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# AN EMPIRE OF LAW?: LEGALISM AND THE INTERNATIONAL CRIMINAL COURT

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## INTRODUCTION

The twentieth century was the most blood-stained hundred years in human history,<sup>1</sup> and the injuries were largely self-inflicted. No longer were plague, disease, or natural disaster the greatest killers; rather, governments themselves were all too often transformed from salutary associations for mutual protection and the promotion of the common good into instruments of terror, crime, and “administrative

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1 The estimates for deaths in all of the conflicts of the twentieth century top 170 million. See STÉPHANE COURTOIS, ET AL., *THE BLACK BOOK OF COMMUNISM* 4 (1999); R.J. RUMMELL, *DEATH BY GOVERNMENT* 3 (1994).

massacre."<sup>2</sup> This led to a widespread call for an international tribunal to punish the worst perpetrators of crimes against humanity.<sup>3</sup> Though there have been ad hoc tribunals and national prosecutions of criminals who have committed genocide and other crimes against

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2 The phrase "administrative massacre" was coined by Hannah Arendt to describe state-sponsored mass murder directed against "any given group" wherein the "principle of selection is dependent only upon circumstantial factors." HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 288 (Penguin Books, rev. & enlarged ed. 1977).

3 See, e.g., G.A. Res. 260B, U.N. GAOR, 3d Sess., pt. 1, at 177, U.N. Doc. A/810 (1948) (resolution proposing an international criminal court); see also *The Permanent International Criminal Court: International Law Association Report of the 34th Conference, August 5-11, 1926*, reprinted in 1 BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS 252-68 (1980); INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 17-19 (Mark W. Janis ed., 1992); FARHAD MALEKIAN, 1 INTERNATIONAL CRIMINAL LAW: THE LEGAL AND CRITICAL ANALYSIS OF INTERNATIONAL CRIMES 263-75 (1991); Ass'n Internationale de Droit Pénal, Symposium, *La Création d'une Juridiction Pénale Internationale et la Coopération Internationale en Matière Pénale*, 45 REVUE INTERNATIONALE DE DROIT PÉNALE 435 (1974); M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49, 49 (1995); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 11 (1997) [hereinafter Bassiouni, *From Versailles to Rwanda*]; M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 152-58 (1992); *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 1947 (2001); Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PACE INT'L L. REV. 121, 123 (1994); Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 377 (1992); George A. Finch, *Editorial Comment: Draft Statute for an International Criminal Court*, 46 AM. J. INT'L L. 89 (1952); Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419 (1995); Yuen-Li Liang, *Notes on Legal Questions Concerning the United Nations*, 46 AM. J. INT'L L. 73 (1952); Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 77 (1995); Timothy L.H. McCormack & Gerry J. Simpson, *A New International Criminal Law Regime?*, 42 NETH. INT'L L. REV. 177 (1995); Richard I. Miller, *Far Beyond Nuremberg: Steps Towards an International Criminal Jurisdiction*, 61 KY. L.J. 925, 927 (1973); Vespasien V. Pella, *Plan d'un Code Répressif Mondial*, 6 REVUE INTERNATIONALE DE DROIT PÉNALE 348 (1935); Vespasien V. Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37, 37 (1950); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 387 (2000); Michael P. Scharf, *Getting Serious About an International Criminal Court*, 6 PACE INT'L L. REV. 103 (1994); Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 665 (1996); Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60, 63 (1952).

humanity,<sup>4</sup> the impetus for an International Criminal Court (ICC) culminated in an unprecedented international "statute,"<sup>5</sup> the

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4 Since World War I, there have been four ad hoc international tribunals and five international investigatory commissions established. M. Cherif Bassiouni, *Historical Survey: 1919–1998*, in *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 5 (M. Cherif Bassiouni ed., 1998) [hereinafter *ICC DOCUMENTARY HISTORY*]. The four tribunals are: (1) the International Military Tribunal at Nuremberg, (2) the International Military Tribunal for the Far East at Tokyo, (3) the International Criminal Tribunal for the former Yugoslavia at the Hague, and (4) the International Criminal Tribunal for Rwanda at Arusha. *Id.* at 5–6. The investigatory commissions are: (1) the 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties (investigating atrocities committed during World War I), (2) the 1943 United Nations War Crime Commission (investigating German war crimes during World War II), (3) the 1946 Far Eastern Commission (investigating Japanese war crimes during World War II), (4) the Commission of Experts Established Pursuant to Security Council Resolution 780 (investigating violations of human rights in the former Yugoslavia), and (5) the Independent Commission of Experts established in accordance with Security Council Resolution 935 (investigating violations of human rights in Rwanda). *Id.* at 5–6. Interestingly, the Treaty of Versailles, ending World War I, provided for the prosecution of Kaiser Wilhelm II of Germany for offenses "against international morality," and for the prosecution of other persons for acts against the law of war, but no international tribunals were ever created. *Id.* at 7.

5 The concept of an international "statute," as distinguished from an international "treaty," is an unprecedented and recent development in international law. See American Bar Ass'n Task Force on an Int'l Criminal Court & N.Y. State Bar Association, *Joint Report with Recommendations to the House of Delegates: Establishment of an International Criminal Court*, 27 *INT'L LAW.* 257, 257 (1993) [hereinafter *A.B.A. Task Force*]; James H. Carter, *Report on Improving the Effectiveness of the United Nations in Advancing the Rule of Law in the World, Working Group on Improving the Effectiveness of the United Nations (1994)*, 29 *INT'L LAW.* 293, 300 (1995); Timothy L. Dickinson, *Joint Report with Recommendations to the House of Delegates: Establishment of an International Criminal Court*, 1998 *A.B.A. SEC. INT'L L. & PRAC.* 118B (tracing procedural history of the International Criminal Court); Ronald J. Rychlak & John M. Czarnetzky, *The International Criminal Court and the Question of Subsidiarity*, 2000–2003 *THIRD WORLD LEGAL STUD.* 115, 119 (2003). Ambassador David J. Scheffer, the head of the United States delegation to the ICC negotiations, has noted:

When one speaks of creating a court on an international level, it has to have some governing document for the functioning of that court. And as with the Yugoslav Tribunal and the Rwanda Tribunal, the Security Council adopted statutes or a statute for each tribunal, which is its constitution, basically, the court's own constitution, the basic principles by which the court must function.

It is simply a term of art that has arisen in the international sphere, and during the talks for the ICC, it is that basic constitutional document of the court itself which is described as the statute. The treaty itself, when ratified, embodies that statute, and I guess the best I can say is that it's simply, in U.N. practice, once you have ratified the treaty, per se, you are also, of course, adopting as part of that ratification package, the statute of the court itself.

1998 Rome Statute of the International Criminal Court (Rome Statute).<sup>6</sup>

The Rome Statute attempts, through the ICC, to use notions of criminal law to punish gross violations of international human rights norms. The ICC is an international court with jurisdiction over grave international "crimes" as defined by the Rome Statute.<sup>7</sup> Its jurisdiction is defined in the Rome Statute as "complementary" to that of individual nations.<sup>8</sup> If the individual nation is either unable or unwilling to prosecute malefactors who have committed crimes within the Rome Statute, then the ICC's prosecutor must prosecute.<sup>9</sup> Moreover, the Rome Statute provides that amnesties provided by the nation concerned are not binding on the ICC.<sup>10</sup> The idea behind the ICC is that the international community must end the impunity with which horrible human rights violations have been perpetrated and, if such impunity cannot be deterred effectively in every instance, it must always be punished.

In this Article, we examine the underlying assumptions supporting this jurisdictional scheme to discern whether it might not, in certain circumstances, do more harm than good, and whether its actions might even result in social discord and armed strife rather than peace.<sup>11</sup> These concerns are particularly acute in the very instances

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*The International Criminal Court: Hearings Before the House Comm. On Int'l Relations*, 106th Cong. 46-47 (2000) (statement of Ambassador Scheffer, Ambassador-at-Large for War Crimes Issues, U.S. Dep't of State); see also Vienna Convention of the Law of Treaties, May 23, 1969, art. 34, 1155 U.N.T.S. 331, 341, 8 I.L.M. 679, 693 (1969) (agreeing that no state can be held to the provisions of a treaty that it has not ratified).

6 Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998), available at <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter Rome Statute].

7 For a full discussion of the jurisdictional scheme of the ICC, see *infra* Part II.B.

8 See Rome Statute, *supra* note 6, art. 5, 37 I.L.M. at 1003.

9 *Id.* art. 1, 37 I.L.M. at 1003.

10 *Id.*

11 One of the major justifications for international prosecution of human rights violations is that permitting perpetrators of such crimes to escape without punishment is a threat to peace. See *id.* pmbli., 37 I.L.M. at 1002 ("Recognizing that such grave crimes threaten the peace, security and well-being of the world.") (emphasis removed); see also M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS., Winter 1996, at 9, 26 (1996) (arguing that impunity is "counterproductive to the ultimate goal of peace"); W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175, 178 (1995) (identifying the restoration of public order as a significant goal of sanctions).

where the ICC is most likely to have its greatest utility—where a society is in, or just emerging from, a major transition.<sup>12</sup>

The idea of an international court with jurisdiction during or after a political revolution is not necessarily inherently misguided or dangerous; however, there is a fundamental flaw in the ICC which we believe will cause the court, as it is currently structured, to become either irrelevant or dangerous. That fundamental flaw is the lack of any moral and political check as part of the ICC's structure.<sup>13</sup>

When it comes to tyrants who have visited serious human rights violations upon their fellow citizens, criminal prosecution may well be the most just course of action.<sup>14</sup> An international tribunal would have

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12 The Rome Statute's delineation of the ICC's jurisdiction virtually ensures that the ICC will prosecute cases only where a nation is undergoing, or has emerged from, some sort of political revolution. After all, if a tyrant committing human rights abuses is in control of a nation, even if that nation is already a member of the ICC and its governing body—the Assembly of States Parties—it is highly unlikely that the leader will be surrendered to the ICC for prosecution. The only chance for a trial before the ICC is a revolutionary change in the nature of that nation's government. The subject of transitional justice truly has captured the scholarly imagination, to judge from the effusion of writing on the topic. See, e.g., RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 215 (2000) (noting that transitional justice must “somehow bridge conventional legality and the normative shift entailed by liberalizing transformation”). See generally *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* (A. James McAdams ed., 1997); 1–3 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed., 1995) [hereinafter *TRANSITIONAL JUSTICE*]; Antonio F. Perez, *The Perils of Pinochet: Problems for Transitional Justice and a Supranational Governance Solution*, 28 *DENV. J. INT'L L. & POL'Y* 175 (2000); Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 *GEO. L.J.* 707 (1999).

13 Many of the delegations involved in negotiating the ICC stated that the lack of a political process as part of the court's structure was one of the inherent *strengths* of the ICC, a position that we believe is simply wrong. See, e.g., *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 577 (Roy S. Lee ed., 1999) [hereinafter *THE MAKING OF THE ROME STATUTE*] (calling for greater independence from political influence of the U.N. Security Council (statement of Benin)); *id.* at 587 (lauding prosecutor's independence from “political developments” (statement of Croatia)); *id.* at 592 (stating that it “would have preferred the Court to be independent of any political body . . .” (statement of Egypt)); *id.* at 598 (calling it an advantage that the ICC structure eliminates “the need for a decision of the Security Council in order to establish an ad hoc tribunal” (statement of Hungary)); *id.* at 603 (citing as an achievement of the Rome Statute that recourse to the court is not limited to states, but rather may be brought by the prosecutor at his or her own discretion (statement of Italy)); *id.* at 611 (lauding court as independent of international political process (statement of New Zealand)).

14 Too often, political decisions, such as the decision to prosecute, are influenced by factors that deny justice. Thus, there is the constant fear that laws are not equally applied, or that the rich and powerful are not treated the same way that others are treated. Such fears propel drives for strict, mechanistic application of legalistic for-

an important role in cases where the society in question is incapable of conducting the investigation and trial of the crimes. In other transitional societies, however, the establishment or reestablishment of a stable polity may require attention to not just what is due to victims of human rights crimes, but also the overarching common good of the society. In particular, the calculus of justice in these societies will require a delicate balance between retribution and punishment for terrible crimes on one side, and peace and order on the other. Justice in such a context requires close attention to political and moral bonds among citizens and groups of citizens within the polity, sometimes known for lack of a better term as civic “friendship” or “concord.”<sup>15</sup> In such situations, it is the practical reason of the legitimate representatives of the polity applied to the question of the common good on a case-by-case basis (i.e., morality-influenced politics)<sup>16</sup>—not mechanistic legalism—that will provide the path to justice.<sup>17</sup>

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mulas. A current example can be found in sentencing guidelines, which were originally suggested as a means of assuring equal treatment for all criminal defendants. Of course, many judges feel that the guidelines have harmed the cause of justice by stripping them of their discretion. See generally KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998). The same is true of so-called “three-strikes” legislation. See generally FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* (2001).

15 We employ the term “friendship” in the manner of Aristotle, who distinguished different types of friendship depending upon the nature of the association shared by human beings. Aristotle believed that while very few “true” friendships—something akin to “love” in modern parlance—are possible, in every human association and interaction there are bonds of friendship based in part on human beings’ natural empathy for one another counterbalanced by the individual instrumental concerns of the people involved. Indeed, Aristotle believed that such friendship exists even in the most instrumental of human interactions—parties to a contract. See *infra* notes 161–63.

16 Aquinas defined law as “a dictate of practical reason emanating from the ruler who governs a perfect community.” 2 THOMAS AQUINAS, *Summa Theologica*, in *BASIC WRITINGS OF ST. THOMAS AQUINAS* 748 (Anton C. Pegis ed., 1945). He realized that the ruler might not always properly apply “practical reason” to a given situation, 2 *id.* at 743–44, but he at least recognized its importance. Aquinas argued that in such case the rulers will reflect not the force of law, but “the sovereign’s will would savor of lawlessness rather than of law.” 2 *id.* at 744. It is this practical reason, based on moral considerations and sometimes on political compromise, that can lead to the common good in difficult situations, despite the risk that it may be abused in other cases.

17 Criminal law in a stable nation with an established rule of law is one of many tools for fostering the common good of the nation, its communities, and its citizens, just as the establishment and enforcement of human rights norms is an extremely important aspect of any notion of an international common good. However, the justice that flows from courts and criminal trials comes at a price—absolute adherence to pre-established norms. That alternative precludes the use of political considerations. In an established community dedicated to the rule of law, this is not a major

The ICC as an institution is the result of absolute faith in a nonpolitical, *legalistic* model of justice: where human rights violations have occurred, prosecutions *must* take place either on the national level or in the ICC. The ICC is, therefore, the apotheosis of “legalism”—the late political philosopher Judith Shklar’s term for the ideology grounded in the “ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”<sup>18</sup>

For legalists, the courts of law and trials are “the social paradigms, the perfection, the very epitome, of legalistic morality.”<sup>19</sup> Zealous legalists, particularly lawyers, judges, and legal academics, take the primacy of legalism as a philosophy for granted. Law, in this view, is inherently and morally superior to the sordid compromises and squabbles of political and social intercourse.<sup>20</sup> Rather than an instrument of politics, law is viewed as a distinct science, “sealed off from general social history, from general social theory, from politics, and from morality.”<sup>21</sup> The purpose of legal philosophy and scholarship on

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problem. Enforcement of criminal law manifestly serves the common good of the community, and thus there is little need to weigh political considerations. (This is not to say that such reasoning is impossible, even in local criminal prosecutions. For example, many prosecutors in the United States are elected officials, and thus subject to a significant political check on their duties.) In the few instances where the criminal law ought to bend to greater considerations of justice, there are safety valves such as prosecutorial discretion, plea bargaining, and reduced sentences for cooperation with authorities.

18 JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 1 (1986). See F.C. DeCoste, *Faith: Political Philosophy in the Canadian Academy*, 39 ALBERTA L. REV. 738, 752 (2001) (reviewing CANADIAN POLITICAL PHILOSOPHY: CONTEMPORARY REFLECTIONS (Ronald Beiner & Wayne Norman eds., 2001)).

19 See SHKLAR, *supra* note 18, at 1–2; David Ray Papke, *The American Courtroom Trial: Pop Culture, Courthouse Realities, and the Dream World of Justice*, 40 S. TEX. L. REV. 919, 932 n.60 (1999); see also MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 221 (1994) (noting critically “an increase in the demand for judicial services” and quoting Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 Harv. L. Rev. 761, 771 (1987)); *id.* at 275 (blaming “legal opinion leaders” for “peddling an idea of law that promised too much”).

20 The basis of this theory seems to be reflected in de Tocqueville’s observation, “The spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed., George Laurence trans., Anchor Books 1969) (1840).

21 SHKLAR, *supra* note 18, at 2; Jeffrey Malkan, *Literary Formalism, Legal Formalism*, 19 CARDOZO L. REV. 1393, 1413 (1998); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1185 (1992).



this view solely is to define what is and what is not law, with the goal of exactly defining the boundary between law and politics. Once that boundary is established, "justice" consists of the mechanical, zealous enforcement of the law through the judicial system. Thus elevated above politics, nothing short of an empire of law is established.

We believe that what sparks faith in the ICC, a faith that is held quite strongly in Western intellectual circles, is the dream that such an empire, ruled by law and not fallible human judgment, will largely eradicate the problem of impunity in international affairs through deterrence,<sup>22</sup> and that violations of human rights will become an abnormality. Current political institutions have not stopped human rights violations of the worst sort, so the problem must be with those political institutions. The ICC is thus an attempt to transcend political institutions, both at the national and the international level, and enthrone law and its institutions as the governing authority of the world.

This isolation and elevation of mechanistic law above moral politics in the international arena is a fundamental mistake with potentially grave consequences. Law is a form of social action that is a subset of, not superior to, moral politics.<sup>23</sup> The efforts of the past half century to deal with violations of human rights have culminated in a classic legalist solution—an international criminal court divorced almost entirely from moral politics and purposely insulated from any outside influence, political or otherwise. This elevation of judicial law precludes the possibility of non-legalistic, *political* modes of thought

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22 The National Legal Center for the Public Interest released a monolith on the subject, David Davenport, *The New International Criminal Court: Rush to Justice?* (2002), noting that "a chief objective in creating the International Criminal Court is to deter crime." *Id.* at 30. Davenport goes on to note that by making war and reprisal more civilized, the ICC may actually decrease the likelihood that criminal activity will be deterred. *Id.*; see also Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 *MIL. L. REV.* 156, 188 (2001) (commenting that an offender has "about as much chance of being prosecuted as 'winning the lottery'").

23 See SHKLAR, *supra* note 18, at 8:

As a social ethos which gives rise to the political climate in which judicial and other legal institutions flourish, legalism is beyond reproach. It is the rigidity of legalistic categories of thought, especially in appraising the relationships of law to the political environment within which it functions, that is so deleterious. This is . . . what prevents its exponents from recognizing both the strengths and weaknesses of law and legal procedures in a complex social world.

*Id.*; see also JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 17 (1990) (discussing the faith of adherents to legalism and a "normal model of justice" that with the proper institutional arrangements, injustices will be rare).

and action concerning justice and morality. In many situations, this exclusive reliance on legalistic justice, and the concomitant refusal to recognize any alternate path to justice, will lead to *injustice* in the form of renewed political turmoil and its ultimate extension, war. The goal of this Article is to show that this faith in legalism in the ICC is misplaced and self-defeating, and to suggest ways in which that structure may be altered to reflect the court's proper place as part of an effective international political order.

In Part I of this Article, we explore the traditional political responses to behavior that constitutes a crime under the Rome Statute, including examples from Nazi Germany, Chile, and South Africa. In Part II, we explain the limits of legalism as applied to international affairs, through a discussion of the proper understanding of the role and application of human rights principles, especially in political transitions. In Part III, we delineate flaws in the Rome Statute which might render a legal institution nobly intended to ensure the peace an ignoble instrument of international discord. We also suggest in Part IV ways in which the ICC or some other international criminal court might be structured more carefully to accomplish the lofty goals set for it.<sup>24</sup> We conclude with some thoughts about the human struggle for justice, and the path we must take to achieve an enduring peace.

## I. TRADITIONAL RESPONSES

History reveals four traditional responses to the fall of a regime that has been guilty of genocide and crimes against humanity.<sup>25</sup> The first is physical revenge carried out by the victors, which may lead to bloody cycles of revenge and reprisal.<sup>26</sup> In such cases, the lack of any formal mechanism can lead individuals to exact "justice" by their own

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24 We do not intend to infer that the ICC will not survive, though we believe that if it is to thrive, its jurisdictional provisions must be modified. In this regard, we are mindful that failed political institutions are often the seeds for stronger ones. Obvious examples include the Articles of Confederacy preceding the United States Constitution and the League of Nations preceding the United Nations.

25 See HELENA COBBAN, *THE MORAL ARCHITECTURE OF WORLD PEACE: NOBEL LAUREATES DISCUSS OUR GLOBAL FUTURE* 135 (2000) (summarizing the remarks of Archbishop Desmond Tutu at a conference of Nobel laureates at the University of Virginia).

26 Archbishop Tutu well described this "almost atavistic" impulse toward victors' revenge: "You clobbered me, I am waiting for my chance to clobber you back. That's exactly what happened in Rwanda. The Hutu did something to the Tutsi. The Tutsi disappeared for thirty years. They came back, and we had genocide. . . . Now, that's one way." *Id.*

hands, and by their own lights, with predictably disastrous results. The histories of Rwanda and Bosnia teach that old wounds do not heal by themselves; they require the balm of justice. What form justice takes, and how it is to be gauged, is, of course, the rub.

A second historic response to an overthrown tyranny is the legalistic solution of courtroom trials conducted by judges appointed by the victors or some outside tribunal (such as a military tribunal).<sup>27</sup> The Nuremberg trials following World War II represent the most well known example of this approach. The victorious Allies established a court and procedures for dealing with, and disposing of, the surviving high-level Nazis. Given that Germany's legal system was decimated, the tyrants were fully defeated, and the Allies were willing and able to conduct fair trials, this model seems to have worked well in that particular circumstance.

A third historic approach to a transitional society is the purely political response in which a settlement is reached that includes guarantees such as amnesties that serve to preempt subsequent prosecutions. From several recent examples, we have chosen to examine Chile. Particularly interesting is that the saga of Chile's transition to democracy did not end, at least for much of the world, with the settlement worked out in the country.

A fourth and rather new approach is the "mixed" legalistic and political approach of a Truth and Reconciliation Commission. This has been tried in many transitional societies, but its most notable success has been in South Africa, where a commission has helped that nation move to democracy from apartheid while avoiding civil war.<sup>28</sup>

#### A. *The Legalistic Model: The Example of Nuremberg*

Even before World War II ended, people started talking about putting war criminals, including Adolf Hitler and his close associates, on trial for war crimes.<sup>29</sup> Despite the risk that it might be seen as the victors taking vengeance on defeated nations,<sup>30</sup> there was a sense that

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27 *See id.*

28 *See infra* Part I.C.

29 *See, e.g.*, MICHAEL YOUNG, THE TRIAL OF ADOLF HITLER 144 (1944) (reflecting in part fact and part fiction, the wish of many people in the Allied nations). Hitler's suicide, however, prevented that trial. For a full historical discussion, see Herman von Hebel, *An International Criminal Court—A Historical Perspective*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT 13 (Herman A.M von Hebel et al. eds., 1999).

30 *See* Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBS. 263 (1950), *reprinted in* INTERNATIONAL CRIMINAL LAW 3 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965).

justice had to be served.<sup>31</sup> In January 1943, President Roosevelt, Prime Minister Churchill, and Charles de Gaulle concluded a ten-day meeting in Casablanca. From this meeting came the Allied demand for unconditional surrender.<sup>32</sup> That demand set the tone that led inevitably toward the Nuremberg trials.

At the Moscow Conference in November 1943, in what was to become known as the Moscow Declaration, the United States, Great Britain, and the Soviet Union agreed that "the major criminals whose offenses have no particular location . . . will be punished by a joint decision of the Governments of the Allies."<sup>33</sup> How they would be punished was, however, not clear. The United States and France were in favor of the creation of an international criminal tribunal, wherein not only a trial could be held, but where history could be recorded, the world educated, and deterrence served. The Soviet Union, traditionally appreciative of political show trials, did not object, but also favored summary executions. Great Britain, fearing a trial would become a forum of Nazi propaganda and self-justification, also favored summary, but not mass, executions.<sup>34</sup> Ultimately, the United States was influential in the decision to conduct legitimate trials.<sup>35</sup>

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31 See Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38 (1947), reprinted in INTERNATIONAL CRIMINAL LAW, *supra* note 30, at 239.

32 Some have argued that once Germany was losing the war, the main obstacle to peace was this self-imposed barrier. B.H. LIDDELL HART, HISTORY OF THE SECOND WORLD WAR 681 (G.P. Putnam's Sons 1971) (1970). The German Ambassador to the Holy See later reported: "I told every official quarter in Rome to which I had access that this formula would cost the lives of many more Allied soldiers." ERNST VON WEIZSÄCKER, MEMOIRS OF ERNST VON WEIZSÄCKER 297 (John Andrews trans., 1951). In February 1945, General Eisenhower noted: "The policy [of unconditional surrender] faced the German high command with the choice of being hanged or jumping into a clump of bayonets . . ." TREVOR N. DUPUY & R. ERNEST DUPUY, THE ENCYCLOPEDIA OF MILITARY HISTORY 1016 (1970). In fairness to the Allied leaders, however, it should be noted that a conditional surrender had not held up after World War I.

33 TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 27 (1992).

34 *Id.* at 30; see also Bassiouni, *From Versailles to Rwanda*, *supra* note 3, at 24. Under Churchill's plan, an initial list of fifty to one hundred of the "Hitler and Mussolini gangs and the Japanese war lords" was to be created. Once a person on the list was caught, a short field tribunal to ascertain identity would be convened, and once established, execution would follow within hours. ARIEH J. KOCHAVI, PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT 73 (1998).

35 Chief Prosecutor Jackson explained: "The record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well." Robert H. Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945), in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 101 (1947) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS]; see also BRADLEY F.

The Allies met to negotiate procedures for the post-war trial following the signing of the charter of the United Nations (June 26, 1945). The final agreement, known as the London Agreement, was signed on August 8, 1945.<sup>36</sup> The procedures under which the tribunals would operate were set forth in the Nuremberg Charter, which was annexed to the London Agreement.<sup>37</sup> Although President Tru-

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SMITH, REACHING JUDGMENT AT NUREMBERG 20-45 (1977). The accused were, in Jackson's words, "given the kind of a Trial which they, in the days of their pomp and power, never gave to any man." 19 TRIAL OF THE MAJOR WAR CRIMINALS, *supra*, at 399.

In November 1943, Stalin called for at least 50,000 of the German general staff to be summarily executed. Churchill responded, "I would rather be taken out into the garden here and now and be shot myself than sully my own and my country's honor with such infamy." 5 WINSTON CHURCHILL, THE SECOND WORLD WAR 330 (1952); KOCHAVI, *supra* note 34, at 63; *see also* TAYLOR, *supra* note 33, at 30. In early 1945, however, the British leader sent a note to Supreme Court Justice Robert Jackson (who would become the chief U.S. prosecutor in the war crimes trials), urging execution without trial for Hitler and a number of his associates, including Mussolini. The Americans would not agree, and German leaders would later stand trial for their war crimes.

36 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Agreement]; Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284 [hereinafter Nuremberg Charter]. A number of other States subsequently adhered to the London Agreement, including: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia. The Nuremberg Trials were followed by the International Military Tribunal for the Far East (IMTFE) and the Allied prosecutions in their respective zones of occupations. The IMTFE is generally considered an example of how not to conduct an international criminal tribunal. Rather than a fair judicial inquest, it was a political animal created not by treaty, but by an order of General MacArthur in his capacity as Supreme Commander for the Allied Powers, and conducted as such. Bassiouni, *From Versailles to Rwanda*, *supra* note 3, at 32. The IMTFE was dominated by American judges, prosecutors, and attorneys. *See* INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK 170 (Burns H. Weston et al. eds., 2d ed. 1990); M. Cherif Bassiouni, "Crimes Against Humanity": *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 463 (1994).

In addition to the Nuremberg Trials, the Allies undertook prosecutions in their respective zones of occupation. *See* KOCHAVI, *supra* note 34, at 168; James T. Brand, *Crimes Against Humanity and the Nürnberg Trials*, 28 OR. L. REV. 93, 100 (1949) (citing 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 35, at 11 (1947)).

37 Attached to the London Agreement was the Charter of the International Military Tribunal (IMT), also known as the Nuremberg Charter, which contained the laws under which such Tribunal would operate. *See* Nuremberg Charter, *supra* note 36. Taken together, these documents established several new standards with regard to international criminal tribunals. The Charter's use and definition of "Crimes Against Humanity" was derived from earlier documents, The Martens Preamble, the 1915 Denunciation, and the 1919 Commission's report regarding the Armenian massacre,

man may have been incorrect in calling Nuremberg “the First International Criminal Assize in History,”<sup>38</sup> it was the first time in recorded history that the architects of a war were put on trial by an international body for their acts.<sup>39</sup>

The Nazi leaders had seized power by suspending guarantees of freedom and arresting political opponents to gain control of the legislature.<sup>40</sup> They consolidated their power by reducing the power of local and regional governments; securing control of the civil service; controlling the judiciary; and persecuting and murdering their opponents.<sup>41</sup> They also used terror most effectively.<sup>42</sup> All of these crimes called for criminal prosecution.

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TAYLOR, *supra* note 33, at 13, 27, but it codified for the first time a nexus between crimes against humanity and war. The Charter also codified the 1919 Commission’s rejection of immunity for heads of state. Nuremberg Charter, *supra* note 36, art. 7, 59 Stat. at 1548, 82 U.N.T.S. at 288. It also rejected the so-called “superior orders” defense wherein a soldier could claim innocence based upon his orders, though existence of such orders could be considered for mitigation of sentences. *Id.* art. 8, 59 Stat. at 1548, 82 U.N.T.S. at 288. The Nuremberg Charter rests on the principle that “individuals have international duties which transcend the national obligations of obedience imposed by the individual state.” 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 35, at 223. This was important, as many defendants at Nuremberg wanted to assert such a claim as a defense. The Nuremberg Charter also introduced into international criminal law the concepts of conspiracy and culpability based upon membership of organizations. See Nuremberg Charter, *supra* note 36, arts. 6, 9, 59 Stat. at 147–48, 82 U.N.T.S. at 286–88, 290.

38 President Harry S. Truman chose this phrase to describe the Nuremberg trial. See Jonathan A. Bush, *Nuremberg: The Modern Law of War and its Limitations*, 93 COLUM. L. REV. 2022, 2025 (1993) (reviewing TAYLOR, *supra* note 33, and citing FROM NUREMBERG TO MY LAI (Jay W. Baird ed., 1972)).

39 The 1919 Commission of World War I was formed to investigate allegations of war crimes and atrocities, though no prosecutions ever took place. After World War I, the Kellogg-Briand Pact outlawing war had been signed, leading Justice Jackson to question “what statesman . . . could doubt, from 1928 onwards, that aggressive war . . . was unlawful and outlawed?” See Hans Ehard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 43 AM. J. INT’L L. 223, 232 (1949) (quoting 3 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 35, at 103). For historical surveys and collections of documents, see 2 FERENCZ, *supra* note 3 *passim*; Bassiouni, *From Versailles to Rwanda*, *supra* note 3 *passim*; and Wexler, *supra* note 3, at 669–85.

40 See RONALD J. RYCHLAK, *HITLER, THE WAR, AND THE POPE* 50–51 (2000); 2 WILLIAM L. SHIRER, *20TH CENTURY JOURNEY, THE NIGHTMARE YEARS 1930–1940*, at 116–17 (1984); WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* 194, 196 (1960).

41 JOHN TOLAND, *ADOLF HITLER* 259–521 (1976) (detailing the Nazi rise to power). The Nuremberg Tribunal observed:

The Hitler Cabinet was anxious to pass an “Enabling Act” that would give them full legislative powers, including the power to deviate from the Constitution. They were without the necessary majority in the Reichstag to be able

The Nuremberg Tribunal was empowered, *inter alia*, to punish persons who, while acting in the interests of the European Axis countries, had committed crimes against peace,<sup>43</sup> including: planning, pre-

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to do this constitutionally. They therefore made use of the decree suspending the guarantees of freedom and took into so-called "protective custody" a large number of Communist deputies and Party officials. Having done this, Hitler introduced the "Enabling Act" into the Reichstag, and after he had made it clear that if it was not passed, further forceful measures would be taken, the act was passed on 24 March 1933.

1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 35, at 178. The Tribunal also stated: "In order to place the complete control of the machinery of Government in the hands of the Nazi leaders, a series of laws and decrees were passed which reduced the powers of regional and local governments throughout Germany, transforming them into subordinate divisions of the Government of the Reich." *Id.*

42 See generally ALAN BULLOCK, *HITLER: A STUDY IN TYRANNY* (rev. ed. 1962); GUNTHER DESCHNER, *WARSAW RISING* (1972); CHARLES BRACELEN FLOOD, *HITLER: THE PATH TO POWER* (1989); MARTIN GILBERT, *AUSCHWITZ AND THE ALLIES* (1981); MARTIN GILBERT, *THE HOLOCAUST: A HISTORY OF THE JEWS OF EUROPE DURING THE SECOND WORLD WAR* (1985); MARTIN GILBERT, *THE SECOND WORLD WAR: A COMPLETE HISTORY* (1989); JOHN KEEGAN, *THE SECOND WORLD WAR* (1989); HENRI DE LUBAC, *CHRISTIAN RESISTANCE TO ANTI-SEMITISM: MEMORIES FROM 1940-1944* (1990); JOHN LUKACS, *THE HITLER OF HISTORY* (1997); POPE PIUS XI, *ON THE PRESENT POSITION OF THE CATHOLIC CHURCH IN THE GERMAN EMPIRE* (1937); ALBERT SPEER, *INSIDE THE THIRD REICH* (1970); *WARTIME CORRESPONDENCE BETWEEN PRESIDENT ROOSEVELT AND POPE PIUS XII* (Myron C. Taylor ed., 1947).

43 Count one of the indictment addressed the nature and development of the common plan or conspiracy to commit, *inter alia*, crimes against peace. Count one began with a general discussion of the rise of the Nazi Party, its central role in the common plan or conspiracy, its aims and objectives, and the techniques and methods that it used to advance the common plan or conspiracy, including the acquisition of totalitarian control of Germany and the economic planning and mobilization for aggressive war. 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 35, at 27, 29. Count one also addressed the defendants' use of Nazi control of the German Government for foreign aggression by pursuing their plan of re-arming, re-occupying, and fortifying the Rhineland in violation of the Treaty of Versailles as well as other treaties, and thereby acquiring military strength and political bargaining power against other nations. 1 *id.* at 35.

Count two contained charges relating to crimes against peace. It alleged that all of the defendants had participated in planning, preparing, initiating, and waging wars of aggression, which were also wars in violation of international treaties, agreements, and assurances, initiated against the following twelve countries on the dates indicated: Poland (1939); the United Kingdom and France (1939); Denmark and Norway (1940); Belgium, the Netherlands and Luxembourg (1940); Yugoslavia and Greece (1941); the Soviet Union (1941); and the United States (1941). 1 *id.* at 42.

Counts three and four contained the charges relating to war crimes and crimes against humanity, respectively. 1 *id.* at 42-68. The indictment was submitted to the Nuremberg Tribunal on October 18, 1945. 1 *id.* at 171. The Nuremberg Tribunal made the following observations concerning the charges relating to crimes against peace:

paring, initiating or waging a war of aggression, waging war in violation of international treaties, agreements or assurances, or participating in a common plan or conspiracy to accomplish any of the above.<sup>44</sup> In addition to a conspiracy or “common plan” count, there were three basic counts in the indictment: crimes against peace (aggressive war),<sup>45</sup> crimes against the laws of war (war crimes),<sup>46</sup> and crimes against humanity (murder and injury to civilians for racial, religious, or political reasons).<sup>47</sup>

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The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

1 *id.* at 186.

44 Article 6 of the Nuremberg Charter provided as follows:

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing . . . .

Nuremberg Charter, *supra* note 36, art. 6(a), 59 Stat. 1544, 1547, 82 U.N.T.S. 284, 286–88.

45 The crimes against peace count was based on the Kellogg-Briand Peace Pact of 1928, which outlawed war as an instrument of national policy, and on Germany’s violation of the many treaties that committed her to the peaceful resolution of her disputes with her neighboring states. Invasions such as those of Czechoslovakia and Austria, were not found to be crimes against peace on the ground that they were acts of aggression and not wars of aggression. Ehard, *supra* note 39, at 232.

46 The war crimes and crimes against humanity counts at Nuremberg were the forerunners of the United Nations Security Council resolution of May 25, 1993, which provides the basis for the international tribunals that laid the groundwork for the ICC.

47 According to the Nuremberg Charter, and the holding of the International Military Tribunal, in order to be actionable, crimes against humanity (murder, enslavement, etc. of civilians for political, religious, or racial reasons) had to be carried out “in execution of or in connection with” another crime within the jurisdiction of the tribunal. Nuremberg Charter, *supra* note 36, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288. What this meant was that the pre-war persecution of the Jews in Nazi Germany was not actionable because it was not connected with a war crime or crime against peace.



United States Supreme Court Justice Robert H. Jackson, on leave to serve as the American Chief Prosecutor,<sup>48</sup> in his opening statement (which has been called “perhaps the greatest forensic speech in the English language”<sup>49</sup>), addressed the quadripartite International Military Tribunal (IMT), saying: “The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”<sup>50</sup> The IMT itself made the following observations concerning the global impact of Nazi crimes against peace:

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other

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48 Robert H. Jackson was appointed Chief Counsel for war crimes by President Truman on April 26, 1945. TAYLOR, *supra* note 33, at 45. Previous to this appointment, Jackson had served as Assistant Attorney General, Solicitor General, Attorney General, and finally, Associate Justice of the United States Supreme Court. *Id.* at 43. Several weeks before accepting the Chief Counsel position, Justice Jackson publicly stated his belief that the waging of aggressive war should be criminalized, but also said that if any trials of Nazi war criminals were to be held, the four powers must be prepared to release any defendants who were acquitted. Robert H. Jackson, Address to the American Society of International Law on the Topic “The Rule of Law Among Nations” (Apr. 13, 1945), in TAYLOR, *supra* note 33, at 44–45. For a detailed presentation of the prosecutors’ experiences at Nuremberg, see *Judgments on Nuremberg: The Past Half Century and Beyond—A Panel Discussion of Nuremberg Prosecutors*, 16 B.C. THIRD WORLD L.J. 193, 193 (1996) [hereinafter *Judgments on Nuremberg*].

49 *Judgments on Nuremberg*, *supra* note 48, at 195.

50 Robert H. Jackson, *supra* note 35, at 99; see also 1 DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR’S COMPREHENSIVE ACCOUNT 152 (1999); THE NUREMBERG TRIAL AND INTERNATIONAL LAW 77 (George Ginsburgs & V.N. Kudriavtsev eds., 1990). Prosecutor Jackson also commented in his opening statement on how remarkable it was for the Allies to have put this tribunal together so soon after the war:

[L]ess than eight months ago today the courtroom in which you sit was an enemy fortress in the hands of German SS troops. Less than eight months ago nearly all our witnesses and documents were in the enemy hands. The law had not been codified, no procedures had been established, no Tribunal was in existence, no usable courthouse stood here, none of the hundreds of tons of official German documents had been examined, no prosecuting staff had been assembled, nearly all of the present defendants were at large, and the four prosecuting powers had not yet joined in common cause to try them.

Robert H. Jackson, *supra* note 35, at 100.

war crimes in that it contains within itself the accumulated evil of the whole.<sup>51</sup>

The criminal trial model was particularly appropriate in this case.<sup>52</sup> The Nazis had been defeated by an outside force—the Allies. This was not the case of an actual or potential civil war, nor did it involve a negotiated transfer of power from one regime to another. With their call for unconditional surrender, the Allies had taken any chance for negotiations off the table at least two years earlier. As such, there was no reason to try for a political solution at this time.<sup>53</sup> Moreover, Adolf Hitler and Josef Göbbels escaped justice by committing suicide,<sup>54</sup> but the Nazis had been defeated, and the surviving Nazi leaders (with a few notable exceptions)<sup>55</sup> were captured and imprisoned. Accordingly, there was no difficulty in getting the defendants to court. Moreover, as the world became aware of the Nazi atrocities, there was no call (or true justification) for across-the-board amnesty for these defendants. In fact, failure to punish those found guilty might well have resulted in open and severe acts of retaliation.<sup>56</sup> As such, criminal prosecution was a very logical option. It was also well-executed.

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51 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 35, at 186. The choice of Nuremberg for the site of these trials was mandated somewhat by the fact that its courthouse was one of the few remaining in Germany large enough to accommodate such proceedings. As Jackson's comments suggest, however, it is ironic that we today equate Nuremberg with constructive limitations on sovereignty designed to create an assured peace. Less than a decade prior to the proceedings, Nuremberg was the site of the annual Nazi Party Day rallies where Adolf Hitler whipped his followers into nationalistic frenzies. It was also from there that many of the most severe racial laws in Nazi Germany were announced. At that time, Nuremberg symbolized nationalism run amok. See RYCHLAK, *supra* note 40, at 77–78.

52 The popularity of this approach to the problem was reflected in some polls at the time showing that almost two-thirds of the respondents were willing to support the abstract principle of a world body to settle disputes between states, with the ability to enforce its decisions. DAVID W. ZIEGLER, WAR, PEACE, AND INTERNATIONAL POLITICS 133 (1987).

53 Hitler revealed himself as an untrustworthy partner in negotiations prior to the war. See RYCHLAK, *supra* note 40, at 119–20.

54 Hermann Göring stood trial, but on October 15, 1946, two hours before his scheduled execution, he committed suicide in his Nuremberg cell. JOHN KEEGAN, THE SECOND WORLD WAR 590 (1990).

55 Adolf Eichmann and Dr. Josef Mengele are the most notorious Nazis who avoided the Nuremberg Trials. Eichmann was later captured, tried and executed, but Mengele lived out his life under an assumed name without ever facing justice. RYCHLACK, *supra* note 40, at 423 nn.187–88.

56 See, e.g., JOHN SACK, AN EYE FOR AN EYE (1993).

Nuremberg established a legacy of fairness and due process in international tribunals.<sup>57</sup> Twenty-four defendants were indicted, twenty-two were prosecuted,<sup>58</sup> three were acquitted, twelve were sentenced to death, three to life, and the remaining to various imprisonment terms from ten to twenty years.<sup>59</sup> The acquittals and sentences to punishments other than death suggest that this was not a situation of "victor's justice."<sup>60</sup>

Nuremberg also made three historic contributions to international legal history. The first was to create an indisputable historical record of the Nazi regime's atrocities and conduct during World War II, beginning with planned acts of aggression, including the Holocaust. The second contribution was establishing that any person could be held personally responsible for crimes; he cannot shield himself under an act of state doctrine.<sup>61</sup> Third, and perhaps most impor-

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57 This is not to say that defendants were given all of the rights that a modern criminal defendant in the United States might expect. See Bassiouni, *From Versailles to Rwanda*, *supra* note 3, at 29 (noting the denial of confrontation and cross-examination rights in some cases). Although there was no appeal process, a clemency review process was available. Bush, *supra* note 38, at 2081.

58 In one case the defendant was deemed too old and unhealthy to face trial. In another case, it was determined that the wrong person had been indicted.

59 The twenty-two defendants who appeared before the Tribunal (and their sentences or the disposition of their cases) were: Martin Bormann (death in absentia), Admiral Karl Dönitz (ten years), Hans Frank (death), Wilhelm Frick (death), Hans Fritzsche (acquitted), Walther Funk (life imprisonment), Hermann Göring (death), Rudolf Hess (life imprisonment), General Alfred Jodl (death), Ernst Kaltenbrunner (death), Field Marshal Wilhelm Keitel (death), Konstantin von Neurath (fifteen years), Franz von Papen (acquitted), Admiral Erich Räder (life imprisonment), Joachim von Ribbentrop (death), Alfred Rosenberg (death), Fritz Sauckel (death), Hjalmar Schacht (acquitted), Baldur von Schirach (twenty years), Arthur Seyss-Inquart (death), Albert Speer (twenty years), and Julius Streicher (death). WHITNEY R. HARRIS, *TYRANNY ON TRIAL* 477-81 (1954).

60 But see Arthur L. Berney, *Revisiting a Conference Commemorating the Nuremberg Trials: A Commentary from a Nuremberg Prosecutor*, 17 B.C. THIRD WORLD L.J. 275, 276 n.6 (1997) ("The most commonly heard criticism was that the tribunal created by victorious powers to try the vanquished, was a retroactive form of victors justice."); Makau Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution?*, 6 BUFF. HUM. RTS. L. REV. 77, 79-82 (2000) (raising similar concerns).

61 Under this defense, rejected at Nuremberg, national sovereignty could be used to exonerate leaders for violations of international law. The IMT said that the test for punishment was whether the actions in question violated international law, not German domestic law. National leaders could be complying with German law, but that was not enough—they had to comply with international law for their behavior to be vindicated. Additionally, Nuremberg developed the doctrine that so-called superior orders could serve as mitigation, but not as exoneration, for war crimes. Furthermore, Nuremberg declared that genocide and mass murder are unmitigable evils, and constitute independent crimes against humanity. See *supra* notes 37, 43.

tant: the ultimate war crime is the launching of an aggressive war—all other war crimes flow from that. The principles of international criminal law derived from the Nuremberg precedent were unanimously affirmed by the General Assembly of the United Nations on December 11, 1946, and became generally accepted as binding international law.<sup>62</sup>

### B. *The Political Model: The Example of Chile*

A second, general model of transitional justice is leaving the past behind in order to concentrate on the future.<sup>63</sup> Particularly where a new government has emerged from a process of negotiation grounded in political or military stalemate, a cornerstone of the transition often is legal amnesty for past human rights abuses.<sup>64</sup> Chile is such a nation, having granted legal amnesty for human rights violations by the former regime for abuses up to a date certain, 1978. This amnesty was used to lay the groundwork for the transition to democracy, which culminated in free and peaceful elections ten years later.<sup>65</sup>

On September 11, 1973, the recently appointed military commander in chief of Chile, Augusto Pinochet, imposed martial law, os-

62 The "Nuremberg trial and subsequent proceedings did not wholly clarify the rules on the taking of hostages and reprisals. These gaps were corrected by the 1949 Geneva Conventions." Henry T. King, Jr., *Address: The Meaning of Nuremberg*, 30 CASE W. RES. J. INT'L L. 143, 145 (1998).

63 See generally TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (A. James McAdams ed., 1997) [hereinafter RULE OF LAW] (printing essays concerning transitional justice and the experience of several countries including Chile); 1-3 TRANSITIONAL JUSTICE, *supra* note 12 (examining more than twenty transitions following World War II, including Chile's experience).

64 An analogous approach is "lustration," whereby officials and collaborators of the previous regime, declared to have been an illegal regime by the new government, are exposed publicly and prohibited from participating in the new government. See 2 TRANSITIONAL JUSTICE, *supra* note 12, at 532-92 (detailing the experience of lustration in Czechoslovakia, later the Czech Republic); Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357, 365-85 (1999) (same); Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 LAW & CONTEMP. PROBS., Autumn 1996, at 181, 181-83 (same).

65 See 2 TRANSITIONAL JUSTICE, *supra* note 12, at 453-54 (summarizing events in the Chilean transition); Stephen Kim Park, *Dictators in the Dock: Retroactive Justice in Consolidating Democracies, A Comparative Analysis of Chile and South Korea*, 25 FLETCHER F. WORLD AFF. 127, 127-34 (2001) (same); Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995*, 2 TULSA J. COMP. & INT'L L. 253, 268-69 (1995) (same); Robert J. Quinn, Note, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 917-19 (1994) (same).

tensibly to restore social order to the nation.<sup>66</sup> Pinochet and his junta immediately consolidated their grip over the country through a systematic campaign of repression aimed at eradicating all opposing groups and individuals.<sup>67</sup> The Chilean National Commission on Truth and Reconciliation later determined that 2279 individuals died or "disappeared," though the actual number may be higher.<sup>68</sup>

Despite the oppression, Chile enjoyed an economic boom under Pinochet.<sup>69</sup> His successful economic reform gave Pinochet many supporters, even though opposition grew steadily throughout the 1980s.<sup>70</sup> Apparently believing that the people would support him if given the chance, Pinochet permitted a plebiscite allowing citizens to vote for or against his regime. He lost.<sup>71</sup> Patricio Aylwin, a Christian Democrat with the backing of a center-left coalition, assumed power in March 1990, but not until Pinochet negotiated an amnesty deal.<sup>72</sup>

As a result of the settlement with the newly-elected government, Pinochet was named commander in chief of the armed forces until 1998, and thereafter to be appointed senator for life. Because of the associated immunities and statutes of limitations, Pinochet was shielded from prosecution for any crimes committed during his

66 Park, *supra* note 65, at 131.

67 *Id.* "The most intense and brutal repression was carried out in the initial years under Pinochet. . . . Indeed, it has been estimated that more than 45,000 people were detained and 1,500 killed by the end of 1973 alone." *Id.*

68 *Id.* (citing REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Phillip E. Berryman trans., 1993)).

69 *Id.* at 132. Given the unique history of Chile among its neighbors, it is perhaps not surprising that an enduring legacy of the junta is its economic program:

An open market economy was instituted [by the junta], and the ideas of intellectuals and politicians, such as Friedrich von Hayek, Milton Friedman, Michael Novak, and Margaret Thatcher, were frequently mentioned as sources of inspiration for Chilean public policies. The new model established deep roots and, with minor changes, it prevailed even after the armed forces left power.

Jorge Correa Sutil, "No Victorious Army Has Ever Been Prosecuted . . .": *The Unsettled Story of Transitional Justice in Chile*, in RULE OF LAW, *supra* note 63, at 125.

70 2 TRANSITIONAL JUSTICE, *supra* note 12, at 453. Pinochet was forced to declare a state of siege in 1983, which led to the arrest of 1200 people. 2 *id.* In 1986, 15,000 people were arrested and a new state of siege declared in response to popular demonstrations and an assassination attempt on Pinochet. 2 *id.* At the same time, the government's violations of the human rights of its citizens drew increasing international condemnation. 2 *id.* In January 1987, in anticipation of an historic visit by Pope John Paul II, the state of siege was lifted and political parties were permitted to resume activities, though the government continued its iron grip on power through the security forces. 2 *id.* at 454.

71 2 *id.*

72 Park, *supra* note 65, at 132.

rule.<sup>73</sup> In 1990, the Chilean Supreme Court also affirmed the constitutionality of an earlier Amnesty Law, thereby shutting the door on the prosecution of those involved in human rights violations.<sup>74</sup>

In 1998, the world community became involved in the Pinochet affair, when a Spanish warrant, executed in London, led to his arrest for human rights violations. Following a long extradition battle, Pinochet was eventually returned to Chile.<sup>75</sup> Shortly thereafter, in May 2000, the Chilean courts reinterpreted the immunity given under the

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73 *Id.* (citing Nehal Bhuta, Note, *Justice Without Borders? Prosecuting General Pinochet*, 23 MELB. U. L. REV. 499, 510–11 (1999)).

74 *Id.*

75 On October 16, 1998, Pinochet, who was in London for medical treatment, was detained on a Spanish warrant for human right violations, specifically murder, torture and hostage-taking. *Bringing the General to Justice*, ECONOMIST, Nov. 28, 1998, at 23. Spain's warrant was based on international treaties to which both Spain and the United Kingdom were parties. Perez, *supra* note 12, at 191. In Chile, Pinochet supporters protested the detention, but opponents of Pinochet held protests of their own. Clifford Krauss, *Pinochet Case Reviving Voices of the Tortured*, N.Y. TIMES, Jan. 3, 2000, at A1; Clifford Krauss, *Threats over Pinochet Case Inflaming Tensions in Chile*, N.Y. TIMES, Oct. 24, 1998, at A1. The Chilean government immediately declared that an extradition would be a violation of the national sovereignty of Chile and demanded the return of Pinochet. The two leading candidates for the 1999 Chilean presidential election, one conservative and the other socialist, both demanded the return of Pinochet stating that he should properly be tried by Chilean courts. Clifford Krauss, *Freed by Britain, Pinochet is Facing a New Legal Battle at Home*, N.Y. TIMES, Mar. 3, 2000, at A1.

The detention of Pinochet landed the British government in a political and legal thicket. The House of Lords issued three separate rulings in the case. In *Ex parte Pinochet I*, the House of Lords overturned a lower court decision refusing extradition because Pinochet enjoyed immunity due to his status as former Head of State. *Regina v. Bartle, Ex parte Pinochet*, 37 I.L.M. 1302 (H.L. 1998); see also *Bringing the General to Justice, supra*, at 23. In *Ex parte Pinochet II*, the first ruling was set aside on procedural grounds because one of the judges had connections with an intervenor, Amnesty International. *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No.2), 1 E.R. 577 (H.L. 1999). *Ex parte Pinochet III* modified *Ex parte Pinochet I*, holding that Pinochet was only extraditable for crimes that occurred after all relevant states had become parties to the Torture Convention. *Regina v. Bartle et al., Ex parte Pinochet*, 38 I.L.M. 581 (H.L. 1999). In the end, on March 2, 2000, after 503 days of incarceration, Pinochet was returned to Chile following a decision by the British Home Secretary, Jack Straw, not to extradite him to Spain. *The General Sneaks Away*, ECONOMIST, Mar. 4, 2000, at 57.

The Spanish request for extradition proved to Chile that their democracy was perhaps not as fragile as they had thought. Even though there had been wide-spread protests from opposing groups, the lack of violence in the Pinochet extradition case demonstrated to the government that perhaps justice for the past victims of the Pinochet regime might be pursued without risking a civil war. Matt Moffett, *Guatemalans March to Court to Redress Horrors of War: Pinochet Case Emboldens Latin American Calls for Justice*, WALL ST. J. EUR., July 19, 2000, at 1. Current Chilean president

Amnesty Law,<sup>76</sup> which led to a warrant being issued for Pinochet's arrest on charges of homicide and kidnapping.<sup>77</sup> That case was overturned by the Chilean Supreme Court on procedural grounds.<sup>78</sup> In March 2001, a Chilean appellate court ruled that Pinochet could be tried for covering up murders but could not be tried for the underlying crimes themselves.<sup>79</sup> In an anticlimactic denouement, in July 2001, a panel of the Chilean Court of Appeals held that Pinochet was mentally unfit to stand trial, and the case ended.<sup>80</sup>

The Spanish request for extradition and the subsequent decisions from the British House of Lords illustrate the core problem with international jurisdiction for human rights crimes: too often national concerns are overlooked when the situation is viewed from the international level. Where there are political reasons for granting immunity, the international community must recognize that the nation may have made a difficult decision in which it balanced the needs of justice with the desire to avoid civil war.

Chile is an especially intricate example of this situation. Pinochet was an evil dictator, but his peaceful relinquishment of power in exchange for immunity may have avoided a civil war. This example raises some obvious questions for the architects of the ICC. Will the next powerful dictator with military backing refuse to surrender peacefully, knowing that the international community might not accept an agreement struck with a transitional government?<sup>81</sup> Chile lends at least some support to those who fear that the inflexibility of

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Lagos promised that Pinochet would no longer enjoy immunity from prosecution. See Clifford Krauss, *Man in the News: Ricardo Lagos Escobar*, N.Y. TIMES, Jan. 18, 2000, at A3.

76 Clifford Krauss, *Ruling on Immunity Puts Chile Closer to Trial of Pinochet*, N.Y. TIMES, May 25, 2000 at A4.

77 This change also has subjected most former army intelligence directors to the possibility of being prosecuted. Moffett, *supra* note 75.

78 Park, *supra* note 65, at 127.

79 *Court Reduces Pinochet Charges*, TORONTO STAR, Jan. 30, 2001, available at 2001 WL 15737829. Moreover, due to an apparent drafting oversight, it is possible that Chilean courts in the future might declare that the "disappeared" will be presumed to have been kidnapped, a crime not covered under the Amnesty Law, thus giving some hope that those responsible for the "disappearances" could still be tried for their crimes. See Krauss, *supra* note 76.

80 *He's Demented*, ECONOMIST, July 14, 2001, at 36. According to *The Economist*, "Neither the centre-left government nor the conservative opposition wanted it to continue. Both saw it as a distraction ahead of a congressional election in December." *Id.*

81 See Perez, *supra* note 12, at 216-21 (citing the example of Cuba and Fidel Castro). For an actual situation that arose after we set forth this hypothetical, see Kenneth R. Bazinet, *Bush Closer to Decision on Troops to Liberia*, N.Y. DAILY NEWS, July 4, 2003, at 7 ("Nigeria offered [President Charles] Taylor exile, but before he accepts a deal, he wants immunity from UN war crimes charges he already faces.").

international law that the Rome Statute embodies could lead to a bloody civil war.<sup>82</sup>

### C. *Truth and Reconciliation: South Africa's "Mixed" Model*

South Africa presents a striking example of a "third way" to approach transitional justice. Rather than immediate prosecution of the perpetrators of human rights violations, the nation chose to emphasize "restorative" rather than "retributive" or "deterrent" justice. As Archbishop Desmond Tutu, head of South Africa's Truth and Reconciliation Commission (TRC), explained:

[R]etributive justice—in which an impersonal state hands down punishment with little consideration for victims and hardly any for the perpetrator—is not the only form of justice. I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment but, in the spirit of *ubuntu*, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured.<sup>83</sup>

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82 On the other hand, the final chapter of the Pinochet saga has not been written. Perhaps Chile will demonstrate that a truly democratic society cannot be achieved without openly confronting the past, and that a peaceful transition to democracy is not always the path to true national reconciliation. As one woman who lost her husband to Pinochet's death-squads ominously warns, "Truth and justice have long been delayed. . . . The government has never really addressed the problem of the tortured and the disappeared. Now that deep hurt can no longer be ignored, let alone forgotten." Isabel Chadwick, 'The Hurt Can No Longer Be Ignored,' NEWSWEEK, Dec. 7, 1998, at 43.

83 DESMOND MPIOLO TUTU, NO FUTURE WITHOUT FORGIVENESS 54–55 (1999). For a discussion of the concept of restorative justice, particularly in the context of societies in transition from an oppressive political regime to a free, democratic government, see Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH V. JUSTICE 68–98 (Robert I. Rotberg & Dennis Thompson eds., 2000); Charles Villa-Vicencio, *Restorative Justice: Dealing With the Past Differently*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 68 (Charles Villa-Vicencio & Wilhelm Werwoerd eds., 2000) [hereinafter LOOKING BACK, REACHING FORWARD]. The African concept of *ubuntu* has been rendered as "humaneness" in English. See Kiss, *supra*, at 81. One commentator, Professor Elizabeth Kiss of Duke University, in describing the origins of restorative justice, notes that "restorative justice has been championed by people from many different traditions, religions, and cultures, from the Japanese to the Maori of New Zealand, and that the TRC traced the notion of restorative justice both to 'Judaean-Christian tradition' and to 'African traditional values' like *ubuntu*." *Id.* at 86. The South African TRC, discussing the idea of *ubuntu* in its final report, quotes an



Apartheid, which until recent decades was the controlling political system in South Africa, was based upon four core ideas:

First, the population of South Africa comprised four “racial groups”—White, Coloured, Indian, and African—each with its own inherent culture. Second, Whites, as the civilized race, were entitled to have absolute control over the state. Third, white interests should prevail over black interests; the state was not obliged to provide equal facilities for the subordinate races. Fourth, the white racial group formed a single nation, with Afrikaans- and English-speaking components, while Africans belonged to several . . . distinct nations or potential nations—a formula that made the white nation the largest in the country.<sup>84</sup>

Naturally, this system led to decades of political strife and violent protests.

In 1977, the United Nations imposed an embargo on all arms shipments to South Africa.<sup>85</sup> In the mid-1980s, violence and protest escalated in black South African townships, culminating in the proclamation of a national state of emergency.<sup>86</sup>

In 1989, F.W. de Klerk was elected president of South Africa.<sup>87</sup> In a speech before Parliament on February 2, 1990, de Klerk declared that “the time for negotiation has arrived,” and announced the begin-

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African proverb: “*umuntu ngumuntu ngabantu*—people are people through other people.” 1 S. AFR. TRUTH & RECONCILIATION COMM’N, FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION, ch. 5, ¶¶ 80–88, at 125–28 (1998) [hereinafter TRC REPORT] (noting that one of the main tasks of the TRC was “restoring the human and civil dignity of victims”); see also Justice Yvonne Mokgoro, *Ubuntu and the Law in South Africa*, 4 BUFF. HUM. RTS. L. REV. 15 (1998). Strangely, Professor Kiss goes on to state that “[i]n its genesis, restorative justice . . . is not concerned with exclusively theological concepts like the salvation of the soul, but with themes like human dignity, respect and mercy.” Kiss, *supra*, at 83–86. If Professor Kiss means to imply that human dignity, mercy, and respect for each human being are not integral aspects of modern western theology, she is, of course, mistaken. See, e.g., POPE JOHN PAUL II, *EVANGELIUM VITAE* [ON THE VALUE AND INVIOABILITY OF HUMAN LIFE] (1995). For a further discussion of the philosophical underpinnings of the South African TRC, see *infra* notes 94–107 and accompanying text.

84 LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 190 (3d ed. 2001). The rapid expansion of the South African economy during World War II and concomitant social tensions led to a backlash by the radical Afrikaaner government after the war. *Id.* at 177–86.

85 *Id.* at 214. In 1979, one of the authors of this article (R.J.R.) served as an intern at the United Nations Centre on Transnational Corporations, where his assignment was to monitor trade with South Africa for any violations of this embargo.

86 *Id.* at 212.

87 *Id.* at 237. Apparently due to his temper, de Klerk’s predecessor P.W. Botha was known as “die Groot Krokodil”—the Great Crocodile. NELSON MANDELA, *A LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* 478 (1994).

ning of the dismantling of apartheid. The bans on black political organizations were lifted; certain political prisoners were released; capital punishment was abolished; and many of the curbs related to the preexisting state of emergency were ended.<sup>88</sup> De Klerk then began preparing for constitutional negotiations by having remaining apartheid laws repealed, releasing over a thousand political prisoners, canceling the state of emergency, and continuing negotiations with Nelson Mandela and the ANC.<sup>89</sup>

The negotiations culminated in a February 1993 agreement on a timetable for change in South Africa. A new parliament would be elected in April 1994, which would have the task of drafting a new constitution. In the meantime, negotiators—including Mandela, de Klerk, and the representatives of eighteen other parties—hammered out an interim constitution which was to take effect after the election.<sup>90</sup>

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P.W. Botha offered to free Nelson Mandela and other political prisoners as early as 1985, provided they would renounce violence. *Id.* at 244. Mandela and the others refused because the offer did not include reform of apartheid. *Id.* Mandela subsequently wrote to Botha in January 1989, outlining a negotiated settlement intended to reassure the white minority against concerns of majority dominance if apartheid were abolished. *Id.* Mandela wrote:

Two political issues will have to be addressed; firstly, the demand for majority rule in a unitary state, secondly, the concern of white South Africa over this demand, as well as the insistence of whites on structural guarantees that majority rule will not mean domination of the white minority by blacks. The most crucial tasks which will face the government and the ANC [African National Congress] will be to reconcile these two positions.

*Id.* at 476. Botha was a hardline Afrikaaner leader who resigned as President only after suffering a debilitating stroke, but not before “crossing the Rubicon” by meeting with Mandela and shaking his hand in a formal setting in July 1989. *Id.* at 480. At that meeting, no real progress was made, but in a fascinating exchange, Mandela drew a parallel between the Afrikaaner rebellion in 1914 and the long struggle for black liberation in South Africa, and then asked Botha to free all political prisoners, an offer Botha declined. *Id.* at 479–80.

88 *Id.* at 484–85. Mandela himself was released on February 11, 1990, with very little advance notice, but without making any concessions concerning his subsequent behavior. *Id.* at 485–91. At his first press conference after regaining his freedom, Mandela proclaimed that “[w]hites are fellow South Africans . . . and we want them to feel safe and to know that we appreciate the contribution they have made toward the development of this country.” *Id.* at 495.

89 THOMPSON, *supra* note 84, at 246–47.

90 *Id.* at 252. The interim constitution provided for a bicameral legislature, election of the President by the lower house, forced coalition government through the appointment of “executive deputy presidents” by parties with large numbers of seats in the legislature, power sharing in the cabinet also based upon legislative strength, and a large catalogue of fundamental rights. *Id.* at 250–51.

In the 1994 election, the ANC received over 60% of the vote.<sup>91</sup> On May 10, 1994, Mandela was inaugurated President of South Africa.<sup>92</sup> The new constitution contained a "Postamble" providing that, in certain circumstances, amnesty was to be granted for crimes committed in furtherance of political objectives in the past, and that it was up to Parliament to legislate the mechanics and conditions for granting such amnesty.<sup>93</sup>

On May 27, 1994, the new Justice Minister, Dullah Omar, announced to the Parliament that it was the intention of the government to form a Truth and Reconciliation Commission.<sup>94</sup> Omar explained the intent of the TRC process thusly:

If the wounds of the past are to be healed, if a multiplicity of legal actions are to be avoided, if future human rights violations are to be avoided, and indeed, if we are to successfully initiate the building of a human rights culture, then disclosure of the truth and its acknowledgment are essential. We cannot forgive on behalf of victims, nor do we have the moral right to do so. It is the victims themselves who must speak. Their voices need to be heard. The fundamental issue for all South Africans is therefore to come to terms with our past on

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91 MANDELA, *supra* note 87, at 539. The National Party (NP) captured a majority in the Western Cape Province, where so-called "coloured" voters—primarily individuals of Indian and Asian descent—voted with whites. *Id.* at 539.

92 *Id.* at 540.

93 The Interim Constitution provided:

In order to advance reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under the Constitution shall adopt a law providing the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

S. AFR. CONST. ch. 16 (1994). The origin of the Postamble is, apparently, somewhat murky. The deputy chairperson of the TRC, Alex Boraine, endorses the view that the Postamble's clarity of language is due to the time constraints weighing upon the drafters of the interim constitution, which led to the Postamble not being edited by the technical committee responsible for drafting, thus explaining the lack of legal or technical language in the postamble's exhortation. ALEX BORAINÉ, *A COUNTRY UNMASKED* 39–40 (2000) (citing the views of Lourens du Plessis).

94 BORAINÉ, *supra* note 93, at 40. The architects of the TRC were well aware of the twenty or so truth commissions all over the world in the past twenty-five years, some famous—Argentina, Chile, El Salvador, and some not so well known—Sri Lanka, Chad, Uganda. See Priscilla Hayner, *Same Species, Different Animal: How South Africa Compares to Other Truth Commissions Worldwide*, in *LOOKING BACK, REACHING FORWARD*, *supra* note 83, at 34. See generally PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2001).

the only moral basis possible, namely that the truth be told and that the truth be acknowledged.<sup>95</sup>

In response to the government's proposal, Parliament in 1995 enacted the Promotion of National Unity and Reconciliation Act (Act) which established the TRC with the instruction that it take up the task of "promot[ing] national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past."<sup>96</sup>

95 BORAINÉ, *supra* note 93, at 41. The idea of a truth commission was denounced by both the NP and the Zulu Inkatha Freedom Party, who feared that such a process would lead to a witch hunt. MARTIN MEREDITH, *COMING TO TERMS* 18 (2000). The NP called for general amnesty and amnesia as the best way for South Africa to move forward. *Id.* On the other hand, there also were calls for Nuremberg-style trials and reparations to be paid by the white community. *Id.* President Mandela was concerned that putting criminals on trial would lead to a coup. *Id.* at 19 ("Mandela himself once remarked privately that if he were to announce a series of criminal trials, he could well wake up the following morning to find his home ringed by tanks.").

96 1 TRC REPORT, *supra* note 83, ch. 11, app. 1, at 304. The TRC was to investigate fully gross violations of human rights committed by any person or organization during the relevant period, including "the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations." 1 *id.* ch. 6, ¶ 1, at 135. The TRC was given the mandate to investigate gross human rights violations beginning with the Sharpeville massacre in 1960, through May 10, 1994 (the date the ANC came to power). 1 *id.* ch. 13, at 498–506. The TRC was granted broad subpoena powers with the concomitant powers of search and seizure. 1 *id.* ch. 12, ¶ 33, at 441. In the investigative process, every effort was made to ease the discomfort of victims and their families, particularly in testifying before the TRC. See TUTU, *supra* note 83, at 81–83 (describing the accommodations made to help ensure that victims would come forward). It was also, however, important to establish a true historical record which might not be possible through any other process. Archbishop Tutu explained:

The criminal justice system is not the best way to arrive at the truth. There is no incentive for perpetrators to tell the truth, and often the court must decide between the word of a victim against the evidence of many perpetrators. Such legal proceedings are also harrowing experiences for victims, who are invariably put through extensive cross-examination.

MEREDITH, *supra* note 95, at 316 (quoting Archbishop Tutu). Eventually, 21,300 individuals presented petitions to the TRC. 4 TRC REPORT, *supra* note 83, ch. 10, ¶¶ 12–14, at 285–87.

One commentator has enumerated several forces that coalesced into the compromise known as the TRC: a political stalemate with no clearly dominant winner; a negotiated settlement of apartheid rather than a revolutionary takeover; a graduated shift from the apartheid government to democracy; the fragility of the resultant democracy; the fear that the security forces would "derail" the shift to democracy; a culture of gross human rights violations; a commitment to overcome that legacy; the shift from parliamentary to constitutional sovereignty; and, the constitutional commitments to nation-building, reconciliation, and amnesty for past violations of human rights. Johnny De Lange, *The Historical Context, Legal Origins and Philosophical Founda-*

In carrying out its mandate to investigate and report on the defined crimes, the TRC was given the power to grant amnesty to "persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of [the] Act."<sup>97</sup> Amnesty was only granted after the applicant made a full accounting of his acts,<sup>98</sup> provided that he had been truthful, and had disclosed under whose orders he acted.<sup>99</sup>

The amnesty powers of the TRC were controversial,<sup>100</sup> but the compromise resulting in the amnesty provision in the South African constitution embodied both a skepticism regarding the efficacy and utility of retributive, criminal prosecutions, and a real concern about the practical problems involved in prosecution of such large-scale crimes committed over so many years.<sup>101</sup> If individual justice were not

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*tion of the South African Truth and Reconciliation Commission, in LOOKING BACK, REACHING FORWARD, supra note 83, at 14, 17–18. That same commentator, an ANC member and Member of Parliament in South Africa, states several other reasons why South Africa "had no choice" but to establish the TRC: international pressure; the TRC provided a structured and manageable alternative to vengeance or Nuremberg-style trials; the need for a common memory to be recorded; the yearning for an honorable conclusion to a shameful past; and, perhaps most interestingly, the call of "our morality as a people who want to heal our nation, and restore the faith of those in our country and the international community in our common future." Id. at 18.*

97 1 TRC REPORT, *supra* note 83, ch. 4, ¶ 31, at 55.

98 The Amnesty Committee of the TRC evaluated each application in light of several criteria: the motive of the offense; the factual and legal circumstances under which the act was committed; the objective of the act, including political dimensions and whether it was directed against an individual or organization; whether the perpetrator was a member of a political organization; and, the proportionality of the act to the objective. These criteria were based upon principles drafted by Carl Norgaard, former president of the European Human Rights Commission, during the political transition in Namibia, and upon a study of state practices regarding exceptions to extradition law for political offenses. Richard Lyster, *Amnesty: The Burden of Victims, in LOOKING BACK, REACHING FORWARD, supra note 83, at 184, 188–89, 299 n.19. For the statutory prerequisites to amnesty, see § 20(1)–(3) of Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr).*

99 §§ 18(1)–22(2) of Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.). The amnesty provision was carried out by a subcommittee of the TRC that was made up entirely of judges and lawyers, unlike the human rights investigation committee. *See BORAINE, supra note 93, at 116–17.*

100 *See Lyster, supra note 98, at 186. On the question whether states have the obligation under international law to prosecute perpetrators of human rights violations, see Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L.J. 2537 (1991) (supporting a duty to prosecute grave violations of human rights and calling for procedural mechanisms in international human rights conventions to ensure a victim's ability to prosecute perpetrators).*

101 *See Lyster, supra note 98, at 186–88 (detailing the problems and potential futility of individual criminal prosecutions).*

possible, at least an historical accounting and collective reckoning would be.<sup>102</sup>

The TRC final report<sup>103</sup> explained that restorative justice “seeks to redefine crime: it shifts the primary focus of crime from the breaking of laws or offences against a faceless state to a perception of crime as violations against human beings . . . [It] encourages victims, offenders and the community to be directly involved in resolving conflict.”<sup>104</sup>

102 “We have a nation of victims, and if we are unable to provide complete justice on an individual basis . . . it is possible for us to ensure that there is historical and collective justice for the people of our country.” *Id.* at 188 (quoting remarks of former Justice Minister Dullah Omar). In its report, the TRC noted that “[t]he issue is not . . . a straight trade-off between amnesty and criminal or civil trials,” but rather “a choice between more or less full disclosure.” 1 TRC REPORT, *supra* note 83, ch. 5, ¶ 71, at 122.

103 After completing its work, the TRC compiled and produced a five-volume report detailing the results of its efforts. The comprehensive report made clear that very few groups in South African society were without blame during the apartheid years. The NP and its governments, particularly that of P.W. Botha during the 1970s, were singled out as perpetrators of a criminal regime. 2 TRC REPORT, *supra* note 83, ch. 5, ¶ 263, at 470. The Inkatha Freedom Party and ANC also were found to have committed serious crimes, including causing the deaths of scores of political opponents. 2 *id.* ch. 7, ¶ 460, at 685.

The TRC Report even touched President Mandela’s family with its recital of human rights violations committed by his wife, Winnie Mandela, in the 1980s. 2 *id.* ch. 6, ¶ 110, at 581. The candor of the TRC Report apparently surprised some of its subjects in the ANC and they attempted to interdict the publication of the report on the day before it was due to be presented to President Mandela, but the High Court in Cape Town rebuffed the attempt. *See* MEREDITH, *supra* note 95, at 304–05. Archbishop Tutu was particularly incensed at the ANC’s tactics: “I have struggled against a tyranny. I did not do that to substitute another. . . . I didn’t struggle in order to remove one set of those who thought they were tin gods and replace them with others . . . .” *Id.* at 303. On October 29, 1998, President Mandela accepted the TRC Report, “with all its imperfections,” and stated that it would provide a “foundation of the edifice of reconciliation,” but that the “further construction of that house of peace” required the efforts of all South Africans. *Id.* at 306.

104 1 TRC REPORT, *supra* note 83, ch. 5, ¶ 81, at 126. *See* Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where The International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 214 (2000) (noting the comments of Archbishop Tutu regarding restorative justice). Restorative justice is a sophisticated concept, “involv[ing] the restoration of relationships as a basis for the prevention of the reoccurrence of human rights abuses and the reparation of damage to the personal dignity and well-being of victims.” Villa-Vicencio, *supra* note 83, at 70. Villa-Vicencio views restorative justice as a “holistic” theory of justice, and states that:

As democracy necessarily includes more than universal franchise, so it is wrong to reduce justice to a functioning judicial system. It has to do with a nation committed to a set of moral values that provides the basis of what Lon Fuller refers to as a “relatively stable reciprocity of expectation between law-giver and subject.” This involves holding in creative tension a number of

Restorative justice “includes the restoration of the moral worth and equal dignity of all people as well as the restoration of social equality. It is a process that must be seen to emerge within the context of different layers of justice.”<sup>105</sup>

The TRC process did not fulfill all of its goals. Its architects have no illusions that the TRC by itself can “restore” the nation.<sup>106</sup> Never-

important ideals that sometimes contradict each other—ideals that extend beyond the capacity of any single judicial procedure to deliver. Restorative justice is, as such, a theory of justice that needs to pervade all of society, rather than a specific act in and of itself.

*Id.* (citation omitted). Villa-Vicencio goes on list several concerns that he believes are implicated in efforts of transitional societies to provide restorative justice: an organized system of justice complying with international standards on human rights; administration of justice to everyone’s benefit, including the institution of peace even at the expense of punishment; the promotion of moral values that make for shared commitment to a society governed by the rule of law; accountability for gross violations of human rights; a sense of shared *political*, rather than criminal guilt; punishment, where necessary; rehabilitation of victims, to the extent possible; and, the acknowledgment of the truth about the past. *Id.* at 70–72. He also quotes several others to make the point that truth-telling is vital to, and may be a form of, justice in and of itself. *Id.* at 72.

105 Villa-Vicencio, *supra* note 104, at 215 (footnote omitted). Professor Villa-Vicencio adumbrates the other “layers of justice” to which he refers, and the significance of each:

- 1) *Retributive justice* affirms the place of *lex talionis* (“an eye for an eye and a tooth for a tooth”) as an alternative to unbridled revenge.
- 2) *Deterrent justice* has a place in seeking to limit atrocities in the future.
- 3) *Compensatory justice* that requires beneficiaries of the old order to share in programs of restitution needs to be explored.
- 4) *Rehabilitative justice* that addresses the needs of both victims and survivors is important. The needs of victims must be redressed. The psychological and anti-social needs of perpetrators also need to be met. No nation can afford the presence of unrehabilitated torturers and killers.
- 5) *Justice as the affirmation of human dignity* recognizes the equal dignity of all people.
- 6) *Justice as exoneration* affirms the need for the records of persons who have been falsely accused by the state and/or within their own communities to be put straight.

No model of justice covers all the stops.

*Id.*

106 As for impunity, the actual experience in the TRC would not seem to give much hope to future human rights violators. Out of a total of 7000 applications, only 150 were granted amnesty, 4500 (mostly common criminals) were denied, and the rest await final determination. Some of these decisions were highly controversial. For example, the Committee on Amnesty granted a blanket amnesty to ANC leader, and now President, Thabo Mbeki and thirty-six other ANC activists without requiring them to publicly disclose their crimes. MEREDITH, *supra* note 95, at 314. This decision caused an uproar in the white community and led the TRC itself to attempt to over-

theless, the South African model of restorative justice—amnesty for public confession, no civil liability but the availability of reparations, the recognition of collective political responsibility (though of different degrees) for the nation's sorrowful past—seems to have tread successfully the boundaries between retribution and forgiveness, reconciliation and criminal justice, and, ultimately, civil war and peace.<sup>107</sup> It might be added that the TRC process has kept the peace in South Africa for over a decade when all indications would have suggested civil war.

## II. THE ICC AND THE INTERNATIONAL JURIDICAL MODEL

Even a brief discussion of the political history of just a few nations that have made the transition from tyranny to democracy reveals two things. First, each transitional nation has its own complex history and political dilemmas from which the transitional settlement emerges. Second, it is incorrect to characterize the choice faced by these societies as rewarding impunity with amnesties or prosecution of wrongdoers. Transitions such as those in Germany, Chile, and South Africa are complex, and the choices faced by leaders are full of political nuance, tinged with great uncertainty about the future. Almost always, many lives ride on those choices.

### A. *An International Criminal Court is Born*

Cognizant of the challenges faced by countries undergoing transitions from tyranny to democracy, in recent years the international

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turn the decision, to no avail. *Id.* Moreover, victims were not left entirely without remedies. The Promotion of National Unity and Reconciliation Act mandated that the TRC have a Committee on Reparation and Reconciliation that would, among other things, recommend the granting of reparations to victims of gross human rights violations, to be paid from a fund established by the government. § 4(f) of Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.); see also 5 TRC REPORT, *supra* note 83, ch. 5, ¶¶ 5, 42, at 170, 178. TRC Chairman Tutu has expressed the hope that all victims would receive approximately \$23,000 in reparation payments each, paid over six years, though the government has not budgeted nearly that amount. See TUTU, *supra* note 83, at 58. He also noted that there was *some* price extracted from the perpetrators by making them publicly testify to their acts:

Let us imagine what this means. Often this is the first time that an applicant's family and community learn that an apparently decent man was, for instance, a callous torturer or a member of a ruthless death squad that assassinated many opponents of the previous regime. There is, therefore, a price to be paid. Public disclosure results in public shaming and, sometimes, a marriage may be a sad casualty as well.

MEREDITH, *supra* note 95, at 317 (quoting Archbishop Tutu).

107 De Lange, *supra* note 96, at 25–26.



community has attempted to craft institutions that will foster peace and respect for human rights. Emboldened by the example of Nuremberg, the United Nations set up ad hoc tribunals to prosecute individuals accused of human rights violations in Rwanda and the former Yugoslavia. In 1992, the United Nations General Assembly instructed the International Law Commission (ILC) to prepare a draft statute for a permanent international criminal court.<sup>108</sup> Two years later, the ILC presented its draft to the United Nations General Assembly, which established an ad hoc committee to refine the provisions of the ILC draft. The ad hoc committee held several sessions in 1995, and at the end of that year requested that the General Assembly convert it into a preparatory committee so that it could begin redrafting the statute.<sup>109</sup>

In 1998, the United Nations convened the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to negotiate specifics related to the formation of an International Criminal Court. Despite numerous unresolved issues, the delegates at that conference adopted a draft statute.<sup>110</sup>

The Rome Conference did *not* represent an exercise in multilateral treaty-making, in which unanimity of decisionmaking is the fundamental feature.<sup>111</sup> Rather, the governments of the world engaged in what was, in fact, a quasi-legislative effort.<sup>112</sup> More than a treaty, the Rome Statute changes international law in a way that will be bind-

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108 Chapter Seven of the United Nations Charter defines the Security Council's central role in the maintenance of international peace and security. U.N. CHARTER art. 39. Strained relations during the Cold War prevented much advancement for several decades. See Bassiouni, *From Versailles to Rwanda*, *supra* note 3, at 38–39 (noting that “[j]ustice was the Cold War’s casualty”).

109 See LAWYERS COMM. FOR HUMAN RIGHTS, ESTABLISHING AN INTERNATIONAL CRIMINAL COURT: MAJOR UNRESOLVED ISSUES IN THE DRAFT STATUTE pt. I.A (rev. ed. 1998), available at <http://www.iccnw.org/romearchive/papers/RomeTreaty/LCHRUnresolvedIssues.pdf>.

110 Rome Statute, *supra* note 6. The Rome Conference left certain issues unresolved, and the General Assembly assigned these issues to the Preparatory Committee to be finalized. The unresolved issues included the formulation of rules of procedure and evidence, the definition of aggression, and elements of crimes additional to the definition of those crimes in the ICC statute. For a history of the events leading up to the Rome Statute, see M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT’L & COMP. L. REV. 1, 1–19 (1991).

111 See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 607–40 (5th ed. 1998) (describing characteristics of international transactions); LORD MCNAIR, THE LAW OF TREATIES 1–236 (1961) (explaining the theory, terminology, constitutional requirements, and ratification process of treaty-making).

112 See, e.g., ZIEGLER, *supra* note 52, at 163–79.

ing (at least in some cases) on non-signatories.<sup>113</sup> As the Preamble to the Rome Statute notes, the purpose of the ICC is to end impunity for the perpetrators of “atrocities that deeply shock the conscience of humanity.”<sup>114</sup>

The ICC will have the unique power to prosecute and sentence individuals, and also to impose obligations of cooperation upon states,<sup>115</sup> regardless “of whether they are parties to relevant treaties or have accepted the Court’s jurisdiction with respect to the crimes in question.”<sup>116</sup> It was agreed in Rome that the court would have jurisdiction over four core crimes: genocide,<sup>117</sup> crimes against humanity,<sup>118</sup> war crimes,<sup>119</sup> and the crime of aggression.<sup>120</sup>

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113 See generally *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, U.N. GAOR Int’l Law Commission, 49th Sess., Supp. No. 10-5, at 79–80, U.N. Doc. A/49/10 (1994) [hereinafter *Report of the International Law Commission*] (setting forth the preconditions to the exercise of jurisdiction); A.B.A. Task Force, *supra* note 5, at 257; Carter, *supra* note 5, at 300–04 (containing a recommendation on the ICC, crafted by the Working Group on Improving the Effectiveness of the United Nations); Dickinson, *supra* note 5 (tracing the procedural history of the International Criminal Court).

114 Rome Statute, *supra* note 6, pmbi., 37 I.L.M. at 1002.

115 Phakiso Mochochoko, *International Cooperation and Judicial Assistance*, in *THE MAKING OF THE ROME STATUTE*, *supra* note 13, at 305–14 (exploring the limits of the “duty to cooperate”).

116 Dickinson, *supra* note 5, at 13 (adopting language supporting automatic jurisdiction over crimes under the Rome Statute, without requiring additional declaration of consent by states); see also Lara A. Ballard, Comment, *The Recognition and Enforcement of International Criminal Court Judgments in U.S. Courts*, 29 COLUM. HUM. RTS. L. REV. 143, 163 (1997) (“States parties to the ICC treaty that have accepted the ICC’s jurisdiction with regard to the crime in question must ‘respond without undue delay to the request,’ which may be for the disclosure of evidence, the apprehension of suspects, or another form of judicial or police assistance.”) (quoting *Report of the International Law Commission*, *supra* note 113, art. 51(b), at 129) (footnote omitted).

117 Rome Statute, *supra* note 6, art. 5(1)(a), 37 I.L.M. at 1003.

118 See *id.* art. 5(1)(b), 37 I.L.M. at 1003. The list includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, enforced disappearance, and persecution. *Id.* art. 7, 37 I.L.M. at 1004–05. See generally Benjamin B. Ferencz, Book Review, 94 AM. J. INT’L L. 218, 219 (2000) (“The emotionally charged issue of ‘forced pregnancy’ required delicate compromises with Catholic and Arab countries, which feared interference with national laws prohibiting abortion.”).

119 Rome Statute, *supra* note 6, art. 5(1)(c), 37 I.L.M. at 1004.

120 *Id.* art. 5(1)(d), 37 I.L.M. at 1004. The text of the Rome Statute does not define the crime of aggression. The delegates at the Rome Conference were unable to agree on a definition of this crime and “essentially agreed to disagree.” Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?*, 19 N.Y.L. SCH. J. INT’L & COMP. L. 413, 418 (2000). U.S. Ambassador David Scheffer pointed out that the inclusion of this crime was an ill-conceived concession to advocates, and the future definition

The requirement in the Rome Statute that sixty states ratify the Statute before the Court can come into existence was met on April 11, 2002, with the simultaneous submission of ten instruments of ratification.<sup>121</sup> Nevertheless, there remains significant opposition to the ICC in the world community.<sup>122</sup> Perhaps most notably, the United States,

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“could be without limit and call into question any use of military forces or even economic sanctions.” Smidt, *supra* note 22, at 204.

One model based liability for the crime of aggression on the individual responsibility model contained within the Nuremberg Charter, fashioned for use by the International Military Tribunal following World War II. See Nuremberg Charter, *supra* note 36, art. 6, 59 Stat. 1544, 1547, 82 U.N.T.S. 284, 288. The second model simulated U.N. General Assembly Resolution 3314, adopted in 1974, which placed responsibility for the crime of aggression with the states themselves. G.A. Res. 3314, U.N. GAOR, 29th Sess., Annex, at 142, U.N. Doc. A/Res./3314 (1974).

The Preparatory Committee on the Establishment of an International Criminal Court set forth three possible definitions of aggression. See Dawson, *supra*, at 418. The Rome Statute establishes the crimes that are within the Court’s jurisdiction as follows:

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
  - (a) The crime of genocide;
  - (b) Crimes against humanity;
  - (c) War crimes;
  - (d) The crime of aggression.

Rome Statute, *supra* note 6, art. 5(1), 37 I.L.M. at 1003–04. The Statute continues and defines the crimes under (a), (b), and (c); however, the definition of subsection (d) provides:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

*Id.* art. 5(2), 37 I.L.M. at 1004. As a result, jurisdiction over crimes of aggression, whatever that will come to mean, will not be exercised by the ICC until it is defined and approved by the parties to the Rome Statute.

121 On that date, ratifications were submitted by the nations of: Bosnia and Herzegovina, Bulgaria, Cambodia, the Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania, and Slovakia, which took the number of ratifications to a total of sixty-six. “This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.” Rome Statute, *supra* note 6, art. 126, 37 I.L.M. at 1068; see also Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, N.Y. TIMES, July 1, 2002, at A3 (noting that the “speed of the court’s creation” exceeded expectations).

122 The United States, Israel, and the Holy See are among those nations that have not yet ratified the Statute, though the United States and Israel both signed it on the

which signed the Rome Statute,<sup>123</sup> and announced that it has no intention of ratifying it,<sup>124</sup> an event that some compared to “unsigned”

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last day for which the Statute was open for signature, presumably to preserve their ability to shape the Court in future preparatory meetings.

For a complete list of countries' positions on the Rome Statute and their status regarding signature and/or ratification, and their expressed reservations concerning the court, see United Nations, *U.N. Treaty Collection: Rome Statute of the International Criminal Court*, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited Oct. 10, 2003).

123 The signing came on December 31, 2000, less than a month before the end of the Democratic Clinton Administration and after it was known that Bill Clinton would be succeeded by Republican George W. Bush. With the signing, President Clinton expressed concerns about “significant flaws” in the treaty, and he added: “I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until fundamental concerns are satisfied.” Statement on the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES. DOC. 1 (Dec. 31, 2000); Lee A. Casey et al., *The United States and the International Criminal Court: Concerns and Possible Courses of Action* 28 (Feb. 8, 2002), available at <http://www.fed-soc.org/Publications/Terrorism/ICC.pdf>. Previously he had proclaimed to the U.N. General Assembly, that “before the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law.” Ferencz, *supra* note 118, at 221 (quoting President Clinton’s statement of Sept. 22, 1997).

124 The United States argues that the exercise of jurisdiction under Article 12 creates disincentives for countries undertaking military actions on humanitarian and human rights grounds because their soldiers may be subject to prosecution under the Rome Statute. See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 19 (1999) (arguing that negative consequences of the ICC related to peace-establishing type interventions are responsible for the lack of American support for the ICC).

The former American Ambassador-at-Large for War Crimes Issues, the leader of the American delegation to the Rome Conference, has written that “the United States has special responsibilities and special exposure to political controversy over [its] actions,” a factor that “cannot be taken lightly when issues of international peace and security are at stake,” and that the United States is “called upon to act, sometimes at great risk, far more than any other nation.” Scheffer, *supra*, at 12. Ambassador Scheffer testified to the Senate Foreign Relations subcommittee:

On the practical side, no other nation matches the extent of the United States’ overseas military commitments through alliances and special missions such as current peacekeeping commitments in the former Yugoslavia. We don’t have the luxury of not considering these factors. On the legal side, the provisions violate a fundamental principle of international law that a treaty cannot be applied to a state that is not a party to it.

Statement by David Scheffer, Senior Advisor and Counsel to Ambassador Madeleine K. Albright and the U.S. Permanent Representative to the United Nations, on the International Criminal Court, in the Sixth Committee, U.S.U.N. Press Rel. No. 165(96), at 8 (Oct. 31, 1996). As Scheffer also has noted, a state party might kill thousands of people within its territory, and the United States might be called upon to stop the killing. If a U.S. bomb inadvertently kills innocents, the nation could

it.<sup>125</sup> Ambassador for war crimes Pierre-Richard Prosper explained the U.S. position on December 19, 2001:

As many of you know, the International Criminal Court has been a point of concern for the United States. This concern has not changed as a result of September 11th. While the United States has sought from the inception of the debate at the end of World War II a court that could be neutral, focused on the pursuit of efficient justice, and most of all immune from the poisonous taint of raw political power, the Bush administration, as with the previous administration, opposes the Rome Treaty. And despite the signature by President Clinton, we—like the previous administration—will not send it to the United States Senate for ratification.

We are steadfast in our concerns and committed to our beliefs that the United States cannot be part of a process that lacks the essential safeguards to avoid a politicization of the process. We also firmly believe that the ICC treaty is just that—a treaty. Therefore it does not and should not have jurisdiction over a non-party state absent United Nations Security Council action. The United States has a unique role in the world in helping to defend freedom and advance the cause of humanity. We will continue to meet our responsibility but not at the price of our national security.<sup>126</sup>

There are several factors that might influence a nation's decision regarding ratification. Perhaps the most fundamental concern for non-signatories, however, is the effect of the ICC's jurisdictional provisions on the ability of sovereign states to deal with alleged human rights violations on their own.<sup>127</sup> Those jurisdictional provisions re-

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hand the American officials over to the ICC while shielding its own wrongdoers. Davenport, *supra* note 22, at 10.

125 At a minimum, the government's notification apparently relieves the United States from its obligation under international law *not* to work against a treaty to which it is a signatory. According to some accounts, it has done that since the announcement. See Editorial, *Doubling the Damage at the U.N.*, N.Y. TIMES, July 2, 2002, at A20 (criticizing the Bush administration's "misguided campaign to demolish the International Criminal Court"); Serge Schmemmann, *U.S. Vetoes Bosnia Mission, Then Allows 3-Day Reprieve*, N.Y. TIMES, July 1, 2002, at A3 (describing United States' efforts at the U.N. Security Council to limit the impact of the ICC on American peacekeeping troops); Serge Schmemmann, *U.S. vs. U.N. Court: Two Worldviews*, N.Y. TIMES, July 2, 2002, at A8; Thom Shanker & James Dao, *U.S. Might Refuse New Peace Duties Without Immunity*, N.Y. TIMES, July 3, 2002, at A1.

126 John Washburn, *The International Criminal Court Arrives—The U.S. Position: Status and Prospects*, 25 FORDHAM INT'L L.J. 873, 873–74 (2002) (quoting U.S. Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper, Address at the Peace Palace, The Hague, Neth. (Dec. 19, 2001)).

127 The International Court of Justice at The Hague, in contrast, has jurisdiction over matters such as disputes between nations and treaty interpretation. National

quire some explication to place the Court's powers in proper context.<sup>128</sup>

*B. The ICC's Jurisdiction: Complementarity and the Potential for Overreach*

Article 22 of the Rome Statute provides that “[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”<sup>129</sup> In the case of ambiguity, the definition shall be construed in favor of the person being investigated, prosecuted or convicted.<sup>130</sup> The Court may exercise jurisdiction if (1) a State Party refers a crime to the Court's prosecutor; (2) the Security Council, acting under Chapter VII of the United Nations Charter, refers a crime to the prosecutor; or (3) the prosecutor initiates an investigation into a crime.<sup>131</sup> Because the Security Council's actions under Chapter VII are mandatory, the Court could exercise jurisdiction even when neither the state territory where the crime was committed nor the state of nationality of the offender were a party to the Rome Statute.<sup>132</sup>

If the matter is referred by a State Party or initiated *proprio motu* by the prosecutor, the Court's jurisdiction is more restricted. In such instances, jurisdiction extends to the territory of a non-party State only if that State consents to the jurisdiction of the Court, and either the acts were committed in the territory of the consenting State or the accused is a national of the consenting State.<sup>133</sup> The Statute provides

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courts never really had jurisdiction over matters like this, so there was less of a sovereignty issue with that court. Davenport, *supra* note 22, at 2.

128 Article 120 of the Rome Statute prohibits reservations in the signing of the statute. Rome Statute, *supra* note 6, art. 120, 37 I.L.M. at 1066. That, however, did not prevent at least some nations (notably France) from attaching declarations that are very close to reservations. See United Nations, *supra* note 122 (asserting France's right to national self defense, defining military objectives, rejecting ICC jurisdiction over collateral damage claims, and more).

129 Rome Statute, *supra* note 6, art. 22(1), 37 I.L.M. at 1015.

130 *Id.* art. 22(2), 37 I.L.M. at 1015.

131 *Id.* art. 13, 37 I.L.M. at 1010–11.

132 See *id.* art. 13(b), 37 I.L.M. at 1011; see also U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Background Information*, at <http://www.un.org/icc/index.html> (discussing the authority of the Security Council to refer situations to the court) (last visited Sept. 3, 2003).

133 Rome Statute, *supra* note 6, art. 4(2), 37 I.L.M. at 1003; *id.* art. 12(2), 37 I.L.M. at 1010:

The Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute . . .

for jurisdiction *ratione personae* over natural persons only (thereby excluding organizations or States).<sup>134</sup>

The United States, the most vocal and powerful opponent of the ICC, has stated its opposition to the Article 15 authorization of the prosecutor "to initiate investigations and prosecutions" without a referral from a State Party or the Security Council.<sup>135</sup> In other words, the lack of an external political check on the prosecutor's powers to investigate and prosecute is a significant impediment to ratification in some nations, including the United States.<sup>136</sup> Indeed, it seems appro-

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

*Id.* Therefore, the court would still be unable to exercise jurisdiction over crimes committed within the territory of a non-state party by that state's own nationals

134 *Id.* art. 1, 37 I.L.M. at 1003; *see also id.* art 25(1), 37 I.L.M. at 1016. The Statute does not permit trials in absentia. Thus, the court must always have the defendant in its custody to obtain personal jurisdiction, in the sense that U.S. lawyers use the term. *Id.* art. 63(1), 37 I.L.M. at 1037.

135 *See Scheffer, supra* note 124, at 12–13, 18.

Under Article 12, the ICC may exercise such jurisdiction over anyone anywhere in the world, even in the absence of a referral by the Security Council, if either the state of the territory where the crime was committed or the state of the nationality of the accused consents. Ironically, the treaty exposes non parties in ways that parties are not exposed. . . . It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize.

*Id.* at 18; *see also Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Senate Subcomm. on Int'l Operations of the Comm. on Foreign Relations, 105th Cong. 129 (1998)* (statement of David L. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation) (expressing concerns regarding the proposal for a *proprio motu* prosecutor).

136 The Rome Statute contains a complex procedure by which a pre-trial chamber is to supervise cases in which the prosecutor exercises his or her investigatory powers. Rome Statute, *supra* note 6, art. 53(3), 37 I.L.M. at 1029. The Prosecutor may commence an investigation only if the pre-trial chamber has determined that a "reasonable basis" exists to initiate the investigation. *Id.* art. 15(3), (4), 37 I.L.M. at 1011. Reasonable basis is not defined in the statute, but Article 53 suggests that a finding of reasonable basis has three elements: (1) there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (2) the case is or would be admissible under Article 17; (3) the investigation serves the interests of justice, taking into account the gravity of the crime and the interest of victims. *See id.* art. 53, 37 I.L.M. at 1029–30. In addition to considering the admissibility of a case under Article 17 and the interests of justice, the Prosecutor should consider

appropriate to call the Court's prosecutor an international independent prosecutor precisely because he or she will be largely unchecked by a political process in making the decision to prosecute a particular case.<sup>137</sup> This is a significant concern to Americans, who see concentration of power, without a significant check, as a threat to liberty.<sup>138</sup>

The focal point for the debate over the relationship of the ICC to national courts and/or governments is the Rome Statute's doctrine of "complementarity."<sup>139</sup> This is a new doctrine in international law,<sup>140</sup>

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whether there is "a sufficient legal or factual basis to seek a warrant or summons under article 58." *Id.* art. 53(2)(a), 37 I.L.M. at 1029. If a State or the Security Council refers a situation, however, the Prosecutor will initiate an investigation pursuant to article 53, unless there is no reasonable basis to proceed under the Statute. *Id.* art. 53(1), 37 I.L.M. at 1029. The Statute permits the pre-trial chamber to order an investigation or prosecution to proceed if the Prosecutor's decision is based solely on a determination that the prosecution would not serve the interests of justice. *Id.* art. 53(3)(b), 37 I.L.M. at 1029.

137 Symposium, *Toward an International Criminal Court? A Debate*, 14 EMORY INT'L L. REV. 159, 164-65 (2000).

[T]his Statute of Rome creates not just a court, but it creates an enormous, potentially enormous, source of executive power: the prosecutor, just kind of out there in the international environment. Beyond control. Certainly beyond control of the United States and not part of any ordered structure of accountability. This is the kind of creation of authority that, I think, a free people should find unacceptable. This is not a passive court, moreover, like the International Court of Justice, but, particularly in the form of the prosecutor, a potentially very powerful actor.

*Id.* (noting the comments of John Bolton, Senior Vice President, American Enterprise Institute). Bolton went on to explain: "This court is just kind of an arm and a leg out there. It's not part of a coherent constitutional structure. It's subject to no popular accountability—the prosecutor isn't. There are no structures that give me faith, as a free person, that its authority won't be abused." *Id.* at 188. The editorial page of the Wall Street Journal characterized the entire court as the equivalent of a "global special prosecutor," with no checks on its power whatsoever. Editorial, *A Global Special Prosecutor?*, WALL ST. J., May 7, 2002, at A26; see also William F. Jasper, *The International Criminal Court: A Monster in the Making*, CATH. FAM. NEWS, Apr. 2002, at 25 ("Here again you see one of the violations of the fundamental principle of separation of powers. We have the executive—the prosecutor—acting as part of the court.").

138 See David P. Schippers, *Ethics in Government*, MINDSZENTY REP., Aug. 2002, at 1, available at <http://www.mindszenty.org/report> ("Anyone who reads the accounts of the Constitutional Convention—the actual minutes of the Constitutional Convention in 1787—will see that there is one idea that flows throughout the entire Convention and it is this: men in power cannot be trusted with that power.").

139 The origin of the term "complementarity" may be traced to the Preamble of the ILC Draft Statute, which provided that the ICC was "intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective." *Report of the International Law Commission, supra* note 113, pmb1. A complete "legislative history" of the idea of complementarity may be found in an article written by John T. Holmes, acting head of the Canadian delega-



and it is the cornerstone of the ICC in world affairs.<sup>141</sup> Simply put, the ICC will take jurisdiction over, and prosecute, individuals who have committed crimes within the Rome Statute where national jurisdictions are “unable or *unwilling*” to act.<sup>142</sup> Thus, the ICC is intended to make clear that a *purely* juridical model is the only appropriate method for dealing with human rights violations. From the point of view of the people constructing the institution, the only remedy for such violations is prosecution, either locally or in an international tribunal; no other solution apparently received much attention.<sup>143</sup>

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tion to the Preparatory Commission for the establishment of the ICC, and the head of the ad hoc committee on complementarity at the Rome Conference, in charge of defining the concept. John T. Holmes, *The Principle of Complementarity*, in THE MAKING OF THE ROME STATUTE, *supra* note 13, at 41 *passim*. Mr. Holmes, in his introductory comments, calls the relationship between the ICC and national courts “fundamental,” but notes that “[d]efining the precise nature of this relationship was both politically sensitive and legally complex.” *Id.* at 41.

140 Webster’s dictionary defines “complementarity” as “the interrelationship or the completion or perfection brought about by the interrelationship of one or more units supplementing, being dependent upon, or standing in polar position to another unit or other units.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 464 (Philip B. Gove ed., 1986). Complementarity is a familiar concept in physics where it refers, for example, to the finding that light can be both particle and wave. The psychological version of complementarity proposes that there are four different theoretical perspectives or grounds for studying psychological, behavioral, and social phenomena. One ground is taken from physical science and deals with psychological phenomena as physical phenomena, a second is grounded in biological systems, a third in social systems, and a fourth in values, meaning, and purpose. Joseph F. Rychlak, *A Suggested Principle of Complementarity for Psychology*, 48 AM. PSYCHOLOGIST 933, 933–41 (1993).

141 Mahnoush H. Arsanjani, *Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, *supra* note 29, at 57, 67. The Tenth Preambular Paragraph of the Rome Statute proclaims that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” Rome Statute, *supra* note 6, pmbll., 37 I.L.M. at 1002. Article 1 of the ICC Statute mentions the principle of complementarity as one of the cornerstones of the ICC regime. *Id.* art. 1, 37 I.L.M. at 1003.

142 Rome Statute, *supra* note 6, art. 17(a), 37 I.L.M. at 1012 (emphasis added).

143 For example, John T. Holmes, the Canadian diplomat in charge of the negotiations over the meaning of the term, does not cite any substantive discussion of truth commissions such as in South Africa in his article detailing the evolution of the contours of complementarity at the Rome Conference. See Holmes, *supra* note 139, at 41–78. For additional information on the disputes regarding complementarity in the early stages of the deliberations, see *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, ¶¶ 153–78, U.N. Doc. A/51/22 (1996); see also Christopher Keith Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal*

“Complementarity” in the Rome Statute denotes “a secondary role—not in importance but in the sequence of events.”<sup>144</sup> In other words, national courts have the first right and obligation to prosecute perpetrators of international crimes; and, because ICC jurisdiction is complementary to national courts, ICC jurisdiction can only be invoked if the national court is unwilling or unable to prosecute.<sup>145</sup> The complementarity principle is intended to permit the Court to step in when a person visits human rights crimes upon innocents, and the relevant country is powerless for one reason or another to deal judicially with the matter. There is, however, great potential for abuse of the Court’s jurisdiction, due to the fact that the decision as to whether a state is “unwilling or unable” to conduct a meaningful trial will ultimately not be made by that state, but rather by the ICC.

The Court will have to consider whether there has been undue delay in the state-initiated prosecution indicative of a lack of a genuine intention to proceed, or whether the domestic case is conducted independently and impartially, consistent with the expressed intention to bring the person to justice. In other words, is the State acting in good faith? This is not a standard issue in criminal cases. It is a highly complex and litigious jurisdictional matter that could nearly paralyze the Court, especially in its early years.<sup>146</sup>

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*Court*, 91 AM. J. INT’L L. 177, 181 (1997) (describing the two basic approaches of the various delegations to the principle of complementarity).

144 The view that the concept of complementarity should not create a presumption in favor of the jurisdiction of national courts and that the ICC should, on the contrary, be given primary jurisdiction was expressed and rejected during negotiations. See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, ¶ 32, U.N. Doc. A/50/22 (1995).

145 Rome Statute, *supra* note 6, art. 17(a), 37 I.L.M. at 1012; see also Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT’L L. REV. 1, 67–68 (2000) (“Initially, some delegations in the Ad Hoc Committee and Preparatory Committee lamented the fact that complementarity was included in the Preamble, because they believed that it afforded to the principle of complementarity too great a significance.”). The International Criminal Tribunals for both the Former Yugoslavia and Rwanda proceeded on the contrary assumption, namely that their jurisdiction enjoyed precedence over that of national courts. Statute of the International Tribunal (as amended May 17, 2002), 32 I.L.M. 1192, 1194 (1993), available at <http://www.un.org/icty/legaldoc/index.htm>, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. 2/RES/827 (1993), 32 I.L.M. 1203 (1993); Statute of the International Tribunal for Rwanda, art. 8(2) (1994), 33 I.L.M. 1602, 1605 (1994), available at <http://www.ict.r.org/ENGLISH/basicdocs/statute.html>, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3 (1994), U.N. Doc. S/Res/95 (1994), 33 I.L.M. 1600 (1994).

146 Louise Arbour & Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, *supra* note 29, at 129, 131.

The ICC will not simply accept the state's assurance that it can handle the case.<sup>147</sup> "The Court is required to examine whether, despite the state's assertion that it can successfully manage the domestic processing, that state is unable to obtain the accused, or the evidence, or otherwise to carry out the proceedings."<sup>148</sup> The Preparatory Committee's Report of 1996 recorded some concerns in this regard:

It was noted that while the determination of "availability" of national criminal systems was more factual, the determination of whether such a system was "ineffective" was too subjective. Such a determination would place the Court in the position of passing judgement on the penal system of a State. That would impinge on the sovereignty of national legal systems and might be embarrassing to that State to the extent that it might impede its eventual cooperation with the Court.<sup>149</sup>

The principle of complementarity cannot avoid this problem, but many supporters of the ICC suggest that a court of limited jurisdiction will not pose a threat to national sovereignty.<sup>150</sup> This contention merits further scrutiny.

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147 Indeed, the Canadian diplomat who led the negotiations over complementarity at the Rome Conference noted with startling candor in his legislative history of complementarity that

[t]he Statute's provisions on complementarity are intended to refer to criminal investigations. Thus, where no such investigation occurred, the Court would be free to act. A truth commission and the amnesties it provides may not meet the test of a criminal investigation, since the simple telling of the truth to a non-judicial body may convey an individual immunity from national prosecution. Whether it is good that the Court seemingly is able to conduct its own investigations and prosecutions in these cases and what will be the effect on future national reconciliation efforts are beyond the purview of this article. However, it should be noted that the Prosecutor does have some discretion in these matters.

Holmes, *supra* note 139, at 77.

148 *Id.*

149 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, *supra* note 143, ¶ 161.

150 "The principle of complementarity says that if a nation is worried about having its people called before the International Criminal Court, it need only investigate them conscientiously itself and if appropriate, prosecute them. That is an absolute defense to any prosecution by the ICC." Symposium, *supra* note 137, at 171 (noting the comments of Kenneth Roth, Executive Director, Human Rights Watch). The treaty also commands that the court is to exercise its jurisdiction only in cases involving "the most serious crimes of concern to the international community as a whole." Rome Statute, *supra* note 6, art. 5(1), 37 I.L.M. at 1003; *see also id.* art. 1., 37 I.L.M. at 1003 (granting the Court "the power to exercise its jurisdiction over persons for the most serious crimes of international concern").

### C. *The Threat to National Sovereignty*

Complementarity will force nation states to change their domestic substantive criminal laws.<sup>151</sup> As one supporter of the ICC has explained, in order to convince the ICC that it is willing and able to prosecute those crimes that are defined in the Rome Statute, a state may need to adopt its own laws prohibiting those crimes.<sup>152</sup>

States may need to introduce new criminal laws, proscribing genocide, crimes against humanity, and war crimes, if they do not have such laws already. The simplest approach is to adopt the definitions of the crimes within the jurisdiction of the ICC. However, States may wish to go beyond these definitions, and give their courts jurisdiction over other international crimes as well.<sup>153</sup>

Moreover, as the ICC decides its initial cases and begins to develop a common law of what constitutes effective and acceptable national trials, states will be forced to follow those precedents or risk having their defendants retried before the ICC. State grants of amnesty or pardons are unlikely to be effective.<sup>154</sup>

Americans have seen a federal court system, of supposed limited jurisdiction, grow dramatically over the past forty years. There is every reason to think that the ICC will receive similar pressure to expand,<sup>155</sup> and nations that are concerned about their sovereignty are likely to be left without persuasive arguments.<sup>156</sup> "This is because the comple-

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151 See Jennifer Schnese, *Trends Emerging in Implementation of the ICC Statute*, INT'L CRIM. CT. MONITOR, Nov. 2000, at 18 (reporting that Hans-Peter Kaul of the German Foreign Ministry and head of the German delegation to the Preparatory Commission noted that the ICC might serve to harmonize national criminal laws among the States).

152 Joanne Lee, *Ratifying and Implementing the Rome Statute*, INT'L CRIM. CT. MONITOR, Nov. 2000, at 3.

153 *Id.* Note the assumption that a state will be unable to prosecute aggression.

154 Davenport, *supra* note 22, at 14 (noting that "[m]any of the high expectations for the International Criminal Court cannot be realized without an active prosecutorial agenda").

155 At the first Preparatory Committee meeting following the events of September 11, 2001, a motion was made to include terrorism within the ICC's jurisdiction. There have also been pressures to include international drug dealing within the Court. Davenport, *supra* note 22, at 6. According to at least one observer, expansion of the Court's jurisdiction was in mind at the time that the Rome Statute was negotiated. See Jasper, *supra* note 137, at 24. The head of the World Federalist Association kept telling activists: "now just hold off, we just have to get this treaty through. We have to get it established. We can always add the other crimes later." *Id.*; see also Davenport, *supra* note 22, at 18 (describing the "structural means by which the Court's scope is likely to be significantly expanded beyond its core purposes").

156 Some commentators already feel that the complementarity doctrine makes it too hard to bring a case before the ICC. HUMAN RIGHTS WATCH, JUSTICE IN THE BAL-

mentarity doctrine is based strictly on political will; it does not rest upon a moral basis” nor does it rest upon the idea of service that underlies the doctrine of subsidiarity; “[t]hus, when it seems appropriate, and political will shifts, there will be no principled basis on which to oppose expansion of the ICC’s jurisdiction.”<sup>157</sup>

The doctrine of complementarity precludes a case-by-case political solution to the grave moral problems left in the wake of human rights violations. Indeed, it is more than an academic exercise to ask how the situation in South Africa would be different today if the ICC had been a functioning international institution and the Rome Statute applied. Would it have been possible *not* to prosecute the Afrikaaner perpetrators of apartheid,<sup>158</sup> particularly high-ranking government officials? Would South Africa be better off today if prosecutions had occurred? Even more complicated is the situation of Augusto Pinochet in Chile. Would Chile have been better off with a prosecution conducted by an international body? Would Pinochet ever have relinquished power in the face of such a threat? Whether these questions were considered in detail during the negotiations leading up to the Court’s establishment is unclear. What is clear from the document itself is that the Rome Statute commits the world to one and only one solution to the problem of human rights violations: prosecution on the Nuremberg model.

In negotiating the Rome Statute, the world community seems not to have discussed in any meaningful way whether a criminal prosecution model truly is a “one size fits all” solution to all future instances of human rights violations, particularly those where a nation is in transition from a tyranny to democracy.<sup>159</sup> This potentially disastrous situation is the result of a misunderstanding of the proper role of law and its limits as an instrument for fostering the common good, coupled with a faulty understanding of the origin and role of human rights. The experience of the past century teaches that flawed political models pursued with passion and zeal—even if constructed with the best of intentions based upon the highest of ideals—can lead to the needless effusion of the blood of innocents. In what follows, we attempt to fill the lacunae in the theory underpinning the ICC as an institution

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ANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 69–94 (1998).

157 Rychlak & Czarnetzky, *supra* note 5, at 130.

158 Apartheid is one of the defined crimes in the Rome Statute. Rome Statute, *supra* note 6, art. 7(1)(j), 37 I.L.M. at 1005.

159 Similarly, in a domestic case, it might be illegal for police officers or firefighters to strike, but following a resolution of the labor stoppage, it is unlikely that criminal prosecutions would be the best next move.

and suggest ways that the practical problems with the Court might be ameliorated before it is too late.

### III. JUSTICE AND THE LIMITS OF LAW

The possibility of an international legal order with the power to punish and deter evil actions has never been so near reality as it is today. The effort, of course, has been to establish an institution that will lead the fight for a world where human rights are respected and where punishment is just and swift for those who refuse to live humanely. The ordering of human affairs, however, requires more than good intentions. Such an endeavor requires a realistic view of the nature of human beings as complete persons—that is, both as individuals and as members of communities—and a moral commitment to the common good. Unfortunately, one of the ICC's greatest weaknesses is that it does not take such a view.

#### A. *The Role of Law in Justice*

Human beings are born into and become part of different “communities.” The first and most basic community is the family, which is the institution primarily responsible for the development of the individual and his or her potential.<sup>160</sup> People also become, either voluntarily or by happenstance, part of other institutions that contribute to the development of the person. Communities are groups of individuals who hold something in common, be it political views, religious beliefs, or business interests.<sup>161</sup> Most human beings are members simultaneously of several different communities, beginning with a family and nation and perhaps including a corporation or other employer, a church, or one or more civic or social clubs.<sup>162</sup> Members of

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160 See BERNARD YACK, *THE PROBLEMS OF A POLITICAL ANIMAL: COMMUNITY, JUSTICE, AND CONFLICT IN ARISTOTELIAN POLITICAL THOUGHT* 27–33 (1993).

161 For a discussion of these and other types of communities, and their treatment by Aristotle, see *id.* at 29–33. Aristotle, of course, held that “the highest good for man is found not in the political life, nor in any other form of practical activity, but in theoretical inquiry and contemplation of truth.” *DICTIONARY OF PHILOSOPHY* 22 (Dagobert D. Runes ed., 1960).

162 See generally WILLIAM L. REESE, *DICTIONARY OF PHILOSOPHY AND RELIGION: EASTERN AND WESTERN THOUGHT* 32 (1980) (noting that “Aristotle regarded the family as the basic unit of the state, and the state as a creation of nature, since in isolation man is not self sufficient”); YACK, *supra* note 160, at 29–33 (describing four key features of Aristotle’s conception of community).

such communities coordinate their activities over time through interaction with others in the group “with a view to a shared objective.”<sup>163</sup>

Taking these insights seriously, legal theorists increasingly recognize that an international “community,” which transcends traditional nation states, ethnic groups, and clans, might be necessary to secure fully the “common good” of all human beings.<sup>164</sup> If nation states are *incomplete* communities, then other nation states and, perhaps, international organizations must assist nation states in coordinating their activities in order to foster the common good of their citizens.<sup>165</sup> This begs the question, however: When is it appropriate for a larger community to step in and direct the activities of a smaller community? Specifically, in this instance, when ought an international tribunal have exclusive and/or superior jurisdiction to prosecute crimes committed within a particular country?

The problem begins with the relationship between politics and justice. In a family, each member contributes to the good of the collective and, by easing the burdens of life on its members, the collective permits each member to flourish and develop.<sup>166</sup> In a larger context, however, families are incapable, by themselves, of perfectly securing the good. Thus, families associate with other families to

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163 YACK, *supra* note 160, at 153. According to Aristotle, the political community is primary among other types of communities because its end is to promote the good life of its individual members, and hence the common good of the political community itself. ARISTOTLE, *Politics* 1252b30, in *THE BASIC WORKS OF ARISTOTLE* 1129 (Richard McKeon ed., Benjamin Jowett trans., 1941). Aristotle explains that it is the human being’s ability to express reason through speech that makes humans naturally form such political communities, and distinguishes such communities from those of other animals such as bees. *Id.* 1253a, in *THE BASIC WORKS OF ARISTOTLE*, *supra*, at 1129–30. He even goes so far as to say that an individual who by nature has no state is either “a bad man or a god,” because of man’s nature as “a political animal.” *Id.* 1252b25–1253b5, in *THE BASIC WORKS OF ARISTOTLE*, *supra*, at 1129–30.

164 ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 235 (1999) (“Natural law theorists are coming to view the territorial or national state as crucially ‘incomplete,’ that is to say, incapable of doing all that can and must be done to secure conditions for the all-round flourishing of its citizens.”).

165 *Id.* at 235. Professor George agrees with Professor Finnis:

If it now appears that the good of individuals can only be fully secured and realized in the context of international community, we must conclude that the claim of the national state to be a complete community is unwarranted and the postulate of the national legal order, that it is supreme and comprehensive and an exclusive source of legal obligation, is increasingly what lawyers would call a ‘legal fiction.’

JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 150 (1980).

166 See generally JENNIFER ROBACK MORSE, *LOVE & ECONOMICS: WHY THE LAISSEZ-FAIRE FAMILY DOESN’T WORK* (2001).

form local bodies politic that result in villages and towns.<sup>167</sup> Local bodies politic then form together through increasingly large associations to form a national body politic. The national body politic may establish a nation state. At each level, the goal of the polity is the common good, which is both an end and a means.<sup>168</sup> It is an end in the sense that it is directed to the enrichment of the individuals within the polity, and a means by which individuals achieve all other goods—including the design of the polity.<sup>169</sup>

Legalistic justice is not superior to the common good, nor is it congruent with the common good; rather, it is a component, albeit an extremely important one, of the common good.<sup>170</sup> Jacques Maritain put the matter thus:

If the person has the opportunity of being treated as a person in social life, and if the unpleasant works which this life imposes can be made easy and happy and even exalting, it is first of all due to the development of law and to institutions of law. But it is also and indispensably due to the development of civic friendship, with the confidence and mutual devotion this implies on the part of those who carry it out. For the true city of human rights, fraternity is not a privilege of nature which flows from the natural goodness of man and which the State need only proclaim. It is the end of a slow and difficult conquest which demands virtue and sacrifice and a perpetual victory of man over himself. In this sense, we can say that the

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167 Of course, individuals form associations with goals other than the purely political—sports and leisure clubs, debating societies, fraternal organizations, religious groups, etc. What unites these groups is that they are directed at the common, reciprocal good of their individual members and of the collective.

168 For an excellent summary of different theories of the common good, see MICHAEL NOVAK, *FREE PERSONS AND THE COMMON GOOD* (1989). For discussions of the concept of the “common good” from a theological standpoint, and the interplay of the “common good” with theories of justice, see Robert J. Araujo, S.J., *Justice as Right Relationship: A Philosophical and Theological Reflection on Affirmative Action*, 27 *PEPP. L. REV.* 377, 415–19, 448–52 (2000); and Robert J. Araujo, S.J., *The Lawyer’s Duty to Promote the Common Good: The Virtuous Law Student and Teacher*, 40 *S. TEX. L. REV.* 83, 91–95 (1999).

169 JAMES V. SCHALL, *JACQUES MARITAIN: THE PHILOSOPHER IN SOCIETY* 204 (1998). Legal theorist John Finnis, building upon these fundamental insights of the Aristotelian/Thomist tradition, suggests that justice is “an ensemble of requirements of practical reasonableness that hold because the human person must seek to realize and respect human goods not merely in himself and for his own sake but also in common, in community.” FINNIS, *supra* note 165, at 161.

170 The desired common good, of course, is the good of *persons*, not of constructs such as the “state.” SCHALL, *supra* note 169, at 204. The state exists to serve the person, not the other way around. JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 49–51 (1972).



heroic ideal towards which true political emancipation tends is the inauguration of a fraternal city.<sup>171</sup>

By emphasizing civic friendship as crucial to and, indeed, a prerequisite for a society that truly respects human rights, Maritain is following Aristotle and Aquinas and anticipating Desmond Tutu, each of whom devote at least as much attention to the idea of civic friendship as to legal justice in their political philosophies.<sup>172</sup>

The key insight that flows from this observation is that reason can suggest which aspects of social life are necessary for the common good in the form of predefined legal norms (including human rights norms). These legal norms (which we will refer to as “legal justice”<sup>173</sup>) are not, however, sufficient to establish a society truly founded on human rights. “[Legal] justice by itself, though noble, is a cold and impersonal virtue.”<sup>174</sup>

This is not to denigrate the importance of legal justice. Legal justice on the national and international levels most emphatically includes human rights norms, which are therefore vital to the calculus of what constitutes the “good” of the nation. Since at least the time of Aristotle, however, philosophers have held that legal justice alone is insufficient.<sup>175</sup> What is necessary for a just society is for people to choose to live together in civic friendship in a body politic, regulated by just laws that are subject to political checks and balances.<sup>176</sup>

Rather than seeking to develop comprehensive lists of legal norms that are then simply translated into positive laws to be enforced by courts, Aristotle held a *political* concept of justice.<sup>177</sup> This concept

171 JACQUES MARITAIN, *The Conquest of Freedom, in* THE EDUCATION OF MAN: THE EDUCATIONAL PHILOSOPHY OF JACQUES MARITAIN 159, 172–73 (Donald Gallagher & Idella Gallagher eds., 1962). It is at this very point that Professor Judith Shklar’s theories regarding legalism and the common law tradition meet. See SHKLAR, *supra* note 18, at 113–23.

172 See SCHALL, *supra* note 169, at 142 (regarding Aristotle and Aquinas); TUTU, *supra* note 83, at 30–32, 54–56 (describing Archbishop Tutu’s definition of *ubuntu* and its importance as a theory of justice different from purely legal or corrective justice).

173 See YACK, *supra* note 160, at 130–31 (identifying such an approach to justice as a “legalistic or adjudicatory” approach to justice, which is common to much of modern political philosophy).

174 See SCHALL, *supra* note 169, at 142.

175 Jacques Maritain, for example, asserted that true justice requires a recognition of individuals in their concrete reality, and it includes the classic and intertwined notions of general and distributive justice. *Id.* at 145.

176 *Nemo nisi per amicitiam intelligitur*, runs the ancient proverb: “no one is understood except through friendship.” See JACQUES MARITAIN, *MAN AND STATE* 202 (1951).

177 ARISTOTLE, *Nicomachean Ethics* 1129a1–1137a31, in THE BASIC WORKS OF ARISTOTLE, *supra* note 163, at 1002–19; see YACK, *supra* note 160, at 131 (“I suggest that . . .

is rooted in his view of politics,<sup>178</sup> which in turn leads him to examine the nature of human friendship. According to Aristotle, "Friendship seems too to hold states together, and lawgivers to care more for it than for justice . . . when men are friends they have no need of justice, while when they are just they need friendship as well . . . ." <sup>179</sup>

According to Aristotle's political philosophy, members of the body politic are not friends in the sense of being "brothers or comrades," but neither are they simply self-interested parties joined together in a mutual contract. Rather, the friendship that is characteristic of citizens in civic life is between these two extremes and ultimately is determined by the parties' desires. Thus, political friendship is a "shared advantage friendship" which permits individuals to come together to promote their good because each cannot flourish alone.<sup>180</sup>

Civic friendship has been established mainly in accordance with utility; for men seem to have come together because each is not sufficient for himself, though they would have come together anyhow for the sake of living in company. . . . The justice belonging to the friendship of those useful to one another is pre-eminently justice, for it is . . . political justice.<sup>181</sup>

Accordingly, Aristotle identifies justice in general with acts intended to promote the common advantage of the community, not simple adherence to the law. The fair and the lawful "are different as a part is from its whole (for all that is unfair is unlawful, but not all that is unlawful is unfair) . . . ." <sup>182</sup>

As the preeminent form of justice, general justice requires that legalistic or corrective justice, with its defined norms of fairness, must sometimes give way to other aspects of the common good. Familiar examples are parole or pardon of violent criminals, or offering a plea bargain to one murderer in order to prosecute others. Less familiar, but important when discussing an international common good, is the

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Aristotle rejects the legalist understanding of justice . . . . In its place he develops a much more explicitly *political* understanding of justice than we find in most philosophic theories."); REESE, *supra* note 162, at 274 (providing definitions of justice based upon the writings of Aristotle, Plato, Locke, and Aquinas).

178 Aristotle understood politics to be "the means by which we *identify* the changing and often conflicting standards of justice that guide us in political life." YACK, *supra* note 160, at 132.

179 ARISTOTLE 1155a22-27, *supra* note 177, at 1058-59.

180 YACK, *supra* note 160, at 110-11.

181 ARISTOTLE, *Eudaemon Ethics* 1242a6-13, in *THE COMPLETE WORKS OF ARISTOTLE* 1922 (Jonathan Barnes ed., J. Solomon trans., 1984).

182 ARISTOTLE 1130b10-11, *supra* note 177, at 1005.

interest of the body politic in personal and national security, individual freedom, and civil peace.

Aristotle's concept of general justice does not imply that there is one defined state of affairs that the philosopher could discover solely by applying abstract reason to the community. Instead, the common good of the community emerges from the dialectic between *competing* conceptions of the good in society.<sup>183</sup> For Aristotle, therefore, general justice emerges primarily from politics (as he defined the term),<sup>184</sup> as the identification of the common good in communities only emerges from political exchange.<sup>185</sup> One commentator explained Aristotle's view of justice as

a distinctly political conception of justice, first of all, in its political understanding of the common good, an understanding that reflects the nature and intensity of the claims made by competing groups within the political community. It is also distinctly political in that it focuses on what people do with the power they gain in political communities to shape the life of other individuals, not just on whether or not they are faithful to basic standards of fairness. Aristotelian justice is not a pattern laid up in heaven, or anywhere else for that matter. It is, instead, a disposition to do what we can to promote the common advantage of competing individuals and groups, a disposition that we use to measure the performance of political actors.<sup>186</sup>

Such a view of justice means that justice in a particular community in a certain situation might be highly indeterminate. In this case, the only way to both rebuild the bonds of community and resolve the

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183 See REESE, *supra* note 162, at 274 (offering Aristotle's concept of justice); YACK, *supra* note 160, at 171 (stating that general justice represents a disposition to seek and promote the common advantage of competing groups). One scholar explained the problem with the way most people view a world government as follows:

When people talk about the ability of world government to control aggression, the analogy they usually use is the police versus the lone bank robber. But the analogy with the firefighter's union or the IRA would be more appropriate. Individual criminal acts are easy to deal with, organized political acts much harder. The threat to peace in the world comes not from individuals but from organized groups such as revisionist states, military factions, and revolutionary parties.

ZIEGLER, *supra* note 52, at 129; see also INIS L. CLAUDE, JR., *POWER AND INTERNATIONAL RELATIONS* 243-55 (1962) (arguing that the central task for world government would be to find ways to deal with disruptive states as opposed to disruptive individuals). Problems with a striking firefighter's union, of course, require political negotiation and compromise far more often than they require criminal prosecution.

184 YACK, *supra* note 160, at 172.

185 *Id.*

186 *Id.*

problem is through negotiation; there is no alternative to moral politics.<sup>187</sup> “[A]ttempts to depoliticize political justice are doomed to failure . . . .”<sup>188</sup>

### B. *Justice and the Structure of Government*

A political, nonlegalistic view of justice leads naturally to certain conclusions about the structure of government. In this regard, Jacques Maritain was careful to distinguish between the “body politic” and the “state.” The body politic, or political society, is made up of the various communities and families of a nation joined together for the pursuit of the common good of the body politic and its individual constituents.<sup>189</sup> The state, on the other hand, is the subsidiary part of the body politic that is “especially concerned with the maintenance of law, the promotion of the common welfare and public order, and the administration of public affairs.”<sup>190</sup> As the part of the body politic that specializes in promoting the common good of the entire body politic, and the one that therefore has a monopoly on force, the state is the lead instrument of the body politic, and is superior to its other organs.<sup>191</sup> On the other hand, the state is *not* superior to the body politic itself; rather, it is the agent “endowed with topmost authority not by its own right and for its own sake, but only by virtue and to the extent of the requirements of the common good . . . .”<sup>192</sup> Thus, it is a grave mistake to think of the state as having absorbed the body politic entirely, or as the equivalent of a natural person with moral rights of its own.<sup>193</sup>

This view of the place of the state in the body politic leads to an expansive view of appropriate structures of government, that are limited primarily by the duty to promote the common good of the body politic that the government will serve.<sup>194</sup> The best government struc-

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187 This is not to say that there can be no objective, transcendent truth. The point is simply that justice in a given case might be better served by looking beyond traditional retributive justice (even though that might be, in the end, the best path to the truth).

188 YACK, *supra* note 160, at 172. As previously noted, this political view of justice is strikingly similar to the traditional African concept of *ubuntu*. See Mokgoro, *supra* note 83, at 15–16.

189 MARITAIN, *supra* note 176, at 10–11.

190 *Id.* at 12.

191 *Id.* at 12–13.

192 *Id.* at 13.

193 *Id.* at 13–14.

194 For a detailed discussion of the legitimacy and authority of government, see FINNIS, *supra* note 165, at 245–54.

ture in any particular case depends upon numerous factors—e.g., local customs, culture, climate, history, etc.—and thus a wide range of potentially legitimate government structures promoting the common good is possible. It is through the application of practical reasoning about the best way to promote the common good in a particular body politic that the state is formed, in a process that is often much more art than science in the face of complex political situations.<sup>195</sup>

A valid governmental structure must not impinge upon any of the natural goods which are crucial to the common good of the body politic and its organs. Thus, such fundamental human goods as individual liberty must be respected, either in the structure of the government itself through a constitution or through some other means, in order for the state properly to serve the common good.

What emerges from a political view of justice, therefore, is that political reasoning, tempered by morality and practicality, is the best path to the establishment of legitimate government structures dedicated to the common good of the body politic. There cannot be a “one-size-fits-all” solution, at least not without sacrificing some aspect of the good of a particular body politic. Moreover, a legitimate government dedicated to the common good cannot be thrust upon a body politic—either by extraneous “law” or outside political influence. On the contrary, the state must emerge from the body politic itself.

### C. *Making Room for “Political Forgiveness”*

Adherents to a legalistic view of justice would, naturally, find the foregoing discussion odd at best. If obeying laws is the sum of one’s moral duties, then there is no relationship between civic friendship and justice—justice means simply enforcing the laws. If, however, one rejects such a view, then alternative paths to justice must be possible. Indeed, in order to secure a central role for law in a society wracked by political chaos, political solutions might be superior to legalistic ones. As one scholar has noted:

Sometimes . . . the values to be secured by the genuine Rule of Law and authentic constitutional government are best served by departing, temporarily but perhaps drastically, from the law and the constitution. Since such occasions call for that awesome responsibility

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195 An excellent example of precisely this sort of process is the practical statesmanship that took place in Philadelphia at the Constitutional Convention. See generally CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787* (1986) (detailing the compromises made at the Constitutional Convention by the Framers of the U.S. Constitution).

and most measured practical reasonableness which we call statesmanship, one should say nothing that might appear to be a “key” to identifying the occasion or a “guide” to acting in it.<sup>196</sup>

Spurred in part by the recent experiences of countries such as South Africa, philosophers have begun to explore settlements arrived at through political compromise to understand the alternatives to vengeance or prosecution. Particularly intriguing is the search for a *via media* between victor’s justice and amnesia, which in turn has led to an examination of the relationship between justice and forgiveness in politics.<sup>197</sup> Professor P.E. Digeser’s study of “political forgiveness,” for example, rejects the view that legal or “rectificatory” justice is “complete” justice that “trump[s] all other concerns.”<sup>198</sup> Rather, if the appropriate conditions exist, then the statesman might seek an alternative that takes into account the true nature of actual human beings living together in community in crafting a just solution to the type of intractable injustices that are common in transitional societies. In situations where injustice is intractable, and legalistic solutions are not feasible, there is an opening for what Digeser calls political forgiveness, which “can be understood as an action that forgives a debt, reconciles the past, and invites the restoration of the civil and moral equality of transgressors and their victims . . . .”<sup>199</sup>

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196 FINNIS, *supra* note 165, at 275. Finnis goes on to state that in such situations, the statesman’s duty is then to act “for the sake of the standing needs of the good of persons in community—from the sheer fact of power, of opportunity to affect, for good, the common life.” *Id.*

197 See, e.g., P.E. DIGESER, *POLITICAL FORGIVENESS* (2001); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); DONALD W. SHRIVER, *AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS* (1995).

198 DIGESER, *supra* note 197, at 208. Digeser defines “political forgiveness” through a series of conditions necessary for its exercise:

- (1) the existence of a relationship between at least two parties in which (2) there is a debt owed to one party by the other (3) that is relieved by a party with appropriate standing (4) conveying the appropriate signs or utterances in which (5) the success of the act does not depend on the emotional state or internal states of the forgivers, (6) even though it is generally thought good to receive what is due because (7) the effects of settling the past and inviting restoration of the offender or the debtor is somehow also thought to be good.

*Id.* at 207.

199 *Id.* at 28. This is, in part, exactly what criminal punishment in a stable body politic also seeks to do—“[p]unishment . . . . characteristically seeks to restore the distributively just balance of advantages between the criminal and the law-abiding, so that . . . no one should actually have been disadvantaged . . . by choosing to remain within the confines of the law.” FINNIS, *supra* note 165, at 263. See generally Ronald J.

Political forgiveness is an important tool of justice in human affairs because in some instances other human goods override the pursuit of legal justice, and because injustice is indeed often intractable.<sup>200</sup> In such circumstances, political forgiveness is a path to a more general justice in which other goods can be realized. In the case of nations in transition, those goods might include peace and stability, the establishment of a just society, an accurate accounting of the human costs of a nation's recent struggle, the society's sense of political "repose" in the wake of a final settlement, and similar matters.

The concept of political forgiveness raises a number of questions that must be answered not just in theory, but also in practice. Perhaps the most important question is: when is it appropriate for a successor government to forgive the criminal actions of its predecessor? One answer to this question lies in Jacques Maritain's distinction between the state and the body politic.<sup>201</sup> When the state commits crimes against citizens—and therefore against the common good of the body politic—the state acts illegitimately and should be held to account, even if that means being replaced. In other words, it is the good of the body politic and its individual members that has been harmed, and the body politic is responsible for the remedies.<sup>202</sup> If the successor state is the legitimate representative of the body politic, then that state has standing to administer justice against wrongdoers in the former regime. Such justice might include, if appropriate, political forgiveness.<sup>203</sup>

These questions can only be answered definitively in the real world. There is no guidebook for the statesman facing the question of the nature of justice, and thus the common good of his or her body politic, in times of political upheaval. The crucial task for scholars is perhaps not to write such a guidebook, but to help those persons identify paths to the common good, and, most importantly, to ensure

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Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299 (1990) (arguing that society is justified in punishing offenders who violate the rules that society has used to identify itself, and that such punishment is a social good because it is a deterrent and it reinforces societal values). Of course, in other political contexts, considerations such as peace and order in society intrude to significantly occlude the proper path to these goals.

200 DIGESER, *supra* note 197, at 208–09.

201 See *supra* notes 189–97.

202 JEREMY WALDRON, LAW AND DISAGREEMENT 239–49 (1999) [hereinafter LAW AND DISAGREEMENT]; JEREMY WALDRON, THE DIGNITY OF LEGISLATION 3–6 (1999) [hereinafter DIGNITY OF LEGISLATION].

203 Presumably, this would be most successful where innocent victims would also benefit from this forgiveness.

that political institutions do not preclude a nation from taking the right one.

#### D. *The Vision for International Criminal Law and Its Limits*

The discussion of political theory to this point sets the stage for understanding the nature (and thus the proper role) of international criminal law. To begin with the words of its architects, the primary goal of international criminal law is and ought to be the promotion of peace through international cooperation.<sup>204</sup> In translating this goal into law, it is no surprise that the crimes defined in the Rome Statute are all traceable to one or more rights defined by the various human rights instruments which have been signed over the past half century.<sup>205</sup> Despite the nearly universal agreement among nations concerning the rights enumerated in the Universal Declaration of Human Rights and other covenants, there is far from universal accord surrounding the source of those rights.<sup>206</sup> When all of the rights

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204 The Preamble to the Rome Statute makes this precise point in enumerating the reasons for establishing an international criminal court:

*Conscious* that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

*Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

*Recognizing* that such grave crimes threaten the peace, security and well-being of the world,

*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation . . . .

Rome Statute, *supra* note 6, pmbll., 37 I.L.M. at 1002.

205 These instruments include: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Universal Declaration of Human Rights; and the Vienna Declaration and Programme of Action, to name the most prominent and widely accepted instruments. See Jack Donnelly, *Ethics and International Human Rights*, in *ETHICS AND INTERNATIONAL AFFAIRS: EXTENT AND LIMITS* 128, 131 (Jean-Marc Coicaud & Daniel Warner eds., 2001).

206 See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948); Donnelly, *supra* note 205, at 132. The Universal Declaration affirms in its first article that “[a]ll human beings are born free and equal in dignity and rights,” thus clearly laying down the principle that human beings—all human beings—are entitled to enjoy these rights simply because they are human. One of the participants in the negotiations that resulted in the Universal Declaration, Jacques Maritain, stated that “[y]es, we agree about the rights but on condition no one asks us why.” See MARY ANN GLENDON, *WORLD MADE ANEW: ELEA-*



found in the Universal Declaration and the covenants are collected together, they form a long litany of political, social and economic rights, including, inter alia: the right to life and liberty; protection against slavery, torture, and inhumane punishment; equal protection of the law; and protection of privacy, family, and home.<sup>207</sup>

The corpus of internationally recognized human rights evinces a view of the human being as neither radically autonomous—alone in a cruel and uncaring world—nor as merely a meaningless cog completely subsumed by a greater whole.<sup>208</sup> Indeed, far from endorsing either of the extreme theories of autonomous individuality or radical communitarianism, the vision of the human person that emerges from human rights texts, taken together, is that of an individual whose inherent dignity as a human being entitles him or her to certain protections as an individual *and* as a member of society.<sup>209</sup> Human rights enumerated in various international agreements, therefore, reflect “a particular understanding of the meaning of equal concern and respect, based on a substantive conception of human dignity or the conditions required to permit human flourishing,” and therefore directed at the common good.<sup>210</sup> This last point is absolutely crucial: the goal of all international human rights instruments is to define the conditions that will best foster human potential and will, when implemented, produce societies and institutions that can promote the common good.<sup>211</sup> With this understanding, the underlying philosophy that drives the effort to establish the ICC comes into view.

The unprecedented international “statute” defining the crimes within the ICC’s jurisdiction is a translation of general human rights norms into the language of criminal law.<sup>212</sup> Those human rights norms provide a blueprint for the common good of a community, whether it is a single polity which makes up a modern nation state, or some international body politic encompassing all human beings. Like

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NOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 77 (2001) (quoting Jacques Maritain).

207 See Donnelly, *supra* note 205, at 132–33.

208 *Id.* at 135–36.

209 *Id.* at 135–37.

210 *Id.* at 136.

211 See *id.* at 137.

212 This is obvious simply from the names of the crimes: genocide, crime of aggression, war crimes, and crimes against humanity. The legislative action involved in drafting the Rome Statute is, therefore, an example of what Thomas Aquinas called a *determinatio*: the legislator’s attempt to translate a precept of “natural law” (e.g., “murder is wrong”) into positive law to help foster the common good (e.g., the Model Penal Code’s delineation of the elements of various types of homicide, see MODEL PENAL CODE §§ 210.0–210.4 (1985)).

all criminals, the perpetrators of crimes defined by the Rome Statute violate fundamental norms that must be observed if the common good of the community is to be fostered. Like all criminals, they deserve punishment. Through the doctrine of complementarity and the ideology of legalism that it embodies, the drafters of the Rome Statute reveal their faith: zealous enforcement of human rights norms through "international criminal law" is the path to a just and peaceful world.

A legalistic model of criminal justice, however, is not a *sufficient* means of achieving the common good of a body politic. It is only through moral politics that general justice emerges. Any effort to promote the common good solely through legalistic justice will yield at best a cold form of justice that ignores the fact that human communities are bound together by civic friendship, without which human society cannot exist. At worst, legal justice divorced from moral politics will lead to the injustice that emerges when the common good of the body politic is defined solely by what appears in positive legal rules.

#### E. *The Possibility of World Government*

Scholars working within the Aristotelian tradition have long recognized the necessity of the "world community" to foster the common good of all people, over and above modern nation states and their bodies politic.<sup>213</sup> Because nation states are self-evidently "imperfect" societies that are not entirely capable of fostering the common good of their members, it is up to the "world community" to step in where appropriate to do so.<sup>214</sup>

If it now appears that the good of individuals can only be fully secured and realized in the context of international community, we must conclude that the claim of the national state to be a complete community is unwarranted and the postulate of the national legal order, that it is supreme and comprehensive and an exclusive source of legal obligation, is increasingly what lawyers would call a "legal fiction."<sup>215</sup>

The focus for the world body politic must be to develop the political institutions capable of dealing with modern problems such as nuclear war, environmental degradation, starvation, human rights violations, etc.<sup>216</sup> The design of such institutions must proceed ac-

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213 See FINNIS, *supra* note 165, at 150; GEORGE, *supra* note 164, at 234–35; MARTAIN, *supra* note 176, at 188–216.

214 See GEORGE, *supra* note 164, at 234–35.

215 FINNIS, *supra* note 165, at 150.

216 GEORGE, *supra* note 164, at 236.

ording to the dictates of practical reasoning and must emerge from the body politic itself.

This last point is crucial: an effective world "state" cannot be superimposed upon the current international system of nation states. In commenting upon precisely this impulse—which he termed the "merely governmental" theory of world government—Jacques Maritain observed:

The quest of such a Superstate capping the nations is nothing else, in fact, than the quest of the old utopia of a universal Empire. This utopia was pursued in past ages in the form of the Empire of one single nation over all others. The pursuit, in the modern age, of an absolute World Superstate would be the pursuit of a democratic multinational Empire, which would be no better than the others.<sup>217</sup>

This approach to world government, with an over-arching authority capable of resolving disputes is, however, quite seductive.<sup>218</sup>

What Maritain suggests in the place of the merely governmental approach is the "fully political" theory of world organization.<sup>219</sup> Rather than imposing a world government, the effort should be to form a world body politic from which such a government and such institutions might emerge. There is no such world body politic at the moment, and therefore it is premature to envision a true "world" government.<sup>220</sup> Without a world body politic, international organizations that purport to usurp the powers of inferior bodies politic must be limited in scope, and must proceed only with the universal accord of

217 MARITAIN, *supra* note 176, at 204.

218 The argument for a universal kingdom or empire, with a single supreme authority to settle quarrels among those beneath it, is at least as old as Dante's poem, *The Divine Comedy*, and his book *De Monarchia*. See GEORGE H. SABINE & THOMAS L. THORSON, *A HISTORY OF POLITICAL THEORY* 243–48 (4th ed. 1973). The truth, however, is that many of the world's conflicts are civil wars, where there supposedly is a single supreme authority. "If the prescription 'government' doesn't always work at the national level, why should we be certain that it will work at the international level?" ZIEGLER, *supra* note 52, at 130 (noting that "followers of the Bahá'í religion believe in world government and describe how a 'world tribunal will adjudicate and deliver its compulsory and final verdict in all and any disputes that may arise between the various elements constituting this universal system'"); see also INIS L. CLAUDE, JR., *SWORDS INTO PLOWSHARES* 424 (1971).

219 MARITAIN, *supra* note 176, at 204–05.

220 The United Nations does not perform this function. The General Assembly is an assembly of *states*, each with one vote, and therefore does not accurately reflect the world polity. The Security Council with its five permanent members and their veto powers, is even less reflective of any world polity. Perhaps the United Nations represents a first step in the right direction, but it is far from an acceptable world governing body, and thus should not be entrusted with prudential decisionmaking about the "world common good."

those inferior bodies. Indeed, Maritain predicted that any attempt to establish world government without such universal accord would “creat[e] a half-universality to be extended progressively to the whole, [which] would, I am afraid, invite war rather than peace.”<sup>221</sup> A world government would be successful in promoting the common good through justice only if *all* of the channels for doing so—moral, social, political, etc.—were present along with courts of law. That, of course, cannot take place until there is a true body politic.

#### IV. BLUEPRINT FOR AN EFFECTIVE INTERNATIONAL CRIMINAL COURT

Can there be an effective international criminal court? Perhaps, but only if the proponents of such a court soberly acknowledge the limits of a legalistic model in addressing the problem of gross violations of human rights. As the foregoing discussion demonstrates, an international court can be a significant instrument in a body politic’s search for the common good. This has been demonstrated over the years by the several international ad hoc tribunals that have played important roles in helping transitional societies achieve peace and democracy. It is no coincidence, however, that various political entities—nations, states within nations, municipalities, cantons, counties, etc.—do not have *only* a criminal court in charge of vindicating the common good. Beyond the things that such courts do very well (such as finding facts, rendering judgments in individual cases, and deterring crime by meting out justice), a criminal court is simply not well-equipped to account for the other aspects of the common good of the body politic.

##### A. *Political Negotiations: The Sine Qua Non*

Criminal law, which involves punishing people for violating civil norms, is traditionally justified by utilitarian theories such as deterrence, rehabilitation, and incapacitation,<sup>222</sup> as well as a retributive the-

<sup>221</sup> MARITAIN, *supra* note 176, at 212.

<sup>222</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 121–23 (1990) (discussing the way society provides protection by requiring compliance with its laws). These three effects of punishment on potential lawbreakers are often identified as separate theories of punishment. See, e.g., J. KAPLAN & R. WEISBERG, *CRIMINAL LAW: CASES AND MATERIALS* 5–23 (1986). Hence, one commentator might advocate the deterrence theory of punishment, while another will advocate the rehabilitative theory, while still a third writes of the incapacitation theory. In fact, these effects exist regardless of the theory. Thus we may imprison someone in order to deter others, but we will also “benefit” from the incapacitation effect. Rehabilitation might require some additional effort on the part of the penal institution, but essentially it is more appropriate to speak of these effects of punishment rather than

ory which posits that punishment is justified because the wrongdoer is morally culpable.<sup>223</sup> Criminal penalties send utilitarian messages to other potential lawbreakers that society will not countenance such activity and will exact a penalty from lawbreakers (deterrence).<sup>224</sup> Moreover, if the criminal is removed from society, he or she will not be able to commit further criminal acts, at least not on the public at large (incapacitation).<sup>225</sup> Finally, by rehabilitating incarcerated criminals,

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each as a separate theory. Nonetheless, much has been written about each of these effects as separate theories of punishment. Thus, this discussion is limited to a relatively short description of each effect and the potential problems it involves. See Rychlak, *supra* note 199, at 308-14 (discussing and outlining various theories and effects of punishment).

223 Retribution, to the extent it adds the requirement of guilt into the punishment equation, must play an important part in any just criminal system. There is a need in mankind to see that justice is done. Retribution is based on moral culpability. If the criminal deserves punishment, it should be inflicted. JAMES Q. WILSON, *THINKING ABOUT CRIME* 164 (1975) ("We also want, or ought to want, sentences to give appropriate expression to our moral concern over the nature of the offense . . ."). However, if the criminal is not morally culpable, no punishment is justified, regardless of any potential good effect it may have on society. See, e.g., *FROM THE FORTY TWO TRADITIONS OF AN-NAWAWI*, reprinted in *THE PORTABLE WORLD BIBLE* 476 (Robert O. Ballou ed., 1976) ("Actions are to be judged only in accordance with intentions."); *THE KORAN* (E.H. Palmer trans.), in 45 *HARVARD CLASSICS* 885, 990-91 (Charles W. Eliot ed., 1910) (prescribing more severe retributive punishments for those who kill knowingly than for those who kill by mistake). The utilitarian theories might justify punishment "for the greater good of the greater number," regardless of moral blameworthiness, but retribution does not justify punishment without moral culpability.

224 Aquinas said that "[i]t is not always through the perfect goodness of virtue that one obeys the law, but sometimes it is through fear of punishment . . ." 2 *AQUINAS*, *supra* note 16, at 759. If you spank a child, you hope the child will not repeat the wrongdoing. If you spank the child in front of his or her siblings, you hope all will be deterred from committing the bad act in the future. Deterring the offender from repeating the crime is known as specific deterrence, while deterring others is known as general deterrence. See Robert Justin Lipkin, *The Moral Good Theory of Punishment*, 40 *FLA. L. REV.* 17, 30 n.36 (1988) ("General deterrence theories are concerned with punishment's effect on other people and on crime rates."); Rychlak, *supra* note 199, at 309-10; see also *United States v. O'Driscoll*, 586 F. Supp. 1486, 1486 (D. Colo. 1984), *aff'd*, 761 F.2d 589 (10th Cir. 1985) (stating that sentencing is required to deter others from committing the bad act in the future).

225 Under the incapacitation theory, one might compare imprisonment with quarantine. Regardless of any personal culpability, indeed even if the criminal is seen as being ill, incarceration is appropriate, just as enforced isolation of a person with a contagious disease might be justified. See Ferdinand D. Schoeman, *On Incapacitating the Dangerous*, 16 *AM. PHIL. Q.* 27 *passim* (1979), reprinted in *PHILOSOPHY OF LAW* 595 (Joel Feinberg & Hyman Gross eds., 2d ed. 1980). Discounting crimes committed in prison, this theory works by definition, assuming incapacitated criminals would otherwise commit new crimes and assuming that they are not replaced on the streets by new criminals. See ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY*

they will be prepared to reenter society as law-abiding citizens (rehabilitation).<sup>226</sup> Viewed this way, the utilitarian justifications for punishment can all be seen as benefits to the general public.<sup>227</sup>

Experience teaches that citizens sometimes are willing to forego the traditional benefits that they may receive from criminal punishment of wrongdoers if the common good dictates a different course of action. This is the case particularly when some higher truth or other goal is at stake. Thus, in the United States, if a defendant is willing and the court approves, the state will often permit a defendant to plead to a lesser charge and save the state the time and expense of a trial. Similarly, a criminal defendant might be permitted to plead guilty to a lesser offense in exchange for information and testimony that would permit the authorities to arrest other, presumably more "dangerous," criminals. Thus, society is willing at times to sacrifice perfect utilitarian or retributive justice if a higher common good is served by the compromise. Society accepts compromises on criminal punishment as long as widely held norms of justice are not violated.

By punishing the guilty and not punishing the innocent, a society's criminal law system reaffirms societal values.<sup>228</sup> This adds to the cohesion of society in most cases. It might even be said that society

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OLD AND PAINFUL QUESTION 52-55 (1975) (arguing that other persons do commit new crimes when the first offender is incapacitated).

226 The idea of rehabilitation is that society will take the offender, provide education, and make him or her a better person. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 53 (1968) (calling rehabilitation "[t]he most immediately appealing justification for punishment"). This, of course, assumes that the offender is capable of being rehabilitated. At least some criminologists have expressed grave doubts about the criminal law system's ability to rehabilitate. See WILSON, *supra* note 223, at 162-82. If the person can be rehabilitated, the next question is whether society has the right (or the obligation) to rehabilitate a person who does not want to be rehabilitated. See generally AMERICAN FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE* 83-99 (1972) (arguing that a corrupt society has no right to rehabilitate a political prisoner). We are, after all, rehabilitating the criminal for our benefit, not his or her benefit. As a practical matter, it has been suggested that many of our prison systems have exactly the opposite effect, serving instead as schools of crime. WILSON, *supra* note 223, at 166-67 (referring to a growing belief among judges that prisons do not rehabilitate); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 13-18 (1986) (evaluating the evidence and determining that, even where the programs were well planned and financed, rehabilitation did not seem to work).

227 The retributivist looks at the person who has done the bad act and justifies punishment by focusing on moral culpability. See EDMUND L. PINCOFFS, *THE RATIONALE OF LEGAL PUNISHMENT* 82 (1966) ("The retributivist legislator would, presumably, want to prohibit and penalize deeds it would be morally wrong to do. But we have no laws against lying, ingratitude, or lust."); Rychlak, *supra* note 199, at 325-31.

228 This has been called the denunciation effect or theory of criminal punishment. Rychlak, *supra* note 199, at 331-37. The authors would like to thank Avery Cardinal

owes an obligation to the citizens to usually punish those who have committed bad acts.<sup>229</sup> There are cases, however, where punishment of even a clearly guilty person might not promote societal cohesion. At these times, prosecutorial discretion, executive clemency, amnesty, and even jury nullification can do more to serve the common good than would punishment of the guilty. In such cases, members of the society are willing to trade the benefit that they might receive from such punishment for the common good.

Perhaps the most significant problem with the ICC is that it lacks a meaningful political check on its power.<sup>230</sup> Political negotiations are essential to building a nation where the rule of law can be established and human rights can be respected. Those who argue that criminal prosecutions are alone sufficient to build such a society ignore real-world politics at the peril of further bloodshed, and forget the unhappy experiences with prosecutors freed from normal political processes.<sup>231</sup> Furthermore, because the complementarity provisions of the Rome Statute are essentially an international "supremacy clause,"<sup>232</sup> the ICC would not only make its decisions in a political vacuum, but it also could negate political efforts for reconciliation made by national or local polities. To shunt aside in every case the local statesmanship of a future Nelson Mandela in favor of criminal trials in The Hague is to reject what may well be the most effective

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Dulles for suggesting that, since punishment in this case actually re-affirms societal value, "reaffirmation" is a more accurate term. We agree.

229 See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 97 (Peter Laslett ed., Cambridge Univ. Press 1998) (1690) ("[E]very man, by consenting with others to make one Body Politick under one Government, puts himself under an Obligation to every one of that Society, to submit to the determination of the *majority*. . . ."); JOHN STUART MILL, *ON LIBERTY* (1859), reprinted in *PHILOSOPHY OF LAW*, *supra* note 225, at 180, 182 ("[E]very one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest.").

230 Having raised this issue in discussions with several supporters of the ICC as presently contemplated, the authors have received a consistent reply—the political check will naturally flow from the quality of people who will become judges, prosecutors, registrars, and other officeholders of the ICC. In other words, because the very best people will be running the ICC, worry about abuses of the court's jurisdiction is merely "crying wolf." History seems to contradict this faith in the "best and brightest," and we remain unconvinced.

231 In the United States, both major political parties have complained about "independent prosecutors" at various times.

232 The authors thank Professor Richard G. Wilkins at Brigham Young University, J. Reuben Clark Law School, for this term to describe the practical effect of complementarity.

path to peace in any given case.<sup>233</sup> Former U.S. Secretary of State Henry Kissinger recently noted precisely this flaw in the ICC's structure:

The advocates of universal jurisdiction argue that the state is the basic cause of war and cannot be trusted to deliver justice. If law replaced politics, peace and justice would prevail. But even a cursory examination of history shows that there is no evidence to support such a theory. The role of the statesman is to choose the best option when seeking to advance peace and justice, realizing that there is frequently a tension between the two and that any reconciliation is likely to be partial.<sup>234</sup>

The solution to this problem is to tie the exercise of the ICC's jurisdiction to a political decision by an appropriate international body, preferably one which is representative of the international body

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233 See Davenport, *supra* note 22, at 18 ("This policy or political use of the ICC as a kind of substitute for the United Nations, the Security Council, and other forms of international relations and diplomacy is most disturbing.").

234 Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July–Aug. 2001, at 86, 95. In a response to Mr. Kissinger's concerns, Kenneth Roth, the Executive Director of Human Rights Watch and a supporter of the ICC, stated:

Kissinger would have had a better case had prosecutors sought, for example, to overturn the compromise negotiated by South Africa's Nelson Mandela, widely recognized at the time as the legitimate representative of the victims of apartheid. Mandela agreed to grant abusers immunity from prosecution if they gave detailed testimony about their crimes. In an appropriate exercise of prosecutorial discretion, no prosecutor has challenged this arrangement, and no government would likely countenance such a challenge.

Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept.–Oct. 2001, at 150, 153.

These comments, however, reveal the danger of an ICC with sole discretion over the exercise of universal jurisdiction in a way surely unintended by Mr. Roth. First, prosecutorial discretion is lauded in the South Africa case because Mandela was "widely recognized" as a "legitimate representative" of victims. Presumably, the wide recognition of Mandela's legitimacy is not simply a recognition by the citizens of South Africa, but rather the amorphous international "civil society" of intellectuals and nongovernmental organizations. Surely, however, the bona fides of the broker are less important than the substance of the settlement. One wonders if there might be cases where the ICC might wrongly exercise jurisdiction because distaste for the brokers of peace blinds the international community to the benefits of a political settlement.

Second, in putting his faith in "appropriate exercise of prosecutorial discretion," Roth reveals a variation of the argument that only the best people will run the ICC, and they can be trusted to do the "right thing." See *supra* note 230. However, as the U.S. experience with independent prosecutors demonstrates (and Mr. Kissinger points out in his article), a prosecutor bound only by his or her own prudential judgment, without meaningful political checks, can be highly problematic.



politic. There is no such body in the world today, and there may never be.<sup>235</sup> As the example of ad hoc human rights tribunals demonstrates, however, it is possible for the international community to unite behind prosecutions in appropriate cases, after frank political deliberations. Indeed, even without an ICC, a potential tyrant would be foolhardy to assume that he could commit gross violations of human rights with impunity, though this fact nonetheless seems to be precious little deterrent to the modern tyrant.<sup>236</sup>

The international body best equipped to perform the political calculus in such cases is the United Nations Security Council,<sup>237</sup> and it is no surprise that Henry Kissinger proposes that the Security Council establish an advisory organ or subcommittee to advise it regarding prosecutions for any systematic and gross violations of human rights.<sup>238</sup> The Security Council, having decided that prosecution is appropriate, could define the scope of the prosecutions and refer the case to a body such as the ICC.<sup>239</sup> The prosecutor then could exercise discretion in deciding whether or not to prosecute after an appropriate criminal investigation.

In such a scheme, the ICC might still be a standing international court, whose structure would be in place waiting for its jurisdiction to be invoked.<sup>240</sup> By relying on the United Nations Security Council, the

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235 See *supra* notes 166–95 and accompanying text for a discussion of the possibility of an international body politic and its importance in making decisions regarding, for want of a better phrase, the *international* common good.

236 The primary *raison d'être* for the ICC is to deter future tyrants. It seems unlikely to us, however, that the ICC will be an effective deterrent at all. Observers of popular social sciences argue that certainty of punishment, not severity of punishment, is the key to effective deterrence. See, e.g., WILSON, *supra* note 223, at 117–21. Certainty of punishment from a practical standpoint is not attainable, particularly when the wrongdoer is a national leader supported by military power. Accordingly, if deterrence is dependant on both factors, increasing the penalty is the more efficient way to deter crime. See Rychlak, *supra* note 199, at 310. The ICC, however, does not have authority to impose the death penalty. One might wonder whether a court that offers due process, legal advice, and no death penalty might actually *decrease* the fear (and hence deterrence) of a dictator who had feared the fate left to Mussolini or others.

237 From the early days of the Security Council, it was recognized by some observers as “the peace and law enforcer.” Adama Dieng, *International Criminal Justice: From Paper to Practice—A Contribution from the International Criminal Tribunal for Rwanda to the Establishment of the International Criminal Court*, 25 *FORDHAM INT'L L. J.* 688, 691 (2002).

238 Kissinger, *supra* note 234, at 95–96; see also Davenport, *supra* note 22, at 13 (suggesting a proposal similar to Kissinger’s).

239 See Kissinger, *supra* note 234, at 95–96. Mr. Kissinger seems to have in mind a system of purely ad hoc tribunals, rather than a permanent court.

240 By having a standing set of procedures and established legal definitions, this option would put people on notice, thereby eliminating most due process concerns

one international organ that history demonstrates is best (though far from perfectly) capable of making decisions to foster the international common good,<sup>241</sup> the potential for the ICC to do more harm than good would be reduced greatly. Moreover, it is quite likely that, without such a political component, major nations will not join the Court or will refuse to comply with their obligations as signatories when and if the Court acts too aggressively in pursuing prosecutions—thus rendering the ICC impotent.

### B. *Susidiarity, Not Complementarity*

The second, related flaw in the Rome Statute has to do with the doctrine of complementarity.<sup>242</sup> As discussed earlier, the ICC will not take a case unless the affected nation is unable or unwilling to prosecute the wrongdoer, *but* the ICC itself will be the sole arbiter of whether a nation is unable or unwilling to prosecute potential defendants—even if there has been a judicial or some other type of proceeding.<sup>243</sup> Moreover, the ICC does not have to recognize amnesties

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and providing a level of deterrence against tyranny; it would also eliminate any question about “victor’s justice.” The Nuremberg tribunals have been criticized because the defendants did not have such notice. *See supra* note 60 and accompanying text.

241 Kenneth Roth of Human Rights Watch applauded the decision of the Rome Conference to reject a similar proposal “because it would allow the council’s five permanent members, including Russia and China as well as the United States, to exempt their nationals and those of their allies by exercising their vetoes.” Roth, *supra* note 234, at 154. Roth is correct about the imperfect nature of politics. Without such a political check, however, proponents of the court reject the possibility of any solution other than universal criminal jurisdiction in what will sometimes be complicated criminal *and* political questions. Moreover, the experience of the ad hoc tribunal for the former Yugoslavia demonstrates that it is possible for the Security Council to approve the prosecution of individuals, such as Serbs, who are members of nations or ethnic groups that are, or have been, allied politically and tied through culture to permanent members of the Security Council. It is peculiar that supporters of the ICC place little or no faith in the political decisionmaking of the Security Council, but seemingly place enormous faith in the ability of prosecutors and judges to make the same prudential judgments correctly.

242 For a discussion of the origin and meaning of the doctrine of “complementarity,” see *supra* notes 139–50 and accompanying text

243 Obviously we agree that complementarity, with the preference for national trials over trials at the ICC, is better than a system where the preference goes the other way. Some colleagues have noted that the preference was for the international tribunals in the Rwanda situation, and complementarity should be hailed for having changed that. In fact, however, the Rwanda decision was based on the facts of that particular situation. National courts were not in a position to hold these trials. Whether the Rwanda trials were based on complementarity or subsidiarity, it is likely that all trials would have taken place in the international tribunals. We do not see this as a valid criticism of our argument.

granted by nations, even if they are part of a negotiated and delicately balanced political settlement. Simply put, the decision of whether to ignore proceedings or settlements at the national level resides solely with the ICC itself under the Rome Statute. The Statute contains no principles or guidelines for the exercise of this discretion (and no appellate process). Indeed, despite the assurances of some to the contrary,<sup>244</sup> the Rome Statute seems to *require* prosecution regardless of national preferences. There is an alternative. The principle of subsidiarity teaches:

[I]t is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.<sup>245</sup>

The most fundamental facet of the theory is that it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community.<sup>246</sup> Subsidiarity recognizes that the individual will not always be able to do for himself, but where that is true, the individual should be assisted by an intermediate association, such as a family, church, school, or union. Importantly, assistance should come from the intermediate association

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244 The comments of Mr. Kenneth Roth seem to imply that prosecutions would be inappropriate, and would not occur, in a situation akin to South Africa's Truth and Reconciliation Commission. See *supra* note 150. Even if there is "room" for prudential judgment to be exercised in applying the complementarity provision of the Rome Statute, the question remains whether and how the ICC should be the body to make the decision.

245 POPE PIUS XI, QUADRAGESIMO ANNO [ON RECONSTRUCTING THE SOCIAL ORDER], ¶ 79 (1931), reprinted in CONTEMPORARY CATHOLIC SOCIAL TEACHING 47 (Nat'l Conference of Catholic Bishops, U.S. Catholic Conference ed., 1991). See CATECHISM OF THE CATHOLIC CHURCH §§ 1883–1885 (2d ed. 2000) (describing Catholic Church doctrine on subsidiarity). Professor Finnis characterizes subsidiarity as "one important development of the Aristotelian political science, drawing on but going well beyond Aristotle's critique of Plato's communism." FINNIS, *supra* note 165, at 159. Unlike complementarity, subsidiarity is a moral right. *Id.* ("Being a matter of right (justice), not merely efficiency, it is obviously closely related to what many people refer to as the right to *liberty*."); see also Rychlak & Czarnetzky, *supra* note 5, at 138 (discussing the potential role of subsidiarity in the ICC); Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103 (2001) (tracing the roots of subsidiarity and analyzing its past and prospective application in European Union law, federalism in the United States, and as a general governing principle).

246 ZIEGLER, *supra* note 52, at 139 (noting that this was one reason why the Norwegians rejected membership in the European Union in 1972).

closest to the problem, with less involved and more detached associations only used when absolutely necessary.<sup>247</sup>

Subsidiarity has been characterized as “neither a theological nor even really a philosophical principle, but a piece of congealed historical wisdom.”<sup>248</sup> By focusing explicitly on the common good, subsidiarity would require a more nuanced, comprehensive, and *political* determination by the prosecutor and the Court before it assumes jurisdiction. Of course, this is precisely the type of reasoning that is better left to political bodies, who are far better equipped than courts.<sup>249</sup>

Subsidiarity is closely related to Aristotle’s concept of justice as friendship.<sup>250</sup> Jim Towey, director of Faith-Based and Community Initiatives in the George W. Bush Administration, defined subsidiarity in the political sense as follows:

It’s the human principle of contact. It was my experience in dealing with people in soup kitchens and in our AIDS shelter that they were thirsting for someone to know them by name, to care about their life story, to care if they woke up the next morning, simple things like that. And government can’t do that. President Bush says this all the time, “Government cannot love.” It’s very hard for government to be a neighbor.<sup>251</sup>

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247 Stated this way, the doctrine of complementarity seems to embody the spirit of subsidiarity. That is not precisely the case, however. For one thing, the delegates in Rome expressly rejected subsidiarity and instead invented this new legal doctrine of complementarity. There must be a reason for that. We have previously argued that subsidiarity would provide a moral basis for favoring national sovereignty, whereas complementarity offers merely a political one. The practical result in these early years might be negligible or even non-existent. In the long run, however, pressure will mount for the international court to assume greater jurisdiction, and complementarity will offer no logical basis to resist that pressure, whereas subsidiarity would offer a logical, moral basis for resisting such expansion. Rychlack & Czarnetzky, *supra* note 5, at 132–38.

248 John Coleman, S.J., *Development of Church Social Teaching*, in READINGS IN MORAL THEOLOGY NO. 5: OFFICIAL CATHOLIC SOCIAL TEACHING 169, 183 (Charles E. Curran & Richard A. McCormick, S.J., eds., 1986).

249 See LAW AND DISAGREEMENT, *supra* note 202, at 239–49; DIGNITY OF LEGISLATION, *supra* note 202, at 3–6. This is reflected in the common pairing of subsidiarity with the doctrine of solidarity.

250 See *supra* notes 172–88 and accompanying text; see also LAW AND DISAGREEMENT, *supra* note 202, at 137 (noting that communicating experiences and insights to others, which complement or qualify those that the other already possesses, “enables the group as a whole to attain a degree of wisdom and practical knowledge that surpasses even that of the most excellent individual member”).

251 *Crisis Interview with Jim Towey*, CRISIS, June 2002, at 40, 43 (defining subsidiarity).

It would even be harder for an international organization to be a neighbor.

The doctrine of subsidiarity already is found in modern international agreements. The Maastricht Treaty adopts the subsidiarity principle without detracting from the primacy of the Treaty on European Union.<sup>252</sup> In fact, subsidiarity lies at the core of the European Community's Social Charter, and it stands as a maxim for arranging the order of all types of social institutions within the Community, including the delimitation of competencies between the European Communities and the Member States.<sup>253</sup> When the drafters of the Rome Statute bypassed this well-established doctrine and invented a totally new one, they took away the moral preference in favor of flexible, local decisions and replaced it with a rigid, legalistic approach that will operate from a remote, international organization.

Complementarity as defined in the Rome Statute is couched in absolute terms—a nation must investigate and prosecute, or the ICC will step in and do the job. Complementarity seems to be based on nothing more than a legal norm—that the ICC will be *the* institution that enforces human rights norms embodied in the Rome Statute, regardless of the consequences. Seen this way, complementarity shifts power to international institutions at the expense of nation states and their polities.

Subsidiarity, on the other hand, is based on the idea of service from the larger body to the smaller. By focusing on an inquiry into the common good of the nation and, therefore, the actual human beings involved, the calculus of whether to assert jurisdiction in a particular case is not mechanically foreordained. In circumstances similar to post-World War II Germany, the decision to prosecute Nazi officials in an international tribunal undoubtedly would be the same regardless of whether complementarity or subsidiarity was the "rule of decision" regarding international jurisdiction. In situations like the transitional societies in South Africa and Chile, however, subsidiarity would seem to lead to a different result than would complementarity.

Few would disagree with the argument that the South African experience, in ridding itself of apartheid and making the transition to

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252 TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224/1) 191 (1992).

253 See *id.* art. 3(b) (stating that the principle of subsidiarity provides that when the EU does not have exclusive jurisdiction, the EU will act only if the Member States cannot achieve the objectives of the proposed action); see also Larry Catá Backer, *Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems*, 4 TULSA J. COMP. & INT'L L. 185, 211 (1997) (stating that the interests of the supranational unit prevail when the interests of member states conflict).

democracy without bloodshed, was the best course of action for that nation. South Africa's unique colonial experience; its racial, cultural, and economic diversity and vitality; the history of apartheid; the character of leaders such as Nelson Mandela; and many other factors, combined with a commitment by all parties acting in their own self interest to a political process, ultimately yielded a peaceful transition to democracy. This transition included a decision to have a Truth and Reconciliation Commission rather than a purely legalistic mechanism to achieve justice. A proper application of the doctrine of subsidiarity in these circumstances would affirm a decision by an international court not to intervene; that is, to let the nation sort the matter out for itself. Complementarity, however, could easily lead to a different result.

Post-Pinochet Chile also presents an illustrative case. There was no justice in this process for the victims or their families; however, the common good was well served by the political settlement. One need not be an apologist for bloody tyrants to see the advantages of letting the local polity construct its own path to democracy. At a minimum, the decision of an international tribunal to intervene in such circumstance should be based upon a comprehensive review of the local conditions, and the delineation of tangible advantages of prosecution over local solutions. That is precisely what is required under the doctrine of subsidiarity. Complementarity, on the other hand, would mandate prosecution of the tyrants, regardless of any amnesty laws and with no regard for the good of the nation's body politic.

The doctrine of complementarity as set forth in the Rome Statute absolves the ICC prosecutor and court of any requirement to consider the common good. Indeed, one might argue that it would be a violation of the Rome Statute for the prosecutor to do so. This is an intolerable situation. The minimum cure, assuming no effective political body to check the ICC (and perhaps even if there were one), would be for the Court itself to adopt subsidiarity explicitly, and for the Rome Statute to be amended to reflect this change.<sup>254</sup>

### C. *Change the Court's Structure*

More than a "statute" and a court are necessary for the international community to effectively foster the goals that are embodied in human rights norms without making some horrible situations worse.

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<sup>254</sup> To effectuate this change immediately, the Court would have to ignore legislative history and interpret complementarity to be equivalent to subsidiarity, as the Rome Statute by its own terms may not be amended for the first seven years of the Court's existence. See Rome Statute, *supra* note 6, art. 121, 37 I.L.M. at 1067.

There are at least three additional, fundamental requirements. First, in order to be legitimate, any statute or body of international criminal law must emerge from the international body politic. Though the world is very far indeed from being integrated enough politically to be considered one "community" in the sense that we have been discussing, at a minimum an institution such as the ICC should emerge from those institutions that come closest to such a world community. Moreover, the legitimacy of such an institution depends upon it being met by universal, or near universal, agreement in such a "world community," including its most powerful members. Second, there must be a means for the "world body politic" to control the court. Due to concerns that the Security Council might block prosecution of defendants from certain nations, the ICC is not under the auspices of the United Nations. While the concern may have validity, the response in this case is worse than the problem. The ICC desperately needs some form of a political check on its authority, and there is none in the current structure.<sup>255</sup> Third, such a "world body politic" must have a political process through which the general justice of the world community might emerge. Presently, the effort is to build a free-standing international tribunal with worldwide jurisdiction designed without, and divorced from, *any* effective international body politic. Far from recognizing the role of law *within* a political system, the architects of the ICC have been seduced by what one commentator has called the "antipolitical temptation,"<sup>256</sup> manifested in this case by an apparent absolute faith in strict legalism. There is certainly a place for an international tribunal or tribunals to prosecute gross violations of human rights, but the ICC as presently constituted seems doomed to fail.

We would suggest a change to the structure of the Court that would make it less likely to exercise its jurisdiction in all but the most clearly appropriate circumstances. For example, rather than a standing court with its own permanent bureaucracy, the ICC could be re-

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255 The Assembly of States Parties is the organization that has administrative oversight of the court. Perhaps it might one day emerge as such a body, but it is now so closely linked with the ICC itself that it seems hardly reasonable to consider it a separate body. Moreover, it is open (in terms of voting authority) only to those nations that have signed and ratified the Rome Statute.

256 Damon Linker, *The Antipolitical Temptation*, *FIRST THINGS*, June–July 2002, at 10–11.

Just as communism was supposed to redeem us from politics and wound up producing an unprecedented tyranny, so today's prophets of global humanitarianism would trick us into believing that [through the ICC] we can bureaucratize our way out of the human condition. And once again the results are liable to be pernicious.

*Id.*

vised into something of a skeletal institution to be mobilized only in instances analogous to those where there have been ad hoc tribunals in the past.<sup>257</sup> International laws and procedures could be adopted, but they would only be mobilized when a specific case was ready to be tried. This would put putative defendants on notice, eliminate the claim of “victor’s justice,” and also reduce the likelihood that the court’s jurisdiction will significantly expand.

With the currently contemplated standing Court of eighteen judges and full support staff, it is quite likely that the Court will expand its jurisdiction. Most ICC crimes will not be prosecuted until the regime in question has been ousted. As such, cases may be prepared, but trials are unlikely to happen any time soon.<sup>258</sup> In such a situation, sitting judges and related administrators may feel the need to justify their operational budget. In other words, they might begin looking around for cases to prosecute. A shell organization would be far less likely to be influenced by such pressure.

A second structural reform would be to require that, in any given prosecution, the judges sitting on the case be composed of one-half ICC judges and one-half judges from the nation or nations implicated in the case. This would be a minimal attempt to bring an understanding of local circumstances to proceedings at the seat of the ICC in The Hague, which will often be quite far removed from the site of the crimes being prosecuted. Having local judges participate in the proceedings would enhance the credibility of the international tribunal, and perhaps would bring an important perspective to decisions from culpability through sentencing. Such a solution might blunt some of the potential harm from the ICC usurping local political and judicial processes.

#### CONCLUSION

The quest to end impunity in human affairs and to punish those who commit gross violations of human rights is a noble cause that will, hopefully, one day bear fruit. History teaches, however, that the devil can dwell in the details of the most nobly intended institutions. The ICC, as it was designed in the Rome Statute, is a flawed institution that contains the seeds of the Court’s eventual desuetude, or worse, of causing greater harm than the crimes it was intended to redress. We have focused on those flaws, giving concrete examples of how to im-

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257 Given the tendency for bureaucracies to become entrenched and self-perpetuating, it may be too late for this suggestion to be practical.

258 After all, in all of recorded history there have been only four similar cases ever tried. *See supra* note 4.



prove the Court, in the hope that the *ideals* that led to the Rome Statute will not blind the international community to the grave flaws in the instrument designed to give those ideals substance.

An effective international tribunal, one that will do most of the good that its proponents posit for the ICC, cannot rest upon an unbridled faith in legalism. With the ICC, however, the yearning for an end to human rights abuses has led a significant portion of the international community to look only toward mechanistic legalism, enforced by an unaccountable Court. In doing this, the ICC is essentially imposing the "unconditional surrender" model of Nuremberg on all future transitional societies. No room is left for political compromise.<sup>259</sup> This, of course, means that the ICC is taking some potential tools for peace off of the table. That is a dangerous thing to do.

Law itself is an instrument of politics, and therefore does not transcend human beings and our foibles. Though it is unfashionable to assert, humans have no choice but politics when we discuss just resolutions of difficult situations. Put differently, the fallible human beings who will run the ICC, though garbed in the mantle of positive law derived from noble human-rights norms, will still just be human beings. If history teaches anything, it is that human beings with unchecked, absolute power will eventually abuse that power. In the case of an international tribunal with the power decisively to affect the future of entire peoples, the stakes are far too high to deny such a truth learned through so much hardship over the centuries.

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259 Psychologist Abraham Maslow said: "People who are only good with hammers see every problem as a nail." GLENN VAN EKEREN, SPEAKER'S SOURCEBOOK II: QUOTES, STORIES & ANECDOTES FOR EVERY OCCASION 304 (1994) (quoting Abraham Maslow). By offering only one "tool" for peace, the ICC will have the effect of having all problems handled the same way. That strikes us as an unwise approach to world peace.