Courting Danger

What's Wrong With the International Criminal Court

John R. Bolton

ADVOCATES OF a permanent international court to try perpetrators of war crimes and other "crimes against humanity" achieved a major success in July 1997, with the adoption of a multilateral agreement called "the Statute of Rome." This treaty will enter into force after ratification by sixty states (which is expected to occur in 1999 or soon thereafter), creating the first new global juridical institution since the International Court of Justice (ICJ) in 1945. In the eyes of its supporters, the nascent International Criminal Court (ICC) is simply an overdue addition to the family of international organizations, an evolutionary step up from the Nuremberg tribunal, and the next logical institutional development over the ad hoc war crimes courts in Bosnia and Rwanda.

On the surface, this logic is straightforward. Through the Genocide Convention of 1948, the four Geneva Conventions of 1949,[1] and subsequent agreements, many of the "principles" of Nuremberg have been adopted in international treaties. The Cold War, however, essentially froze any prospect that the United Nations could serve as a useful vehicle for the creation of new institutions to "enforce" these conventions. Until the Security Council created the Bosnia tribunal in 1993, and a copy for Rwanda shortly thereafter, there were no international war crimes courts. Only the sporadic use of national judicial mechanisms existed, and more often than not these legal systems were either unavailable to the victims of war crimes and crimes against humanity, or were deemed inadequate afterthoughts. The ICJ, although popularly known as "the World Court", has jurisdiction only over disputes between states, not the adjudication of individual guilt or innocence for violations of international codes of conduct.[2]

With the fading of the Cold War, and particularly with the inauguration of the Clinton administration, however, the International Law Commission[3] resumed serious discussions about the creation of a perma-

John R. Bolton is senior vice president of the American Enterprise Institute. He has served both as assistant attorney general in the Reagan administration and assistant secretary of state in the Bush administration.

[1]The four Geneva Conventions cover the proper treatment of wounded and sick members of the armed forces on land and at sea (and those who are shipwrecked), prisoners of war, and the treatment of civilians in times of war in occupied territories.

[2]ICJ Statute, Article 34(1). The ICJ can also give advisory opinions to the United Nations. UN Charter, Article 96.

[3]The International Law Commission is a UN body created by the General Assembly in 1947 composed of thirty-four "independent" experts, sitting in their personal capacities, charged with responsibility for "the progressive development of international law and its codification."

nent international criminal court, moving in 1994 to a Preparatory Committee established by the General Assembly. This Committee (essentially a committee of the whole General Assembly) made the final preparations for the Rome Conference in the summer of 1998.

The product of the Conference—the Statute of Rome—establishes both substantive principles of international law and creates new institutions and procedures to adjudicate these principles. Substantively, the Statute confers jurisdiction on the ICC over four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.

"Genocide" is defined essentially as in the original Genocide Convention of 1948, and prohibits acts intended to destroy national or ethnic groups (Article 6 of the Rome Statute). "Crimes against humanity" are broadly defined to prohibit "widespread or systematic" attacks against civilians that result in murder, enslavement, torture, rape, persecution, enforced disappearances, apartheid, and other enumerated offenses (Article 7). Prohibited "war crimes" include acts "committed as a part of a plan or policy" such as: violations of the four Geneva Conventions; attacks against civilian populations and objects or humanitarian personnel or installations; using weapons that cause superfluous injury or unnecessary suffering; outrages upon personal dignity; starvation as a method of warfare; using civilians as human shields; and a variety of other offenses (Article 8). The "crime of aggression", although declared criminal, is not defined, and the ICC's jurisdiction will not actually attach until the states party to the Statute of Rome agree on a definition pursuant to the Statute's amendatory articles.

Organizationally, the Statute creates an International Criminal Court of eighteen justices to be selected by the treaty parties, and elaborates the Court's structures and procedures. Judges on the Court must reflect "the principal legal systems of the world" and an "equitable geographical representation." Unlike the ICJ, the Court's jurisdiction is "automatic", applicable to *individuals* accused of crimes under the Statute, in many cases regardless of whether their governments have ratified it (Article 25). Moreover, the Court's jurisdiction includes not only those who actually commit offenses, but also commanders or persons who ordered their actions; who knew or should have known that crimes were about to be committed; or who failed to exercise proper control over subordinates, including heads of state or government and members of parliaments (Articles 27 and 28). Those convicted are subject to imprisonment and fines, but there is no provision for the death penalty (Article 77).

A particularly important new institution is the Office of the Prosecutor, which "shall act independently as a separate organ of the Court" (Article 42). The Prosecutor, elected on a secret ballot by an absolute majority of the parties, is responsible for conducting investigations and prosecutions before the Court; no member of the Prosecutor's staff may accept instructions from any outside source. The Prosecutor may initiate investigations based on referrals by those states party to the Statute, or on the basis of information which he or she otherwise obtains. Although the Security Council may refer a matter to the ICC, or may order it to cease a pending investigation, there is no requirement that the Council play any role at all in the ICC's work (Article 16).

Described in these terms, one might assume that the ICC is simply a further step in the orderly march toward the international rule of law and the peaceful settlement of international disputes, sought since time immemorial. Why, then, did the Clinton administration—a principal moving force to create a permanent war crimes court in the five years before the Rome Conference—find itself, to its dismay, unable even to sign the Statute, let alone propose its ratification by the Senate? Why was the United States so isolated from its European allies? What are the prospects for an ICC to which the United States does not belong?

But Whom Will the Hammer Strike?

WHAT HAPPENED in Rome is the completely unintended consequence of the administration's own basic policies, starting in its first days in office. Security Council Resolution 808, creating an international criminal tribunal for Yugoslavia, was adopted on February 22, 1993, just a month after the inauguration. The Rwanda tribunal followed in Security Council Resolution 935 in July 1994. The administration declared these tribunals justifiable on their own merits, and also saw them as building blocks for the ICC. Over two years ago, David J. Scheffer, a confidante of Secretary of State Albright and chief American negotiator on the ICC, wrote:

> The ultimate weapon of international judicial intervention would be a permanent international criminal court (ICC). . . . The ad hoc war crimes tribunals and the proposal for a permanent international criminal court are significant steps toward creating the capacity for international judicial intervention. In the civilized world's box of foreign policy tools, this will be a shiny new hammer to swing in the years ahead.[4]

But this new hammer—the Court and the Prosecutor—has serious problems of legitimacy. The ICC's principal difficulty is that its components do not fit into a coherent "constitutional" structure that clearly delineates how laws are made, adjudicated, and enforced, subject to popular accountability and structured to protect liberty. Instead, the Court and the Prosecutor are simply "out there" in the international system, ready to start functioning when the Statute of Rome comes into effect. This approach is inconsistent with American standards of constitutional order, and is, in fact, a stealth approach to eroding constitutionalism.

This difficulty stems from the authority purportedly vested in the ICC to create authority outside of (and superior to) the U.S. Constitution, and to inhibit the full constitutional autonomy of all three branches of the U.S. government—and, indeed, of all states party to the Statute. ICC advocates rarely assert publicly that this result is central to their stated goals, but it must be for the Court and Prosecutor to be completely effective. And it is for this reason that, whether strong or weak in its actual operations, the ICC has unacceptable consequences for the United States.

The Court's legitimacy problems are two-fold, substantive and structural. As to the former, the ICC's authority is vague and excessively elastic. This is, most emphatically, *not* a court of limited jurisdiction. Even the meaning of genocide, the oldest codified among the three crimes specified in the Statute of Rome, is not clear. The ICC's creation shows graphically all of the inadequacies of how "international law" is created.

The U.S. Senate, for example, could not accept the Statute's definition of genocide unless it is prepared to reverse the position it took in February 1986 in approving the Genocide Convention, when it attached two reservations, five understandings, and one declaration. One understanding, intended to protect American servicemen and women, provides that ". . . acts in the course of armed conflicts committed without the specific intent [required by the Convention] are not sufficient to constitute genocide as defined by this Convention." Another provides that:

> . . . with regard to the reference to an international penal tribunal in article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.[5]

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[4]David J. Scheffer, "International Judicial Intervention", *Foreign Policy* (Spring 1996), pp. 48, 51.

[5]See American Society of International Law, *International Legal Materials*, vol. 28, no. 3 (May 1989), p. 782.

By contrast, Article 120 of the Statute of Rome provides explicitly that "No reservations may be made to this Statute." Thus confronted with a definition of "genocide" that ignores existing American reservations to the underlying Genocide Convention, the Senate could not attach these reservations (or others) to its ratification of the Statute. Stripped of the reservation power, the United States would risk expansive and mischievous definitional interpretations by a politically motivated Court. Indeed, the "no reservations" clause appears obviously directed against the U.S. Senate, and it is a treaty provision we should *never* agree to.

Much of the media attention to the American negotiating position on the ICC concentrated on the Pentagon's fears for American peacekeepers stationed around the world. As real as those risks may be, however, the main concern is not that the Prosecutor will indict the isolated U.S. soldiers who may violate our own laws and values, and their own military training and doctrine, by allegedly committing a war crime. The main concern should be for the president, the cabinet officers who comprise the National Security Council, and other senior civilian and military leaders responsible for our defense and foreign policy. *They* are the potential targets of the politically unaccountable Prosecutor created in Rome.

The Statute of Rome's other two offenses (war crimes and crimes against humanity) are even more vaguely defined, to the point that an activist Court and Prosecutor can broaden the Statute's language essentially without limit. For example, the ICC Statute's definition of "war crimes" includes:

> intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; [and]
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> intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. . . .[6]

A fair reading of these provisions leaves one unable to answer with confidence whether the United States was guilty of war crimes for its aerial bombing campaigns over Germany and Japan in World War II. Indeed, if anything, a straightforward reading of the language probably indicates that the Court would find the United States guilty. *A fortiori*, these provisions seem to imply that the United States would have been guilty of a war crime for dropping atomic bombs on Hiroshima and Nagasaki.[7]

It is precisely this kind of risk that has led the U.S. Supreme Court to invalidate criminal statutes that fail to define exactly what they prohibit under the "void for vagueness" doctrine. "Void for vagueness" is a peculiarly American invention, which is unfortunate because the ICC's list of ambiguities goes on and on. Perhaps the most intriguing is the prohibition in subparagraph (p) against "committing outrages upon personal dignity, in particular humiliating and degrading treatment." Were the problems with the Statute of Rome not so gravely serious, one could imagine this provision as the subject of endless efforts at humor. The definition of "crimes against humanity" includes the catch-all phrase "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." How will this phrase be interpreted? Who will advise our president that he is unambiguously safe from the retroactive imposition of criminal liability if

[6]Statute of Rome, Article 8.2(b)(i) and (iv).

[7]Some governments and NGOs proposed in Rome that the use of nuclear weapons be specifically prohibited. While these proposals were not accepted, the Statute's actual language can certainly support arguments about the "criminal" effects of nuclear weapons for those seeking to outlaw them.

he guesses wrong on "inhumane acts"? Is even a defensive use of nuclear weapons an "inhumane act"?

We are nowhere near the end of the list of prospective "crimes" that can be added to the Statute. Many were suggested at Rome and commanded wide support from participating nations. Most popular was the crime of "aggression", which, as noted, was included in the Statute but not defined. Although frequently easy to identify, "aggression" can at times be something in the eye of the beholder. Thus, Israel justifiably feared in Rome that its pre-emptive strike in the Six-Day War almost certainly would have provoked a proceeding against top Israeli officials had the Statute been in effect in June 1967. Moreover, there is no doubt that Israel will be the target of complaint concerning conditions and practices by the Israeli military in the West Bank and Gaza. The United States, with continuous bipartisan support for many years, has attempted to minimize the disruptive role that the United Nations has all too often played in the Middle East peace process. As if that were not difficult enough, we now face the prospect of the Prosecutor and the Court interjecting themselves into extremely delicate matters at inappropriate times. Israel, therefore, was one of the few governments that voted with the United States against the Statute.[8]

Coincidentally, the United States has had its own considerable experience in the past two decades with the concept of "independent counsels." It is an experience that strongly argues against repetition in an international treaty. Simply launching massive criminal investigations can have an enormous political impact. Although subsequent indictments and convictions are unquestionably more serious still, a zealous independent prosecutor can have a dramatic impact just by calling witnesses and gathering documents, without ever bringing formal charges.

The fundamental problem, however, with the latitude of the Court's interpretative authority stems from the decentralized and unaccountable way in which "international law", and particularly customary international law, evolves. Thus, Japan's Permanent UN Representative said approvingly,

> The war crimes which are considered to have become part of customary international law should also be included, while crimes which cannot be considered as having been crystallized into part of customary international law should be outside the scope of the Court.[9]

This statement expresses cogently the notion that customary international law evolves, or "crystallizes." It is another of those international law phenomena that just happens "out there", among academics and NGO activists. While the historical understanding of customary international law was that it evolved from the practices of nation-states over long years of development, today theorists write approvingly of "spontaneous customary international law" that the cognoscenti discover almost overnight. If this is where the ICC moves us, there is serious danger ahead.

But even beyond this risk is the larger agenda of many ICC supporters, invoking the nearly endless articulation of "international law" that continues inexorably to reduce the international discretion and flexibility of nation-states, and the United States in particular. In judging the Statute of Rome, we should

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[8]Israel also objected to a provision (Article 8.2.(b)(viii)) that makes it a war crime to effect "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside this territory." The inclusion of Article 8.2.(b)(viii) is an excellent example of the politicization of what is masquerading as a purely legal process. We can expect no end to this kind of effort to gain political advantage by manipulating the Statute, the Court, and the Prosecutor.

[9]Statement of Ambassador Hisashi Owada, head of the delegation of Japan, June 15, 1998.

not be misled by examining simply the substantive crimes contained in the final document. We have been put on very clear notice that this list is illustrative only, and just a start.

As troubling as the ICC's substantive and jurisdictional problems are, the problems raised by the Statute's main structures—the Court and the Prosecutor—are still worse. We are not considering a relatively passive court such as the ICJ, which can adjudicate only with the consent of the parties, or when the Security Council or the General Assembly asks for an advisory opinion. The Prosecutor is a powerful element of executive power, namely, the power of law enforcement. Never before has the United States been asked to place any of that power outside of the complete control of our national government.

Indeed, the supposed "independence" of the Prosecutor and the Court from "political" pressures (such as the Security Council) should be more a source of concern for the United States than an element of protection. "Independent" bodies in the UN system have often demonstrated themselves to be more highly politicized than some of the explicitly political organs, UNESCO and the ILO being cases in point. Political accountability, by contrast, which is almost totally absent from the ICC scheme, would have been a real protection. Instead, we now face the prospect, as "public choice" analysis would predict, that the ICC will be "captured" not by governments but by NGOs and others with narrow special interests, and the time to pursue them.

THE AMERICAN concept of the separation of powers reflects the settled belief that liberty is best protected when, to the maximum extent possible, the various authorities legitimately exercised by government are placed in separate branches. So structuring the national government, the Framers believed, would prevent the excessive accumulation of power in a limited number of hands, thus providing the greatest protection for individual liberty. Continental European constitutional structures do not, by and large, reflect a similar set of beliefs. They do not so thoroughly separate judicial from executive powers, just as their parliamentary systems do not so thoroughly separate executive from legislative powers. That, of course, is entirely their prerogative, and substantially explains why they are more comfortable with the ICC's structure, which so closely melds prosecutorial and judicial functions. They may be able to support such an approach, but we should not.

In addition, our Constitution provides that the exercise of executive power is rendered accountable to the citizenry in two ways. First, the law enforcement power is exercised only through an elected president. The president is constitutionally charged (Article II, Section 3) with the responsibility to "take Care that the Laws be faithfully executed", and the constitutional authority of the actual law enforcers stems directly from the only elected executive official. Second, Congress, all of whose members are popularly elected, exercises significant influence and oversight, both through its statute-making authority and through the appropriations process.

In European parliamentary systems, these sorts of political checks are either greatly attenuated or entirely absent, just as with structures such as the Court and Prosecutor created in Rome. They are accountable to no one. The Prosecutor will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight, elected or unelected, in the Statute of Rome. The Prosecutor, and his or her as yet undefined investigatory, arresting, and detaining apparatus, is answerable only to the Court, and then only partially. The Europeans may be comfortable with such a system, but that is one reason why they are Europeans and we are not.

By long-standing American principles, the ICC's structure utterly fails to provide sufficient accountability to warrant vesting the Prosecutor with the Statute's enormous power of law enforcement. Political accountability is utterly different from "politiciza-

tion", which all agree should form no part of the decisions of either the Prosecutor or the Court. Today, however, the ICC has almost no political accountability *and* carries an enormous risk of politicization. This condition has little to do with our fears of isolated prosecutions of individual American military personnel around the world. It has everything to do with the American fear of unchecked, unaccountable power, and explains why America properly stood apart in Rome from Europe and Canada.

The Real International Interests at Stake

BEYOND the particular American interests adversely affected by the ICC, we can and should worry about the more general errors of the ICC's supporters that will affect all nations. Thus, although the gravest danger from the American perspective is that the ICC will be overbearing and unaccountable, there is an at least equally likely possibility that, in the world at large, the new institution will be powerless and ineffectual. While this may sound contradictory, the ICC is ironically one of those rare creations that may be simultaneously dangerous and weak because its intellectual underpinnings are so erroneous or inadequate in so many respects.

The most basic error is the belief that the ICC will have a substantial, indeed decisive, deterrent effect against the possible perpetration of heinous crimes against humanity. Ironically, ICC proponents now *criticize* Nuremberg as an inadequate, ex post facto response to such crimes, and argue instead for the deterrent value of a permanent Court and Prosecutor.

Rarely if ever has so sweeping a legal proposal had so little empirical evidence to support it. The evidence demonstrates instead that the Court and the Prosecutor will not achieve their central goal because they do not, cannot, and should not have sufficient authority in the real world.

Behind the optimistic rhetoric, ICC proponents have not a shred of evidence supporting their deterrence theories. In fact, they fundamentally confuse the appropriate roles of political and economic power, diplomatic efforts, military force, and legal procedures. No one seriously disputes that the barbarous actions about which ICC supporters complain are unacceptable, but those supporters make a fundamental error in 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.

Recent history is filled with cases where even strong military force or the threat of force failed to deter aggression or gross abuses of human rights. ICC proponents concede as much when they cite cases where the "world community" failed to pay adequate attention, or failed to intervene in a sufficiently timely fashion to prevent genocide or other crimes against humanity. The new Court and Prosecutor, it is said, will now guarantee against similar failures.

But this is fanciful. Deterrence ultimately depends on perceived effectiveness, and the ICC is most unlikely to have that. Even if administratively competent, the ICC's authority is likely to be far too attenuated to make the slightest bit of difference either to the war criminals or to the outside world. In cases where the West in particular has been unwilling to intervene militarily to prevent crimes against humanity as they were happening, why will a potential perpetrator be deterred by the mere possibility of future legal action? A weak and distant Court will have no deterrent effect on the hard men like Pol Pot most likely to commit crimes against humanity. Why should anyone imagine that bewigged judges in the Hague will succeed where cold steel has failed? Holding out the prospect of ICC deterrence to the truly weak and vulnerable is a cruel joke.

Beyond the predictive issue of deterrence, it is by no means clear that "justice" is everywhere and always consistent with the attainable political resolution of serious dis-

putes, whether between or within states. It may be, or it may not be. Unfortunately for moralists and legal theoreticians, human conflict teaches that policymakers must often make trade-offs among inconsistent objectives. This can be a painful realization, confronting us as it does with the irritating facts of human complexity, contradiction, and imperfection. Some elect to ignore these troubling intrusions of reality, but those who would ponder the ICC's practical merits do not have that option.

The existing international record of adjudication is hardly encouraging. The ICC's framers tacitly recognize this problem because, with virtually no debate in Rome, and with the full endorsement of the Clinton administration, they created the ICC outside of the United Nations system. So visibly separating the ICC from the International Court of Justice tacitly acknowledges that the ICJ has failed to garner the legitimacy sought by its founders in 1945.[10] In some respects, this is more than ironic, because much of what was said then about the ICJ anticipates recent claims by ICC supporters. These touching sentiments were not borne out in practice for the ICJ, which has been largely ineffective when invoked and more often ignored in significant international disputes. Indeed, the United States withdrew from the mandatory jurisdiction of the ICJ after its erroneous Nicaragua decisions, and it has even lower public legitimacy here than the rest of the UN.[11]

Among the several reasons why the ICJ is held in such low repute, and what is admitted privately in international circles, is the highly politicized nature of its decisions. Although ICJ judges supposedly function independently of their governments, their election by the UN General Assembly is highly politicized, involving horse trading among and within the UN's several political groupings. Once elected, the judges typically vote along predictable national lines except in the most innocuous of cases. Thus, the ICJ's failure to generate widespread international respect and legitimacy on "civil" matters may well provide the best explanation of why the new "criminal" court was established outside the UN.

The ICJ's failure is a continuing sore point for ICC supporters, one of whom, Kenneth Roth, recently acknowledged that much will depend "on the character and professionalism of the ICC prosecutor and judges." Roth cites the skill and integrity of several jurists serving on the Bosnia and Rwanda tribunals, and concludes that "there is every reason to believe that the ICC will be run by jurists of comparable statute."[12] Utterly absent from Roth's justification is even a mention of the judges of the ICJ during more than fifty years of existence, though it is surely an institution more comparable to a permanent ICC than are the ad hoc Bosnia and Rwanda courts. Roth's silence speaks for itself.

Although supposedly a protection for the ICC's independence, the provisions for the "automatic jurisdiction" of the Court and the Prosecutor are unacceptably broad. They constitute a clear break from the basic premise of the ICJ that there is no jurisdiction without the consent of the state parties. Because parties to the ICC may refer alleged crimes to the Prosecutor, we can virtually guarantee that some will, from the very outset, seek to use the Court for political purposes.

In fact, the Rome Conference substantially minimized the Security Council's role in ICC affairs. The limited remaining role for the Security Council in the ICC is found in Article 16 of the Statute of Rome. Under that article, the Prosecutor is free to investigate, indict, and try before the Court completely at will, unless and until the Security Council

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[10]Although the ICJ has its own Statute, it is expressly created by Chapter XIV of the UN Charter, and is thus one of the "principal organs" authorized thereunder.

[11]The Nicaragua decisions are discussed at length in Robert Bork's "The Limits of 'International Law'", *The National Interest* (Winter 1988/89).

[12]Kenneth Roth, "The Court the U.S. Doesn't Want", *New York Review of Books*, November 19, 1998, p. 45.

acts to stop him. In requiring an affirmative vote of the Council to *stop* a case, the Statute shifts the balance of authority from the Council to the ICC. Moreover, a veto by a Permanent Member of such a restraining Council resolution leaves the ICC completely unsupervised. It seriously undercuts the role of the five Permanent Members of the Council, and radically dilutes their veto power. This was precisely the objective of the ICC's proponents.

Since the UN Charter charges the Council with "primary responsibility for the maintenance of international peace and security", it is more than passingly strange that the Council and the ICC are now to operate almost independently of one another. Strange, that is, only if one is unfamiliar with the agenda of many governments and non-governmental organizations supporting the ICC, whose agenda has for years included a downgrading of the Security Council and especially the weakening of the veto power of its five Permanent Members.

THIS ATTEMPTED marginalization of the Security Council is a fundamental *new* problem created by the ICC that will have a tangible and highly detrimental impact on the conduct of U.S. foreign policy. The Council now risks having the ICC interfere in its ongoing work, with all of the attendant confusion between the appropriate roles of law, politics, and power in settling international disputes.

Accumulated experience strongly favors a case-by-case approach, politically and legally, rather than the inevitable resort to adjudication contemplated by the ICC. One contemporary alternative is South Africa's Truth and Reconciliation Commission. In the aftermath of apartheid, the new government faced the difficult task of establishing and legitimizing truly democratic governmental institutions while dealing simultaneously with earlier crimes. One option would have been widespread prosecutions against those who perpetrated human rights abuses, but the new government chose a different model. Under the Commission's charter, those who committed human rights abuses could come before it to confess past misdeeds. Assuming they confessed truthfully, the Commission could in effect pardon them from prosecution. This approach was intended to make public more of the truth of the apartheid regime in the most credible fashion, to elicit thereby admissions of guilt, and then to permit society to move ahead without the continual opening of old wounds that trials, appeals, and endless recriminations might bring.

I do not argue that the South African approach should be followed everywhere, or even necessarily that it is the correct solution for South Africa. But it is radically different from that contemplated by the ICC, which seeks vindication, punishment, and retribution as its goals, as is the case for most criminal law enforcement institutions. The clear point is that, in some disputes, neither retribution nor complete truth-telling is the best objective. In many former communist countries, for example, citizens are still wrestling with the handling of secret police activities of the now defunct regimes. So extensive was the informing, spying, and compromising in some societies that a tacit decision has been made that the complete opening of secret police and Communist Party files will either not occur, or will happen with exquisite slowness over a very long period. In effect, these societies have chosen "amnesia" because it is simply too difficult for them to sort out relative degrees of past wrongs, and because of their desire to move ahead.

One need not agree with these decisions to have at least some respect for the complexity of the moral and political problems these societies face. Only those completely certain of their own moral standing, and utterly confident in their ability to judge the conduct of others in difficult circumstances, can reject the amnesia alternative out of hand. Our experience should counsel for a prudent approach that does not insist on international adjudication even over a course that the par-

ties to a dispute might themselves agree upon. Indeed, with a permanent ICC, one can predict that one or more disputants might well invoke its jurisdiction at a selfishly opportune moment, and thus, ironically, make an ultimate settlement of their dispute more complicated or less likely.

The recent experience of Chile's General Pinochet compellingly demonstrates this possibility. Chile made painful choices to restore democracy in 1990 after seventeen years of military rule. Many, in Chile and elsewhere, felt that the general was treated too leniently. This is a legitimate view, but so too is its opposite, which asserts the primacy of returning the military to its barracks. Chileans made their choice and have lived with it. But for a self-selected Spanish official, it was not good enough. He sought to extradite Pinochet (during a visit for medical treatment, and under diplomatic status) from the United Kingdom for a trial in Spain on charges of, among other things, genocide. However this particular affair ends, it demonstrates the moral and political arrogance that will likely permeate the ICC, contributing materially to its potential for damage.

ANOTHER alternative, of course, is for the parties themselves to try their own alleged war criminals. ICC proponents usually ignore or overlook this possibility, either because it is inconvenient to their objectives, or because it utilizes national judicial systems and agreements among (or within) nation-states to implement effectively. One important example involves Cambodia. Although Khmer Rouge genocide is frequently offered as an example of why the ICC is needed, its proponents never explain why the Cambodians should not themselves adjudicate alleged war crimes.

Cambodia is again split by intense political differences. As before, the factions seek to internationalize their dispute, each hoping that external political intervention, including the idea of an international war crimes tribunal, will tip the domestic political scales in its favor. Instead, Cambodians should judge their own criminals. There is a strong argument that to obtain the full cathartic benefit of war crimes trials, a nation must be willing to take on the responsibility of judging its own. To create an international tribunal for the task implies immaturity on the part of Cambodians and paternalism on the part of the international community. Repeated interventions by global powers are no substitute for the Cambodians coming to terms with themselves.

ICC proponents frequently assert that the histories of the Bosnia and Rwanda tribunals established by the Security Council demonstrate why a permanent ICC is necessary. The actual evidence proves precisely the contrary: it is wildly premature to extrapolate from the limited and highly unsatisfactory experience with ad hoc tribunals to a permanent Court and Prosecutor.

For Bosnia, as noted above, the ad hoc court was established before the Dayton Agreement, and serves as an example of how a decision to detach war crimes from the underlying political reality advances neither the political resolution of a crisis nor the goal of punishing war criminals. Even today, after Dayton, the tribunal cannot achieve its declared objectives. ICC proponents complain about the lack of NATO resolve in apprehending alleged war criminals. But if not in Bosnia, where? If the political will to risk the lives of troops to apprehend indicted war criminals there does not exist, where will it suddenly spring to life on behalf of the ICC?

It is by no means clear that even the tribunal's "success" would complement or advance the political goals of a free and independent Bosnia, the expiation of wartime hostilities, or reconciliation among the Bosnian factions. In Bosnia, there are no clear communal winners or losers. Indeed, in many respects the war in Bosnia is no more over than it is in the rest of the former Yugoslavia, such as Kosovo. Thus, there is no agreement, either among the Bosnian factions or among the external intervening powers, about how the war crimes tribunal fits into the overall

political dispute or its potential resolution. Bosnia shows that insisting on legal process as a higher priority than a basic political resolution can adversely affect both the legal and political sides of the equation.

In short, and very much unlike Nuremberg, much of the Yugoslav war crimes process seems to be about score settling rather than a more disinterested search for justice that will contribute to political reconciliation. If one side—most likely the Serbs—believes strongly that it is being unfairly treated, then the "search for justice" will have harmed Bosnian national reconciliation. This is a case where it only takes one to tango. Outside observers might disagree with this assessment, but outside observers do not live in Bosnia.

And again, the option of Bosnians trying their own war criminals is not even seriously discussed. One reason, of course, is that at the time of Dayton the Hague tribunal was already a fact of life that some parties did not want to modify. More troubling is that Dayton did not really accomplish much more than a de facto partition of Bosnia. Bluntly stated, if Bosnian Serbs, Croats, and Muslims had reached a true meeting of minds at Dayton, they would have resolved the question of war crimes allegations. That they did not is a straightforward admission that Dayton simply papered over, and almost certainly only temporarily, the underlying causes of past and future conflicts.

The experience of the Rwanda war crimes tribunal is even more discouraging. Widespread corruption and mismanagement in that tribunal's affairs have led many simply to hope that it expires quietly before doing more damage. At least as troubling, however, is the clear impression many have that score settling among Hutus and Tutsis—war by other means—is the principal focus of the Rwanda tribunal. Of course it is.

Consider also Iraq. Its August 1990 invasion of Kuwait unquestionably qualifies as an act of aggression, and there is little debate that the Iraqis committed any number of acts against Kuwaitis and others that would be illegal under the Statute of Rome. Yet, by conscious decision, neither the United States nor any other power, including Kuwait, has seriously sought to create a war crimes tribunal for the Persian Gulf War, and the reasons are clear: this is a case to abjure war crimes prosecutions because the appropriate circumstances are not yet present.

In the first place, the victorious Gulf coalition never had as a goal the unconditional surrender of Iraq or Saddam Hussein's removal from power. Moreover, the key defendants from Saddam on down are not in custody, nor is potentially dispositive documentary and physical evidence, which is still in the hands of the Iraqi government and military. Prosecuting the alleged war criminals *in absentia* is therefore the only possibility, and this approach raises enormous potential risks. Specifically, *in absentia* prosecutions could give rise to "Versailles syndrome" feelings of injustice and persecution by the West, both among Iraqis and generally throughout the Arab world. What Iraq really needs is a new government that can decide on justice for Saddam and his henchmen as an element of that country's own internal political maturation.

ICC advocates defend the Statute of Rome by pointing to the doctrine of "complementarity" (deference to national judicial systems) embodied in the Statute. "Complementarity", like so much else connected with the ICC, is simply an assertion, utterly unproven and untested. If complementarity has any real substance, it 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 that demonstrates why, at most, ad hoc international tribunals are necessary. Indeed, it is precisely the judicial systems that the ICC would likely supplant (such as in Bosnia or, possibly, in Cambodia) where the international effort should be to encourage the warring parties to resolve questions of criminality as part of a comprehensive solution to their disagreements. Removing key elements of the dispute, especially the emotional and contentious issues of war crimes and

crimes against humanity, undercuts the very progress that these peoples, victims and perpetrators alike, must make if they are ever to live peacefully together.

Next Steps

RATHER THAN walk away from the wreckage of its policy in Rome, the Clinton administration is actively working to recreate its shattered strategy to bring the United States into the ICC. It does so because its commitment to the ICC resides at the core of its foreign policy, and because of the intense criticism from the administration's erstwhile supporters, which may shock those unfamiliar with the Byzantine politics of international human rights. Those scorned demand that Clinton sign the Statute of Rome so that it will "put America back in the camp of the friends, rather than the enemies, of human rights."[13] This is true Puritanism: failure to support the ICC is proof of apostasy on human rights generally.

In response, the administration will likely take several steps. First, it will continue to negotiate with signatories in hope of obtaining sufficient amendments to allow the United States to sign on. Second, it will probably support transferring the work of the Bosnia and Rwanda tribunals to the ICC, thus triggering financial support from the UN (and therefore from its principal funder, the United States). Third, the administration will attempt to have the Security Council refer other matters (such as Cambodia) to the ICC, rather than have them come from state referrals or from the Prosecutor, thus also triggering the UN funding obligation. Fourth, they will seek to provide "temporary" or "transitional" assistance to the ICC, which, in the ways of all bureaucracies, may endure forever.

Given that we face two years before having even a prospect of a president who would resolutely oppose the ICC, we can only assume that the Statute of Rome will enter into force before then. Nonetheless, we should not assume that others, especially those who will pay the bills in our absence, will rush to make it fully functioning. Having done the "right thing" in creating the ICC, many European governments, which have more than a passing acquaintance with cynicism, may not rush to make it fully operational. Nor will they necessarily hasten to risk the catastrophic consequences of attempting to assert jurisdiction over an American citizen, interfere in Security Council matters, or otherwise obstruct U.S. foreign policy.

In fact, whether the ICC survives and flourishes depends in large measure on the United States. We should therefore ignore it in our official posture, and attempt to isolate it through our diplomacy, in order to prevent it from acquiring any further legitimacy or resources. U.S. policy toward the ICC should be, in a phrase familiar to President Clinton, "Three No's": no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to "improve" it. Such a policy cannot entirely eliminate the risks posed by the ICC, but it can go a long way in that direction. Certainly, members of Congress should press this view on the Clinton administration.

The plain fact is that additional "fixes" over time to the ICC will not alter its multiple inherent defects. The United States has many alternative foreign policy instruments to utilize that are fully consistent with our national interests, leaving the ICC to the obscurity it so richly deserves. Signatories of the Statute of Rome have created an ICC to their liking, and they should live with it. We should not. □

[13] Roth, p. 47.