years since the creation of the Yugoslav tribunal seems to show almost without contradiction that Serbs regard the tribunal as hopelessly biased against them. This belief reaffirms the long-standing Serbian view that they, as a people, are not understood or appreciated. Croats are outraged with the indictments of some of their people, because the indictments implicitly equate them with the Serbs. Finally, the Bosnian Muslims view the whole process as inadequately vindicating their claims of oppression at the hands of both the Serbs and the Croats.²⁴

Very much unlike Nuremberg, much of the Yugoslav war crimes process seems to be about score settling rather than a more disinterested purging of war criminals that purports to contribute to political reconciliation. The Serbs believe they are being unfairly treated and hold this view strongly. Consequently, the “search for justice” harms the cause of Bosnian national reconciliation. Under

24. See Amra Kebo & Patrick Bishop, *Haunted by the Ghosts of Srebrenica Three Years On, Families Still Grieve for the Thousands Hunted to Death by the Serbs*, DAILY TELEGRAPH, July 10, 1998, at 20 (describing the carnage of the massacre and the lack of justice as perceived by the victims' families).

the circumstances, it is hard to see how an independent ICC would fare much better.

B. DETERRING WAR CRIMINALS

Former Secretary of State, Madeleine Albright, has argued that:

In former Yugoslavia, each time the prospects of punishing war criminals has been publicized, the treatment of detainees has improved and atrocities have diminished. Today, there are signs that some of the worst violators of human rights are being deprived of their authority by one-time protectors who now fear justice under the law. In short, the more serious we are about the Tribunal, the greater the potential deterrent the Tribunal will be.²⁵

The U.N. further proclaims, “[o]nce it is clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment . . . it is hoped that those who would incite a genocide [and other crimes against humanity] will no longer find willing helpers.”²⁶

Despite these claims, there is little evidence to support the contention that war crimes tribunals have had a deterrent effect, either in the near or long-term. Even the best-established domestic legal systems are incapable of deterring all murderers, or even petty thieves for that matter. War crimes tribunals face a far greater challenge. These tribunals are meant to deal with the bloodiest of crimes; men willing to commit mass murder are terribly difficult to dissuade. Such a regime will not be deterred by anything short of substantial military force, and maybe not even that. Although some less ideological regimes may be deterred by the threat of war crimes prosecutions, those bent on mass slaughter historically simply shrugged off such warnings. When legal threats finally arrive, the

25. See Madeleine Albright, *Bosnia in Light of the Holocaust: War Crimes Trials*, Address at the U.S. Holocaust Memorial Museum (Apr. 12, 1994) (arguing for a long-term global deterrent: “[i]f the architects of war and ethnic cleansing in Bosnia go unpunished, the lesson for would-be Milosevic’s around the world will endanger us all”).

26. See United Nations, *Overview of Rome Statute of the International Criminal Court* (1998), available at <http://www.un.org/law/icc/index.html> (providing an overview of the development and provisions of the Rome Statute).

mass killings are well underway, so the accused are already criminally liable and, thus, think they have nothing to gain by stopping the slaughter. Conceivably, some lower-level thugs may be cowed, especially if military threats accompany the legal ones, but experience shows that threats of prosecution are unlikely to sway genocidal regimes. Again, the Bosnian example is instructive.

The Yugoslav tribunal did not substantially dissuade war crimes in the former Yugoslavia. In the summer of 1992, for instance, the U.N. warned Bosnian Serb leaders that expelling Muslims and Croats was a war crime to no avail.²⁷ The fall of Srebrenica in July 1995, with the subsequent massacre of at least seven thousand Bosnian Muslims,²⁸ was the most dramatic failure in Bosnia. It occurred two years after the creation of the tribunal, and shortly after it became clear that the tribunal was about to indict those responsible. Likewise, specific threats from The Hague did not stop President Slobodan Milosevic's forces in 1999 from committing mass killings and expulsions in Kosovo. Indeed, as a former defense counsel in The Hague noted, "No criminal justice system is going to stop crime. It can only curb it. And what crimes might have been committed that weren't committed obviously it's impossible to say."²⁹

Indictments of the International Criminal Court will not deter Saddam Hussein or the next Pol Pot any more than the Yugoslav War Crimes Tribunal deterred Bosnian Serb strongmen from massacring the innocent. The ICC may issue indictments, but unless war criminals are defeated and stripped of power, it is unlikely they will be brought to justice, at least in the near term. Worse, indictments may further entrench a powerful despot, in light of the absence of any incentive to support a peace or the transition to democracy.

27. See LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* 248 (1997) (describing the role of U.N. officials in attempting to terminate ethnic cleansing in Bosnia).

28. See JAN WILLEM HONIG & NORBERT BOTH, *SREBRENICA: RECORD OF A WAR CRIME* 175-85 (1996) (explaining the U.N.'s failure to intervene and end the massacre of Bosnian Muslims in Srebrenica).

29. Personal correspondence from Lee Casey, former defense counsel in The Hague, to author (Jan. 25, 2000) (on file with author).

C. REHABILITATING "RENEGADE" STATES

This justification also lacks in the way of empirical evidence to support the claim that international crimes against humanity or war crimes trials will provide the needed catharsis to a nation and its people torn asunder by conflict or intolerable oppression. Certainly, if Germany is the best-case scenario, one must be modest about one's hopes for a quick rehabilitation. It is not that tribunals have no positive effect, but that the effect is far from decisive and certainly not quick. The popular image of Nuremberg as a lightning catharsis, transforming Germany at a stroke from a thoroughly Nazi country to a penitent democratic one, is a myth. Instead, the Nuremberg experience suggests that, at best, war crimes tribunals are not a quick fix, but rather a small part of a much more ambitious and time-consuming social engineering project—a prospect that few nations are willing to undertake.

Transformation to representative government and concomitant respect for human rights is not a result or by-product of war crimes trials. So far, with the Yugoslav and Rwanda tribunals, observers view the effect of such trials more as victors' justice or vengeance. That being the case, one would be hard pressed to find any rehabilitative effect. Indeed, the Yugoslav Tribunal's chief prosecutor's insistence that Serbia immediately "extradite somebody," and the new government's dismissal of domestic trials for war crimes caused Serbs to view those extradited as "martyrs," creating a general feeling of persecution among Serbs.³⁰ There is, however, overwhelming evidence to conclude that the way to end war crimes and other atrocities is "through restricting and checking power that is, through fostering democratic freedoms."³¹

30. See R. Jeffrey Smith, *Yugoslav Leaders Resist Demand for Extradition*, WASH. POST, Jan. 25, 2001, at A13 (reporting that many Yugoslav officials oppose Serbian prosecutions in an international forum and prefer to try former dictators domestically when the nation is more receptive to the notion).

31. See RUMMEL, *supra* note 1, at 17 (cataloguing evidence that undemocratic state regimes with arbitrary power commit human rights violations, Rummel argues that, "as the arbitrary power of a regime increases massively, that is, as we move from democratic through authoritarian to totalitarian regimes, the amount of killing [by the state] jumps by huge multiples").

D. ENDING IMPUNITY: INDIVIDUAL VERSUS COLLECTIVE RESPONSIBILITY

Former Secretary of State Albright declared that “responsibility for [war] crimes does not rest with the Serbs or Croats or Muslims as peoples; it rests with the people who ordered and committed the crimes. The wounds opened by this war will heal much faster if collective guilt for atrocities is expunged and individual responsibility is assigned.”³² This is, of course, an extremely difficult task. After a war or mass slaughter, the massive number of perpetrators overwhelms the capacity of any legal institution. No tribunal ever seriously contemplated prosecuting more than a fraction of the guilty individuals, so trials tend not to put the blame where it fairly belongs. Of course, if one does not want to conduct hundreds or thousands of trials, or declare whole organizations criminal (as was done in Nuremberg), then a legal approach will necessarily let off large numbers of war criminals. At best, a war crimes tribunal will punish the guiltiest. No state has ever contemplated catching every war criminal, however much each criminal may deserve it. For example, there are an estimated 80,000 to 100,000 murderers in the Rwandan genocide. But as one critic noted, “[s]ince it would be mad to add a second genocide to the first, it is out of the question to kill all the killers. But the desire for vengeance can be assuaged if the real organizers, the ‘big people’ go to the gallows.”³³ The Bosnian Serb soldiers who fired shells indiscriminately into Tuzla or Zepa are war criminals. The snipers in the hills around Sarajevo are war criminals. They are unlikely ever to be tried by any tribunal, and certainly not by the Yugoslav tribunal, which, to date, only publicly indicted eighty-one men.

On the other hand, war crimes tribunal justice is inevitably symbolic; a few war criminals stand for a much larger group of guilty individuals. Thus, what is billed as individual justice can actually become a *de facto* way of exonerating many of the guilty. Clearly, the idea that war crimes tribunals will individualize guilt is fraught with ambiguity. In practice, the logistical and political obstacles to a complete accounting tend to spare many perpetrators,

32. Albright, *supra* note 25.

33. GERARD PRUNIER, *RWANDA CRISIS: HISTORY OF GENOCIDE* 342 (1995).

collaborators, and bystanders. This is useful, insofar as it lessens the danger of nationalist backlash; but it is hardly anything for court advocates to tout or cheer about.

E. ESTABLISHING THE TRUTH

People argued that war crimes trials are useful because they establish both historical record and truth vis-à-vis alleged atrocities. Certainly, the absence of a well-established historical record facilitates the denial that atrocities ever occurred. However, tribunals have no monopoly on truth telling. Ultimately, the purpose of such trials is not to determine an absolute truth, but rather to establish guilt or innocence and punish accordingly. Rules of evidence may limit or exclude information that would add to an historical record. Consequently, trials do not necessarily establish the definitive record or chronology of objective fact. Current negotiations on evidentiary rules for the ICC would bar witness' statements from public disclosure. Indeed, in many countries torn asunder by war and violence, domestically-authorized truth commissions do a much better job of creating an objective and truthful historical record, as well as reconciling victims, to the extent possible, with their tormentors.

A popular view among contemporary political analysts is that an historical inquiry and record that assimilates the evil past is necessary to restore the collective in periods of radical political change. Establishing the "truth" about the state's past wrongs can serve to lay the foundation of the new political order:

[S]uccessor government[s] [have] an obligation to investigate and establish the facts so that the truth be known and be made part of the nation's history. . . . There must be both knowledge and acknowledgement: the events need to be officially recognized and publicly revealed. Truth-telling . . . responds to the demand of justice for the victims [and] facilitates national reconciliation.³⁴

34. Alice H. Henkin, *Conference Report* in STATE CRIME: PUNISHMENT OR PARDON 4-5 (1989); see also Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commission in Latin America*, 20 LAW AND SOC. INQUIRY 79, 93-113 (1995) (evaluating success of truth commissions in Latin American countries); José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights*

To the extent it is necessary for national healing, these commissions and similar vehicles for truth gathering provide a more comprehensive and holistic view of the repressive tragedies of prior autocratic regimes than war crimes tribunals. Reports by these commissions serve as a device to shift the society out of a tragic past into the hopeful future of openness, freedom, and democracy. Honduras, El Salvador, Uruguay, Chile, Argentina, South Africa, and most of the countries of eastern Europe have all used this mechanism to heal the past, learn the lessons so as not to repeat them, and serve as a catalyst for liberalizing political change to democratic government.

F. ACHIEVING JUSTICE, AVERTING VENGEANCE

The most offered final justification states that the alternative to an international criminal court is a domestic tribunal more interested in vengeance than justice—often in an untamed form that is more destabilizing than international trials. It is argued that an impartial international tribunal is preferable to national prosecutions or vigilantism. National prosecution may not be legalistic; instead, it may result in highly politicized trials (as in Croatia) or show trials (as in Serbia). The pressure of trying war criminals may overwhelm national judicial systems (as in Rwanda), or it may simply prefer revenge to legalism. Under this justification, justice of a sort will be done. The question is whether it will be the fine-tuned response of a war crimes tribunal or the “crude” alternative of a national court subject to domestic political pressures for revenge rather than justice.

Such a justification ignores the historical record of societies or nations in turmoil that collectively opted for forgiveness and amnesty, instead of trials or vigilantism to deal with the individuals who committed human rights abuses. Uruguay is one such example.³⁵

Violations, 43 HASTINGS L.J. 1425, 1429-31, 1437 (1992) (arguing that a country can best heal when a newly elected government investigates human rights violations perpetrated by former governments).

35. See generally P. Hayer, *Fifteen Truth Commissions--1974-1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 616 (1994) (demonstrating that the Uruguayan President opposed even a limited investigation of the former military regime's human rights abuses). Numerous cases used amnesties to bring about reconciliation and ultimately peace. Amnesty laws were passed in Argentina, Brazil, Chile, El Salvador, Guatemala, Nicaragua, Spain, Suriname, and Uruguay.

In 1984, after years of military dictatorship, Uruguay negotiated a return to democracy; however, the document that codified the political transition did not address the oppressive crimes committed by the military. Consequently, when attempts were made to prosecute, the military pressured the government to enact an amnesty law, which it did in 1986.³⁶ There was enormous popular indignation over the amnesty law, and the families of the victims launched a successful petition campaign for a plebiscite on the law. Nevertheless, by a narrow margin, the people of Uruguay voted to uphold the amnesty law.³⁷ Consequently, investigations into human rights abuses and all trials then under way ended. A majority of the Uruguayan people believed that this was necessary for national reconciliation and to preserve the peace.³⁸ The results over the last sixteen years have borne out the wisdom of this action.

A permanent tribunal may actually end up undermining the case of human rights by diverting resources from those nations trying to confront past abuses or prevent new ones. For example, the money spent by the U.N. tribunal in Rwanda would be better spent modernizing Rwanda's judiciary or contributing to the development of civil society. Instead, Rwanda struggles to prosecute tens of thousands of prisoners charged with human rights abuses who will languish in jail for years before being brought to trial.

Frankly, it is difficult to see how an ICC prosecutor would agree not to prosecute a tyrant granted amnesty or clemency as part of a peace negotiation. The ICC, as the sole arbiter of its discretionary power, may deprive a state of its healing process as it transitions from authoritarian to democratic institutions. Few would argue that amnesties, as well as punishment, play a constructive role in shaping the political transformation of a nation. Granted, representatives of the soon-to-be-replaced regime often negotiate amnesties with the opposition. However, although these pacts may well be a product of

Id.

36. See Eugene Robinson, *Uruguay Vote Affirms Amnesty for Military; Opponents Called Plebiscite to Reverse Law*, WASH. POST, Apr. 17, 1989, at A21 (discussing enactment of amnesty law in Uruguay).

37. See *id.* (reporting results of the amnesty law plebiscite in Uruguay).

38. See *id.* (showing that proponents of the amnesty law hoped to put the past behind so that Uruguay can move forward).

bargaining and non-legislative processes, they are generally ratified through more participatory processes over the course of the transition.³⁹

There is a very real danger that the prospect of war crimes tribunals could, in fact, serve to perpetuate a war or destabilize post-war efforts to build a secure peace. Indeed, as Raymond Aron has argued, war becomes even more brutal:

Would statesmen yield before having exhausted every means of resistance, if they knew that in the enemy's eyes they are criminals and will be treated as such in case of defeat? It is perhaps immoral, but it is most often wise, to spare the leaders of an enemy state, for otherwise these men will sacrifice the lives and wealth and possessions of their fellow citizens or their subjects in the vain hope of saving themselves. If war as such is criminal, it will be inexpiable.⁴⁰

It is worth contemplating the likelihood of those then in power relinquishing their control if the only alternative awaiting them was an international trial and jail. If the world's dictators realize that amnesty or exile deals are worthless in the face of an indictment from the ICC, then a useful tool for a state's transition to democracy is blunted. Miscreants will be less willing to cede power or call off violence if they cannot trust promises of immunity. For example, would there be any chance of ending the bloodletting in Algeria, which so far has cost over 100,000 lives, if the ICC could ignore the recently brokered amnesty plan?⁴¹ Or, if the junta in Myanmar

39. See, e.g., Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.), available at <http://www.polity.org.za/govdocs/legislation/1995/act95-034.html> (establishing truth commission and granting amnesty to war crimes leaders in South Africa, and explaining that in South Africa, the amnesty debates were part of the Parliamentary debates relating to the adoption of the country's 1993 Constitution); see also Americas Watch Committee, *Challenging Impunity: The Ley de Caducidad and the Referendum Campaign in Uruguay*, AN AMERICAS WATCH REPORT [A.W.R.] 15-16 (1989). Recently, Algerians proposed a rebel amnesty plan to put an end to the killing and violence and bring reconciliation. See Howard Schneider, *Algerians Approve Rebel Amnesty Plan; Measure Aimed at Ending Civil Warfare*, WASH. POST, Sept. 17, 1999, at A17 (reporting that most Algerians want peace and reconciliation after seven years of conflict).

40. RAYMOND ARON, *PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS* 115 (1966).

41. See Schneider, *supra* note 39 (estimating death toll in Algerian civil war).

(Burma) believes that the ICC will hold it accountable, what incentive does the junta have to relinquish power to the forces of democracy? Given the choice, would Chinese dissidents rather have those responsible prosecuted for the massacre at Tiananmen Square or give them safety in exile in return for a democratic China? Furthermore, "[w]ithout a credible guarantee that they will remain unmolested abroad, dictators may well decide that they are better off in their presidential palaces with their security apparatus to protect them. If the people rise up, the obvious course will be to fire on the crowds rather than flee."⁴² A former Polish Solidarity leader explained the prospect of prosecution for crimes against humanity will not persuade a dictator to embark on the path of democracy since that path inexorably leads to incarceration or worse.⁴³ There are, he declared, "two paths from dictatorship: the path of Pinochet and the path of Ceaucescu. . . . 'I choose Pinochet.'"⁴⁴

The abstract ideal of an international judicial system established to right all wrongs has the real potential to upend internal political settlements negotiated to achieve national tranquility and strain otherwise good relations within the community of nations. Spanish magistrate Carlos Escobar's attempt to arrest General Pinochet, and his colleague Baltasar Garzon's arrest warrant for former leading members of the Argentine military dictatorship each resulted in political upheaval in Chile and Argentina, respectively.⁴⁵

It is easy to sit comfortably thousands of miles away and demand justice, but it can come at a very high price in countries slowly emerging from tyranny, such as Yugoslavia, Chile, South Africa, El

42. Marc A. Thiessen, *How Not to Get Rid of Dictators: No Tyrant Will Be Willing to Give up Power if He Ends up on Trial*, WKLY. STANDARD, July 17, 2000, at 16.

43. See *id.* (arguing that ICC prosecutions harm rather than facilitate a transition to democracy).

44. *Id.* At some point nations may decide that their democratic institutions are stable enough to authorize their prosecutors to indict and their courts to try former dictators. It took ten years for Poland to bring charges against former dictator Jaruzelski. See generally Marek Matraszek, *Jaruzelski: To Forgive and Forget*, WARSAW BUS. J., May 21, 2001.

45. See *Argentine President Vows to Reject Spanish Warrants* (Santiago Television Nacional de Chile Imagen Nacional, Nov. 3, 1999) (on file with author).

Salvador, and Poland. These countries have wisely eschewed justice in the name of social peace because unless one achieves “absolute” victory, similar to the Allies in World War II, it is extremely unlikely that the victors can impose absolute justice. This could require a compromise—even tolerating the intolerable—unfortunate as it may be. Of course, the ICC, following the example of the Yugoslav tribunal, would reject any such compromise, insisting that all indicted miscreants come before the bar for its brand of justice no matter what the social and political costs. Such trials jeopardize not only ultimate justice, but also the more precious value of social peace.

III. THE STATUTE OF THE NEW COURT: FRONTAL ASSAULT ON SOVEREIGNTY?

“If the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.”

—Abraham Lincoln⁴⁶

It is not the purpose of this essay to critique every provision of the proposed statute.⁴⁷ Only the more egregious and problematic issues are discussed here. NGOs and many national delegates to the Rome Conference, who were enamored with the idea of a world criminal court, disregarded the pleas of more thoughtful nations to fully address some very difficult issues. Nothing, not even the danger of losing their own national concepts of justice and law, could stop these coalitions from creating the ICC.

Even assuming that the concept of an international court is sound, many provisions in the statute should have raised concerns, even

46. First Inaugural Address of Abraham Lincoln (Mar. 4, 1861), in *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, at 268 (Roy Basler, ed.) (1953).

47. See generally Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22 (1999) (analyzing individual articles of Rome Statute); Michael N. Schmitt & Peter J. Richards, *Into Uncharted Water: The International Criminal Court*, 53 NAVAL WAR C.R. 93 (2000) (dissecting and analyzing provisions of Rome Statute).

among its most ardent supporters. Of course, given the haste by which the delegates ratified the statute, it is not surprising that there were substantive concerns.⁴⁸ Since the statute prohibits reservations under Article 120,⁴⁹ even states ostensibly in favor of the court may find themselves unable to ratify it because of the sovereignty and domestic legal concerns that arise.

A. JURISDICTIONAL LEVIATHAN: THE END OF SOVEREIGNTY?

The germ of dissolution of . . . government is in the constitution of the judiciary; an irresponsible body, . . . working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the states, and the government of all be consolidated into one.⁵⁰

—Thomas Jefferson

One of the most dangerous concepts enshrined in the statute, cleverly disguising the primacy of the Court's jurisdiction, is a concept called "complementarity."⁵¹ Article 1 states that the Court's power is limited by the principle of complementarity; that is, a national court's jurisdiction and authority take precedence over ICC jurisdiction.⁵² However, nations lulled into a false sense of hope that their judicial systems would always prevail in a battle of jurisdictions should take note of Articles 17 and 20. These articles allow the ICC

48. See Kirsch & Holmes, *supra* note 14, at 10-11 (describing how the delegates in Rome literally voted on a statute for the new court without reading the document).

49. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute on the International Criminal Court, July 17, 1998, art. 120, U.N. Doc. A/CONF.189/9 (1998), 37 I.L.M. 999 (1998) [hereinafter Rome Statute, or the Statute].

50. Letter from Thomas Jefferson to Charles Hammond (Aug. 18, 1821), in *THE WRITINGS OF THOMAS JEFFERSON, 1854-1915*, at 331-32 (Andrew A. Lipscomb & Albert Ellery Bergh, eds.) (1903).

51. See Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, 311 Cato Institute Policy Analysis (1998), available at <http://www.cato.org/pubs/pas/pa-311.html> (defining the "complementarity" concept as one in which the ICC complements, but does not replace, national criminal justice systems).

52. See Rome Statute, *supra* note 49, at art. 1.

to take jurisdiction if the state is unable or unwilling to prosecute, or if the proceedings are “conducted in a manner, which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”⁵³ The Statute defines “unwillingness” as an attempt to shield the concerned from criminal responsibility, an unjustified delay, or an obvious lack of independence or impartiality that would reflect an inability to do justice.⁵⁴ Who makes these determinations? The Court will act, in effect, as a supranational judicial body. Moreover, “[t]he ICC will become an unavoidable participant in the national legal process because it will set precedents regarding what it considers ‘effective’ and ‘ineffective’ domestic criminal trials.”⁵⁵

Given this extraordinary power, the ICC will become the “Supreme Court” of all national legal systems. Either a state adopts the decisions of the ICC or risks having its cases called up for “international criminal” prosecution. For example, in the United States, illegally seized evidence is generally inadmissible in a criminal proceeding. In most common law countries, however, illegally seized evidence is admissible, the nature of its seizure going to its weight versus its admissibility. Whereas a U.S. court would acquit an alleged war criminal due to illegally acquired evidence, the ICC could deem the American system ineffective and thus require that person be delivered to the ICC for trial. Other idiosyncrasies of national criminal systems could also fall under ICC scrutiny and judgment. The court could, for example, ignore or discount the protections crafted by a nation and its people to ensure the rights of all its citizens—including the guilty.

With most nations, the thought of trading national sovereignty and the rights enshrined in domestic law to the whims of international bureaucrats and jurists (with no understanding or interest in the cultural values that make up a domestic criminal justice system) should create sufficient concern to warrant hesitation and engender an informed debate before ratification, even if the concept of an ICC

53. *Id.* arts. 17, 20.

54. *Id.* art. 17.

55. See Dempsey, *supra* note 51 (warning that the ICC will infringe on state sovereignty as it slowly expands its jurisdictional authority and its decision produce national repercussions).

is politically attractive.

But apologists for the court argue that “[o]utmoded traditions of state sovereignty must not derail the forward movement” to creating this court.⁵⁶ Legal scholar Sandra Jamison argues that nations must prepare to cede some of their traditional sovereignty in pursuit of a potent international criminal court. “The absolute doctrine that a state is supreme in its own authority, and need not take into account the affairs of other nations,” she says, “is no longer tenable.”⁵⁷ Similarly, Lloyd Axworthy, Canada’s minister of foreign affairs, maintains that:

[There is] an acute dilemma for the United Nations, which finds itself torn between intervening in severe humanitarian crises and respecting national sovereignty. To date, it has responded largely on an ad hoc basis, although always with the terrible lessons of Central Africa and the former Yugoslavia in mind. Gradually, though, new ways of thinking are emerging that address this dilemma A key element of this new thinking is what has been called “human security.” Essentially, this is the idea that security goals should be primarily formulated and achieved in terms of human, rather than state, needs We start from the premise that the threat to life and limb of millions of individuals should take precedence over military and national security interests.⁵⁸

And, as one Court advocate candidly admitted, the ICC “cannot be achieved without impinging upon the traditional criminal jurisdiction of states, but the values concerned are important enough to justify this intrusion.”⁵⁹

56. See Benjamin B. Ferencz, Address at the Rome Conference at the Pace Peace Center (June 16, 1998), available at <http://www.un.org/icc/speeches/616ppc.htm> (asserting conventional power structures of stronger nations must consider the need for universal justice in places such as Yugoslavia and Rwanda).

57. See Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal That Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 432 (1995) (reasoning that an international criminal court would allow nations to prosecute crimes that were formerly out of their power).

58. Lloyd Axworthy, *The New Diplomacy: The U.N., the International Criminal Court, and the Human Security Agenda*, address at the Kennedy School of Government, Harvard University (Apr. 25, 1998), available at http://www.dfait-maeci.gc.ca/english/news/statements/98_state/98_030e.htm.

59. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of the National Courts and International Criminal Tribunals*, 23 YALE

Actually, the concept of “complementarity” argues against creating the ICC in the first place. If most national judicial systems are capable of addressing the substantive crimes the statute proscribes, then a supranational judicial tribunal is only necessary in cases where a national judicial system breaks down. Indeed, the ICC would likely supplant judicial systems in precisely those countries—such as Bosnia, Rwanda, and possible Cambodia—where the international community should encourage the disputing parties to find a comprehensive solution through their own domestic administration of justice. Removing key elements of the dispute—especially those emotional and contentious issues dealing with war crimes and crimes against humanity—undercuts the process of reconciliation and social justice that both victims and perpetrators need to cooperate under if they are ever to live peacefully together.

In fact, the situation in Bosnia illustrates how an international tribunal can be a part of the problem—not the solution. During the Dayton Peace Accords discussions, no one addressed the possibility of the Bosnians trying their own war criminals. The reason was that the Dayton Accords simply papered over the underlying causes of the current (and future) conflict. Moreover, since the Yugoslav Tribunal was already in existence, no one wanted to modify the mandate of the court, even if the parties could have reached an agreement on war crimes prosecutions.

Not only did the Yugoslav tribunal fail to contribute to a comprehensive solution in Bosnia, it arguably inhibited such a result. The recent arrest by national authorities of former Serbian leader Milosevic for embezzlement and other domestic crimes may actually exemplify the best solution. Milosevic reportedly surrendered after being promised by the new government that he would be tried by a domestic court rather than the international court. The resulting trial in a local court could prevent further polarizing an already fractured society. Major segments of Serbian society see any effort to send Milosevic to The Hague as a political move, an attempt to “blame the Serbian people alone for the breakup of Yugoslavia and for causing all the wars and atrocities.”⁶⁰ When Milosevic was subsequently

J. INT’L L. 383, 434-35 (1998).

60. Steven Erlanger & Carlotta Gall, *Milosevic Gave Up After Vow He’ll Get a Fair Trial*, N.Y. TIMES, Apr. 2, 2001, at A1.

handed over to the Yugoslav court for trial, over seventy percent of the Serbs deemed the tribunal "illegitimate," while forty-eight percent approved of his defiant attitude toward the court.⁶¹ It is difficult to see how either the ICC or the Yugoslav court can make an already difficult and painful national transformation any smoother or less painful. On the contrary, many, including those in the current government, see future trials as "witch hunts." Such trials are likely to embarrass past and current political leaders, Western leaders and diplomats, and foment further polarization and discontent among the population.⁶²

The experience of the Rwanda war crimes tribunal is even more discouraging. There, widespread corruption and mismanagement in that tribunal's affairs led many to hope that the tribunal would expire quietly before doing more damage. Equally troubling is the clear impression that score settling among Hutus and Tutsis is the principle focus of the Rwanda tribunal. In fact, with tens of thousands awaiting war crimes prosecutions, one wonders whether the tribunal is not simply genocide by other means. In addition to the Bosnia and Rwanda examples, there is also the example of Iraq where the absence of a tribunal further demonstrates the risks of a permanent court. Iraq's August 1990 invasion of Kuwait unquestionably qualifies as an unjustifiable act of aggression, and there is little debate that the Iraqis committed numerous illegal acts. Yet, by conscious decision, neither the United States nor any other power, including Kuwait, has seriously sought to create a war crimes tribunal for crimes in the Persian Gulf War.

The reasons are straightforward. Unlike Nuremberg, the goal of the victorious coalition in the Persian Gulf never was the unconditional surrender of Saddam Hussein and his removal from power. Indeed, if that had been the goal, there would not have been a coalition of nations because neither Syria nor Saudi Arabia were interested in removing Hussein from power and both worried about

61. See David Holley, *The Myth That Is Milosevic; Even After Defeat, the Former Yugoslav President's Supporters See Him as a Hero Who Epitomizes the Nation's Cult of Victimhood*, L.A. TIMES, July 31, 2001, A1 (detailing popular sentiment about Milosevic).

62. See Steven Erlanger, *A Wider Debate About the Role of Milosevic*, N.Y. TIMES, Apr. 2, 2001, at A8.

the precedent it would set. Accordingly, the coalition did not destroy the existing government of Iraq, its forces never occupied Iraqi territory any longer than was necessary, and they had no plans to transform Iraqi society from a dictatorship to a democracy. Thus, from the coalition's military perspective, war crimes trials formed no part of the long-range strategy. Over ten years later, one can only imagine how much more problematic negotiations over compliance would be with Iraq giving up most of its leadership in war crimes trials, in addition to complying with its other obligations under U.N. Security Council resolutions.

Finally, under Article 15, an unaccountable and independent prosecutor can initiate an investigation on his or her own determination.⁶³ To those that think such power will be exercised with restraint and in accordance with customary and currently accepted notions of international law, let alone domestic legal protections, one need only look at the current criminal tribunal for Yugoslavia for enlightenment. Chief Prosecutor Carla Del Ponte recently announced that NATO's use of, "depleted uranium munitions fall within our jurisdiction, because if the reports and fears of recent days proved founded, [their use] will constitute a war crime, and our tribunal has jurisdiction over war crimes."⁶⁴ This claim does not square with the law of armed conflict under either the Geneva Conventions or customary international law. An aggressive prosecutor, in pursuit of his or her own notions of the law and in concert with a sympathetic tribunal, could severely inhibit the legitimate conduct of foreign relations, alter customary international law, and even further restrict a nation's sovereign rights.

63. See Rome Statute, *supra* note 49, art. 15 (detailing the power of the prosecutor with respect to pre-trial investigations).

64. *Depleted Uranium: Hague War Crimes Prosecutor Not Ruling NATO Trial Out*, ROME LA REPUBBLICA, Jan. 14, 2001 at 14 (F.B.I.S. trans.).

B. UNIVERSAL JURISDICTION RUN AMOK?

Law never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice. . . . [P]erhaps you may consider whether the remedy [for injustice] will not be worse than the evil.

—Henry David Thoreau, *Civil Disobedience*⁶⁵

Interestingly, under Article 124 of the ICC statute, a government may claim a seven-year exemption from the Court's jurisdiction for war crimes committed by its nationals or on its territory.⁶⁶ Further, the Court has no jurisdiction over offenses occurring before the treaty comes into effect or over offenses occurring before ratification for states that become parties after that date.⁶⁷ Such a rule allows state parties to immunize nationals from prosecution for new crimes, but nationals of nonparties remain subject to prosecution no matter when new crimes are added or where they are located. As the U.S. delegate David Scheffer put it, "[f]or a criminal court, this is an indefensible overreach of jurisdiction."⁶⁸ It represents a radical development in the law of treaties, inconsistent with the fundamental principle that only states party to a treaty are bound by its terms.⁶⁹ Nevertheless, Article 12 extends the jurisdiction of the ICC to anyone, anywhere in the world, even without a referral by the Security Council or an established principle of customary international law.⁷⁰ The concept of universal jurisdiction over some

65. HENRY DAVID THOREAU, *WALDEN AND CIVIL DISOBEDIENCE* 225, 231 (Owen Thomas ed., 1966) (1866).

66. See Rome Statute, *supra* note 49, art. 124 (providing seven-year transitional period for states wishing to declare they do not accept the jurisdiction of the Court concerning crimes mentioned in article 8).

67. See *id.*, art. 11 (establishing jurisdiction *ratione temporis*).

68. Scheffer, *supra* note 2, at 20.

69. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 34-38, 1155 U.N.T.S. 331, 8 I.L.M. 679 ("A treaty does not create either obligations or rights for a third State without its consent"); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 324 (1987) (following the rules set forth by Articles 34-37 of the Vienna Convention).

70. See Rome Statute, *supra* note 49, art. 12 (establishing jurisdiction

crimes—for example genocide—does not apply to all the offenses listed in the ICC statute, nor does it envision the possibility that the jurisprudence of the court may cause the understanding of the offense to shift over time. As David Scheffer argues, “[t]he crimes within the court’s jurisdiction . . . go beyond those arguably covered by universal jurisdiction, and court decision or future amendments could effectively create ‘new’ and unacceptable crimes.”⁷¹

No doubt, the court will eventually add new offenses—offenses that are unlikely have the stature of established customary international law. This is an unprecedented change in the sources of national lawmaking, one that further diminishes the traditional notion of state sovereignty. The ICC’s claim to jurisdiction over the nationals of any state that has not joined this treaty is entirely unsupported in accepted rules of international law. In fact, there is no precedent in international law or practice for the exercise of jurisdiction by such a court over the nationals of a state that has not acceded to the treaty creating the court.

This should be of fundamental and singular importance to every state considering ratification, because it goes to the heart of the nation-state-centric international system. To accept the proposition that “like-minded states” can now obligate other states, by a treaty they have not signed or agreed to, portends a fundamental shift in the international system and the beginning of the end of state sovereignty. As one critic noted:

In attempting to subject a [nation’s nationals] to the jurisdiction of the ICC, the ICC states are in fact attempting to act as an international legislature, a power they do not have and a power that is fundamentally at odds with the guarantee of sovereign equality of States memorialized in the United Nations Charter.⁷²

preconditions).

71. Scheffer, *supra* note 2, at 18.

72. *Is a U.N. International Criminal Court in the U.S. National Interest?*, Hearing Before the Subcomm. on Int’l Operations of the Comm. on Foreign Relations U.S.S., 105th Cong. 724 (1998) (statement of Lee A. Casey, Attorney, Hunton & Williams, Washington, D.C.) [hereinafter *Casey Hearing*].

C. CEDING POWER TO THE NEW COURT: SUBJECT MATTER JURISDICTION

I will go to a war crimes tribunal . . . when Americans are tried for Hiroshima, Nagasaki, Vietnam, Cambodia, Panama!

—Zeljko Rasnatovic, indicted war criminal⁷³

I suppose if I had lost the war, I would have been tried as a war criminal. Fortunately, we were on the winning side.

—American General Curtis LeMay after WWII⁷⁴

Article 5 describes the subject matter jurisdiction of the court as “the most serious crimes of concern to the international community as a whole.”⁷⁵ What those crimes are exactly is subject to continuing disagreement. The Conference, for example, was unable to agree on the definition of the crime of “aggression,” one of the four categories of crimes—the others being crimes against humanity, genocide, and war crimes. Additionally, the definitions of other categories of crimes are far broader than those recognized in customary international law. At the Rome Conference and subsequently, NGO activists advocated that “experts” pontificating about what the law “ought to be” can create “instant” customary international law based merely on pronouncements from hastily arranged conferences. Such experts are, of course, prime candidates to serve as judges and prosecutors for the court. The court will then legislate new law in accordance with what judges and prosecutors think the law “ought to be.” We have seen this inclination even in the International Court of Justice. In the words of ICC proponent, Professor Theodor Meron:

[The Court has a] tendency to ignore, for the most part, the availability of evidence of state practice . . . and to assume that noble humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognized as such by states. The “ought” merges with the “is,” . . . [I]t may well be that, in reality, tribunals have

73. *The World Tries Again: Making Rules for War*, ECONOMIST, Mar. 11, 1995, at 23.

74. Richard Rhodes, *The General and World War III*, NEW YORKER, June 19, 1995, at 48.

75. See Rome Statute, *supra* note 49, art. 5 (outlining the four categories of crimes as being “(a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression”).

been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume it violates not only a moral principle of humanity but also a positive norm of customary law.⁷⁶

This is the case even where, in practice, there is no “positive norm of customary law.” The ICC will, essentially, be unfettered in its ability to decide when alleged “crimes” are subject to the jurisdiction of the court, as long as they reasonably fit within one of the many vague and broad definitions of crimes contained in the statute. Once constituted, the court will articulate its own interpretation of international law—one that, no doubt, is designed to reduce the discretion and flexibility of nations. The list of crimes, as vague as it may be, is only the starting point and is illustrative of more crimes to come. Proponents have already put forward proposals to add more crimes and to expand the vague definitions in order to cover radical agendas for social change.

This essay will briefly analyze each of the categories. The intent is not to provide an in-depth study, but to demonstrate how the Rome statute delineates vague and ill-defined categories. In turn, this essay demonstrates how these categories give the court extraordinary powers to define crimes, notwithstanding state practice or the collective will of states, as reflected by the actions or statements of the U.N.

IV. THE CRIME OF AGGRESSION

Defining aggression proved to be so difficult that the conference decided to wait until the statute’s seven-year waiting period for amendment has elapsed before taking up this problem. Interestingly, under the U.N. Charter,⁷⁷ the Security Council is the sole body authorized to determine when a state’s acts amount to aggression and respond accordingly. Allowing an independent ICC to adjudicate the crime of aggression would infringe on the prerogative of the Council and have the effect of second guessing the decisions of the Council. Conceivably, for example, the ICC could acquit an individual

76. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT’L L. 348, 361 (1987).

77. See U.N. Charter art. 33, para. 1.

responsible for acts the Council previously agreed constituted aggression. In effect, the ICC could become the final judge of all international acts, including those of the U.N., even to the point of declaring illegal acts agreed to by that body reflecting the will of the international community. In other words, eighteen judges will be in a position to dictate to the world at large what is acceptable conduct under their notions of international law—unconstrained and unaccountable.

V. THE CRIME OF GENOCIDE

One element of the definition of genocide includes an aspect of mental distress that the United States rejected when it ratified that treaty and passed enabling legislation to carry it out. However, given the statute's Article 120 bar to reservations, the statute's definition and the court's interpretation of that definition would control over domestic law.⁷⁸ In effect, to accept the statute, the United States would have to reverse the position it took vis-à-vis the Genocide Convention. Other nations had similar concerns, but as with all issues of jurisdiction the court will be the final arbiter on the obligations a nation has incurred upon ratification.

Once ratified, this statute subjects a nation to the unreserved judgment of the court. It supercedes all domestic laws and nullifies any domestic act inconsistent with its terms. Who knows how far the court could reach in its efforts to stop the crime of genocide. It is conceivable that it could require a nation to go to war to prevent one nation from killing the nationals of another nation. A nation's public officials and individual citizens could be prosecuted and punished for causing mental harm (and who defines what that is?) to members of the nation's ethnic, racial, or cultural group. Potentially, a charge of any kind of discrimination or unfairness could fall under the court's jurisdiction.

A. WAR CRIMES

The United States and others argued that the statute should define war crimes as those already existing in customary international law.

78. See Rome Statute, *supra* note 49, art. 120.

Conversely, other delegations in Rome argued against limiting the court's jurisdiction to crimes that have merely "attained the status of customary international law."⁷⁹ Instead, they argued that jurisdiction should encompass all violations of humanitarian law. The scope of such violations would be determined by an as yet unquantified plurality of states and international legal experts who advocate what the law should be as opposed to what currently exists as law in the community of nations. Under this view, limiting the court's jurisdiction to the current state of customary international law was considered both unnecessary and counterproductive.

The wholesale adoption of Additional Protocol I to the Geneva Conventions in Article 8 as customary international law—despite its explicit rejection by the United States and others and numerous reservations by many other nations—is dangerous and troubling. The introduction of many vague provisions⁸⁰ into the statute should raise serious concerns with any state contemplating ratification, even those that have ratified Additional Protocol I. The statute did not adopt reservations over the Additional Protocol. This is potentially troubling to any state contemplating ratification because of the "no reservations" prohibition.⁸¹ The ratification of the ICC statute will circumvent those sections of Additional Protocol I any state has previously objected to.

Substantively, there are numerous other problems with the vague delineation of "war crimes" in the statute. As a fundamental principle of war, the use of force must be proportional to the military advantage to be gained and take into account humanitarian concerns. Humanitarian concerns, however, do not predominate, and military forces are not required to suffer casualties or sacrifice the

79. HELEN DUFFY ET AL., JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 11 (1998).

80. There are a number of the Protocol's provisions that are impossibly vague subject to definition through the subsequent practice of states. For example, the standard that forbids "[d]estroying or seizing an enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war. . . ." Rome Statute, *supra* note 49, art. 8(2)(b)(xiii). Also debatable is the standard of "knowledge that [an] attack will cause incidental loss of life or injury to civilians . . . clearly excessive in relation to the concrete and direct overall military advantage anticipated" *Id.*, art. 8(2)(b)(iv).

81. *Id.*, art. 120.

accomplishment of their mission in order to protect civilians or limit collateral damage. Of course, critics of current war-fighting object to a strategy where the lives of combat pilots are valued so highly that all bombs are dropped from a height at which the pilots are safe and civilians are at greater risk. With the availability of “smart” weaponry, which are capable of distinguishing between a barracks and the hospital next door, activists argue that there is now a moral, even legal, obligation to use these weapons to make such distinctions. While it makes little sense to use a one or two million dollar weapon against a thousand-dollar target, critics of the use of force often claim that using anything other than precision guided munitions violates the laws of armed conflict. So, as advances in military technology lift the “fog of war” and facilitate surgical strikes, the law of war may come to resemble the law of tort, with combatants liable to be sued for negligence if they miss their approved military target. Worse yet, combatants may be constantly subjected to the ICC second-guessing over weapon and target selection. In such a situation, a “wrong” decision is likely to result in a commander and his civilian leadership facing prosecution for failing to follow ICC decisional decrees.

The net effect of adopting the vague and ineffective standards of Additional Protocol I will be to allow challenges to every command decision made by a military force and subject it to impractical standards that erode a force’s ability to successfully prosecute a war. Second-guessing long after the fog of battle lifts is an arm-chair exercise well-suited to academics and theorists, but ill-suited to military or political decision-makers whose failure to make correct command decisions can endanger their own forces. Constraining the ability to strike military targets by tilting the traditionally recognized balance or imposing artificial constraints on the use of effective weapons will result in protracted wars and more casualties and destruction. It would be folly to subject a nation’s military operations—approved by the nation’s leadership and a commander’s employment of them—to the continual interference and oversight of an international tribunal or prosecutor with little understanding or appreciation for the nature of warfare during an ongoing conflict. It is hard to comprehend why a nation fighting for its vital national security interests would place itself in such a position. In effect, a nation is agreeing to allow an international court to second-guess its

decisions and, if it disagrees, prosecute its leaders.

B. CRIMES AGAINST HUMANITY

Article 7 of the statute defines “crimes against humanity:”

[T]he following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of populations; (e) Imprisonment or other severe deprivation of physical liberty; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender. . . ; (i) Enforced disappearance . . . ; (j) the crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁸²

Many of these “crimes,” such as enforced disappearance, apartheid, and sexual offenses other than rape, have never previously fallen within the purview of the international tribunals.

Article 7 expands “persecution” to include “the intentional and severe deprivation of fundamental rights contrary to international law,”⁸³ which is an incredibly vague standard that did not exist until the establishment of the Yugoslav and Rwandan tribunals. It is unclear just what would constitute an indictable example of gender persecution. The same holds true for the amorphous crime of “inhumane acts that intentionally cause great suffering or otherwise seriously affect the victim’s physical or mental health.”⁸⁴ To take one example, under the crimes against humanity definition, there is a provision that would make it criminal to impose essentially humiliating conditions on people based on their ethnicity. Again, this is unprecedented in international law and it is subject to any kind of meaning and application the court wishes to put on it.

Yet this vagueness and willingness to leave the interpretation of these “crimes” to the ICC is exactly what many of the NGOs wanted.

82. *Id.*, art. 7.

83. *See id.*

84. *See id.*

Ignoring cultural ties as well as traditional domestic definitions and standards, the clear intent of the statute was to give the court "the flexibility to cover other crimes against humanity that may emerge over time, not contemplated in the statute."⁸⁵ Obviously, if the Yugoslav tribunal is any indication, there is great potential for politicization and overreaching. The Hague tribunal fundamentally changed the definition of the term "war crime" itself, ruling that international law applies not just in conflicts between states but also in civil or internal conflicts. In certain circumstances, "citizenship" is established through ethnicity and religion, as well as through nationality. In convictions of guards at a Bosnian Muslim detention center, it defined rape as a war crime. One radical NGO, for example, in pushing a feminist agenda, went so far as to advocate defining "sexual slavery" to include marriage and interdiction of abortion as a crime against humanity.⁸⁶ Given recent decisions of the European Court of Justice, it is easy to imagine an ICC embracing these new definitions.

C. THE ABSENCE OF OVERSIGHT AND CONTROL

National politics is the realm of authority, of administration, and of law. International politics is the realm of power, of struggle, and of accommodation. The international realm is preeminently a political one.

—Kenneth Waltz⁸⁷

Power tends to corrupt and absolute power corrupts absolutely.

—Lord Acton⁸⁸

85. *Summary of the Key Provisions of the ICC Statute*, HUMAN RIGHTS WATCH, sec. 5, Sept., 1998, available at <http://www.hrw.org/campaigns/icc/docs/icc-statute.htm>.

86. See *Feminist Coalition Urges Naming Catholic Teaching on Abortion a "Crime Against Humanity"* in *New World Court*, CATHOLIC FAMILY & HUMAN RIGHTS INSTITUTE, Mar. 24, 2000, available at http://www.c-fam.org/FAX/Volume_3/faxv3n18.html (discussing a pamphlet released by the Women's Caucus for Gender Justice).

87. KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 113 (Random House 1979).

88. BARON JOHN EMERICH EDWARD DALBERG ACTON, *ESSAYS ON FREEDOM AND POWER* 335 (Gertrude Himmelfarb ed., 1972) (writing a letter to Bishop

The statute allows the court broad interpretative powers to determine the law, even over the objection of a state and long-standing state practice. Article 119 of the statute—probably the most pernicious and dangerous of powers conferred on this court—provides that “[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.”⁸⁹ This provision is short, to the point, and troubling. Through its pronouncements and appellate decisions, the court will serve as the final arbiter of the law and force social changes on a nation and its society. State practice could be declared illegal based on decisions favoring the practices of other states, and the predilections of judges as influenced by impassioned NGOs.

For example, thirty-four European countries signed the European Convention on Human Rights, which bans the death penalty. Countries who continue to use the death penalty are widely criticized in Europe. The death penalty is designated an abuse on a par with torture and genocide—that is, a crime against humanity. U.S. President George W. Bush’s support of the death penalty earned him the title of “world champion executioner,” and many NGOs in Europe and elsewhere call his support of the penalty “criminal.”⁹⁰ It does not take much of a stretch to see a future court decision declaring the death penalty a crime against humanity and authorizing the prosecution of political leaders implementing such a policy. Clearly, the potential of the ICC to affect the customs and laws of a nation is immense.

If in doubt, one need only look at how the European Court of Justice fundamentally changed a nation’s social policies based on that court’s interpretation of the law. Great Britain was recently required by the Court to lift its ban against homosexuals in the military, and Germany was ordered to open all jobs in the military to women as a result of recent Court of Justice decisions.⁹¹ Whether one

Creighton on April 5, 1887).

89. Rome Statute, *supra* note 49, art. 119.

90. T.R. Reid, *Many Europeans See Bush As Executioner Extraordinaire*, WASH. POST, Dec. 17, 2000, at A36.

91. See Peter Finn, *German Women Gain Job Parity in the Military*, WASH. POST, Jan. 3, 2001, at A12 (discussing Germany’s involuntary response to the European Court of Justice’s ruling that provisions in Germany’s constitution,

agrees with these decisions or not is irrelevant to the fact that a non-domestic court, notwithstanding long-held beliefs and cultural practices, chose to overrule a nation's people because it did not comport with its perception of social justice.

Politically driven charges force a nation involved in armed conflict to constantly defend itself against such politically motivated charges. Not only will an opponent exploit past war crimes charges to undermine a nation's credibility and future military operations, but also one's allies will find it difficult to support already politically sensitive missions if there is no independent resolution of such charges. For example, Palestinians and other Arabs repeatedly cited Israeli activities, such as the construction of settlements, as war crimes. On October 1, 2000, the Arab League issued a communiqué following an emergency session in Cairo declaring that it held Israel fully responsible for the deaths of Palestinians resulting from the latest Intefada.⁹² The League called for "an international investigation into the horrible crimes carried out against the Palestinian people and the trial of the [Israeli officials responsible for the deaths] before the International Criminal Court."⁹³ In a recent emergency session, the U.N. Human Rights Commission determined Israel guilty of "'war crimes' and 'crimes against humanity' . . . in the occupied Palestinian territories, including Jerusalem," and started its own human rights investigation on all Israeli activities.⁹⁴ This is but one more illustration of the dangerous and destabilizing potential of an interloping court to make mischief during on-going efforts by parties at conflict attempting to resolve their differences.

A number of advocates for the ICC criticized the United States for refusing to initially sign the statute. A major part of the refusal of the United States to agree to the creation of this court was not because Americans should be treated differently than any other citizen of the

which prohibit women in the military, violate sexual discrimination rules of the European Union).

92. See *U.N. Probe of Israel Sought; Riots Bring Appeal from Arab League*, THE RECORD (Bergen County, N.J.), Oct. 2., 2000, at A6 (describing the Arab League's position on the Israeli-Palestinian clashes).

93. *Id.*

94. John R. Bolton, *The U.N. Also Rises*, WKLY. STANDARD, Oct. 30, 2000, at 12 (noting that this is the same commission that is routinely incapable of condemning China, Cuba, or even Yasser Arafat for human rights violations).

world. This was a more fundamental issue—specifically, the tradition of the people to distrust the consolidation of power into any one organ (or person), particularly one totally unaccountable to any democratically elected body. By its nature, power is capable of abuse, and people are flawed.⁹⁵ The lack of trust in their leaders led the drafters of the U.S. Constitution to impose a system of checks and balances—a separation, if you will, of the powers subject to abuse. As one of the drafters, James Madison, wrote:

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary In framing a government which is to be administered by men over men, 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.⁹⁶

Envisioned and codified by the statute, the ICC would act as policeman, prosecutor, judge, and jury. State parties, under Article 93, are obligated to provide police, investigative, custodial, and other professional services to the court as the court deems necessary.⁹⁷ Of course, the state party involved bears the costs. The state's personnel, with only bureaucratic divisions of authority, would perform all of these functions. As noted above, there would be no appeal from its judgments to any other authority. If the ICC abused its power, the individual defendant would have no legal recourse. From first to last, the ICC would be judge in its own case. While the Statute does provide for an oversight body in Article 112,⁹⁸ a two-thirds majority must approve matters of substance.⁹⁹ Given the fact that most of

95. See generally Chris Hawley, *Report Says U.N.-Paid Lawyers May be Splitting Fees*, WASH. POST, Apr. 1, 2001, at 23 (commenting that even as this article was being written, scandal has erupted over illegal splitting of fees among defense lawyers and their clients at the Yugoslav and Rwandan war crimes tribunals).

96. THE FEDERALIST NO. 51, at 235 (James Madison) (J.R. Pole ed., 1987).

97. See Rome Statute, *supra* note 49, art. 93 (enumerating investigation and prosecution compliance measures required by the court).

98. See *id.*, art. 112(4) (establishing the oversight mechanism to act as a watchdog over the court).

99. See *id.*, art. 112(7)(a) (providing that a two-thirds majority vote must be

those with oversight responsibility would be sympathetic to expanding the court's power, true oversight is unlikely. The ICC would exercise the most fundamental power of government—the administration of criminal justice. The rights of individuals before the court, even those granted to them by their own country, will depend entirely upon its will—good or bad.

CONCLUSION: THE TROUBLE WITH TRIALS IN AN UNACCOUNTABLE COURT

Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.

—Eleanor Roosevelt, 1958¹⁰⁰

We must not worry about committing an offence against the rights of nations nor about violating the laws of humanity. Such feelings today are of secondary importance. . . .

—General von Falkenhayn, German Minister of War, 1914¹⁰¹

We live in a world in which justice is always imperfect. We strive for an ideal conception of the rule of law and preservation of human rights. However, we are oftentimes forced to recognize that they must be balanced by the contingent political exigencies of particular cases. States and regions moving from illiberal, authoritarian, and repressive regimes to liberal democracies historically followed rule-of-law principles tailored to the goal of their political transformation. The ICC, as a distinctly undemocratic institution, fails to represent the will of national and cultural identities, and makes a poor tool to

obtained to override the Court's judgment).

100. Eleanor Roosevelt, Remarks at the Presentation of *In Your Hands* to the United Nations Commission on Human Rights, (Mar. 27 1958), *available at* <http://www.udhr50.org/history/inyour.htm>.

101. GEORGE CLEMENCEAU, *GRANDEUR AND MISERY OF VICTORY* 279 (F.M. Atkinson trans., 1930).

help in this transformation. There is no single, correct response to a state's repressive past. "Which response is appropriate in any given regime's transition is contingent on a number of factors—the affected society's legacies of injustice, its legal culture, and political traditions—as well as on the exigencies of its transitional political circumstances."¹⁰² The historical record indicates that trials are a poor source for normative change. Change to rule-of-law democracies is a product of contemporary political circumstances and historical legacies of injustice.

What is paramount is the visible pursuit of remedy, of return, of wholeness, of political unity—an impetus incorporating values external to those of ideal theories of justice. Domestic judicial systems, unlike the ICC, offer an alternative successor identity that centers on political unity. They also offer a way to reconstitute the collective—across divisive racial, ethnic, cultural, and religious lines—that is grounded in a political identity arising from a society's particular legacies of fear and injustice. While such an approach requires an evolving critical self-understanding—again something lacking in an ICC—it nonetheless draws on a juridical discourse of rights and responsibilities that offers both a transcendent normative vision and a pragmatic course of action.

It is not ideal, and it is even compromised. Yet it is informed by and constructed from the conditions under which it is chosen. Renewal is forged by letting go of the historical injustices and moving from divisiveness to nation building, not interminable trials constantly seeking an unattainable perfection of justice. Resorting to settlements implies compromise, a collective decision to reconstitute the community. To do so has a political dimension, forced consensus, and an eschewing of some measure of individual accountability for past crimes remembered but of necessity forgiven in furtherance of the good for the collective whole.

Political compromise is also a sure sign of working democracies. Those who advocate a new layer of bureaucratic legalism on humanity such as the ICC, fail to understand—or totally ignore—that justice will always have political ramifications. As states transform into modern rule-of-law democracies with their own distinctive

102. RUTI G. TEITEL, *TRANSNATIONAL JUSTICE* 219 (2000).

brands of justice, an international criminal court will no longer be necessary.

The ICC, on the other hand, will permanently remove the fundamental right of a nation and its people to choose how to deal with the tragedies of repression and the horrors of war, and, contrary to the claims of ICC advocates, will not bring closure, justice, or healing. The prospect of years of trials, the re-opening of national wounds, the stripping of a nation's ability to heal itself can only serve the opposite end intended for the Court. As Nobel Laureate Desmond Tutu eloquently explained South Africa's decision not to pursue "war crimes" trials but instead go the route of a truth and reconciliation commission:

The personal truth—. . . "truth of wounded memories"—was a healing truth and a court of law would have left many of those who came to testify, who were frequently uneducated and unsophisticated, bewildered and even more traumatized than before, whereas many bore witness to the fact that coming to talk to the commission had had a marked therapeutic effect on them.¹⁰³

And so South Africa rejected the trial option. This third way was to:

[G]rant amnesty to individuals in exchange for a full disclosure relating to the crime for which amnesty was being sought. It was the carrot of possible freedom in exchange for truth, and the stick was, for those already in jail, the prospect of lengthy prison sentences and, for those still free, the probability of arrest and prosecution and imprisonment.¹⁰⁴

But, of course, if the ICC existed, reconciliation, wound binding, and closure would be impossible. An independent prosecutor and court would have had to try all cases under its jurisdiction, particularly if the state refused to try criminals as the price for reconciliation and peace. Consequently, appeals by the new South African Government to stop such prosecutions would undoubtedly go unheeded because, after all, how could the world criminal court treat one country differently from another?

103. DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 26-27 (1999).

104. *Id.* at 30.

This court will be an international institution without checks or balances, essentially unaccountable to any state or institution for its actions, and without the possibility of appeal. The statute empowers the court to sit in judgment of every nation's foreign policy. It creates an independent prosecutor accountable to no government or institution, and it represents a massive dilution of the United Nations Security Council's powers. In short, this Statute represents a clear and present danger to national sovereignty. This court strikes at the heart and soul of nations, taking the fundamental power of law-making away from individual countries and giving it to an international judiciary.

In many respects, ICC advocates fundamentally confuse the appropriate roles of political and economic power, diplomatic efforts, military force, and legal procedures. No one disputes that barbarous acts are unacceptable to civilized peoples. The real issue is how and when to deal with these acts, and that is not simply, or even primarily, a legal exercise. The ICC advocates make a fundamental error by trying to transform matters of power and force into matters of law. Misunderstanding the appropriate roles of force, diplomacy, and power in the world is not just bad analysis, but bad and potentially dangerous policy for any country.

Existing empirical evidence in the military sphere argues convincingly that a weak and distant legal body will have no deterrent effect on the likes of Pol Pot, Saddam Hussein, or a future Stalin. Holding out the prospect of ICC deterrence to those who are already weak and vulnerable is simply fanciful. The court's advocates mistakenly believe that the search for justice is everywhere and always consistent with the attainable political resolution of serious political and military disputes (whether between or within states) and the reconciliation of hostile neighbors. In the real world, as opposed to in theory, justice and reconciliation may be consistent. Recent experience in situations as diverse as Bosnia, Rwanda, South Africa, Cambodia, and Iraq argue in favor of a case-by-case approach rather than the artificially imposed uniformity, emblematic of the ICC. Realistically, what nation would honor an ICC indictment of a Russian leader for war crimes committed in Chechnya or Chinese leaders for crimes against humanity occurring daily in China? Why would nations further complicate their foreign relations with this type of conundrum?

The protection of human rights and the punishment of those who violate them are laudable goals, but in the conduct of world affairs it is not the only thing or even the most important thing. Peace, stability, social justice, and building the structures to engender a transition to rule-of-law democracy are equally desirable and—particularly in the short term—often more important. Unfortunately, the court's supporters believe otherwise. They would willingly sacrifice the international state-centric system that is, ultimately, the best hope for achieving a peaceful world free of the scourge of despots and the horrors of war. Worse, ICC advocates have an unstated agenda resting fundamentally on the desire to assert the primacy of international institutions over nation-states. Advocates of the court have, of course, downplayed these dangers. But, as one observer noted:

Unfortunately, support for the ICC concept is based largely on emotional appeals to an abstract ideal of an international judicial system, unsupported by any meaningful evidence, and running contrary to sound principles of international crisis resolution. Moreover, for some, faith in the ICC rests largely on an unstated agenda of creating ever more comprehensive international structures to bind nation states . . .¹⁰⁵

This should be unacceptable for any nation, and reason enough to reject the court or embrace it only at their peril.

Nations, like their people, are not perfect. Justice and injustice continue their ever-renewing fight for ascendancy in the affairs of mankind. As one of America's great civil rights leaders presciently wrote:

Salvation for a race, nation, or class must come from within. Freedom is never granted; it is won. Justice is never given; it is exacted. Freedom and justice must be struggled for by the oppressed of all lands and races, and the struggle must be continuous, for freedom is never a final fact, but a continuing evolving process to higher and higher levels of human, social, economic, political and religious relationships.¹⁰⁶

105. *Casey Hearing*, *supra* note 72 (statement of John R. Bolton, Former Assistant Secretary of State for International Organization Affairs; Undersecretary of State for Arms Control and International Security).

106. JERVIS ANDERSON, A. PHILLIP RANDOLPH, *A BIOGRAPHICAL PORTRAIT* vii (1972).

Ultimately, the best hope to stop the slaughter of innocents and the horrors of atrocities is not through an unchecked, imperial international court, but rather through all nations embracing democratic institutions and the rule of law. Until that happy day, democratic nations must continue to maintain the military and moral strength necessary to deter, and unequivocally demonstrate that the costs far outweigh any perceived gains for the illicit behavior and inhumane acts rejected by all civilized nations.