

REASONABLE DOUBT

The Case against the Proposed International Criminal Court

by Gary T. Dempsey

Executive Summary

In July 1998 representatives of governments and nongovernmental organizations will conclude a five-week international conference in Rome aimed at producing a treaty establishing the International Criminal Court. The stated mission of the proposed ICC is to prosecute persons charged with the most serious international crimes, such as war crimes, crimes against humanity, and genocide. With 116 articles and more than 200 wording options to be debated, however, the ICC's draft statute is replete with unresolved issues and alarming possibilities.

Specifically, the court threatens to diminish America's sovereignty, produce arbitrary and highly politicized "justice," and grow into a jurisdictional leviathan. Already some supporters of the proposed court want to give it the authority to prosecute drug trafficking as well as such vague offenses as "serious threats to the environment" and "committing outrages on personal dignity." Even if such expansive authority is not given to the ICC initially, the potential for jurisdictional creep is considerable and worrisome. Moreover, it appears that many of the legal safeguards American citizens enjoy under the U.S. Constitution would be suspended if they were brought before the court. Endangered constitutional protections include the prohibition against double jeopardy, the right to trial by an impartial jury, and the right of the accused to confront the witnesses against him.

For those and other reasons, the U.S. Senate and U.S. House of Representatives should have sufficient grounds to, respectively, refuse to ratify and to fund the International Criminal Court. If Congress goes ahead with the treaty, it could open a Pandora's box of legal mischief and political folly.

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Introduction

On July 17, 1998, government officials and delegates from nongovernmental organizations from around the world will conclude a five-week conference in Rome aimed at finalizing a treaty establishing the International Criminal Court. According to the ICC draft statute completed at the United Nations earlier this year, the proposed court will be empowered to prosecute persons charged with "the most serious crimes of concern to the international community," including war crimes, crimes against humanity, and genocide.¹ But with 116 articles and 200 wording options to be debated by more than 100 countries and organizations, the Rome conference will likely sew together a legal monstrosity.

Serious discussion about creating a permanent international criminal court began following the creation of the Nuremberg and Tokyo tribunals after World War II. In tandem with the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and the various Geneva Conventions (1949), the United Nations General Assembly asked the International Law Commission--the body in charge of codifying international law--to examine the possibility of creating a permanent international criminal court. By the early 1950s the International Law Commission had produced two draft statutes, but the project was shelved when it became apparent that the political climate of the Cold War made such a court impracticable.

In 1989 the UN delegation from Trinidad and Tobago revived the idea of establishing an international criminal court, proposing the creation of a world judicial body capable of dealing with crimes related to international drug trafficking. While the International Law Commission resumed work drafting an ICC statute, the UN established temporary international criminal tribunals to adjudicate cases of war crimes, crimes against humanity, and genocide committed during the recent conflicts in the former Yugoslavia and Rwanda.

The International Law Commission submitted an ICC draft statute to the UN General Assembly in 1994, recommending that an international conference be convened to finalize a treaty. Two years later, the UN General Assembly convened the Preparatory Committee on the Establishment of an International Criminal Court, which allowed UN member states and

nongovernmental organizations to begin preliminary negotiations on the text of the statute. The Preparatory Committee held six sessions over more than two years and completed an amended draft statute on April 3, 1998. The Rome conference that concludes on July 17 is intended to work out the draft statute's many remaining unresolved issues.

The Nuremberg Model Is Not Applicable

It is common for proponents of the ICC to argue that it will function like a permanent Nuremberg tribunal.² In fact, the city of Nuremberg, where 21 Nazis stood trial for their role in the deaths of more than 20 million people, is mounting a serious campaign to be the permanent home of the proposed court.³ Yet according to John R. Bolton, former assistant secretary of state for international organization affairs, the Nuremberg comparison does not withstand close inspection: "Whenever the idea of a war crimes tribunal is raised, Nuremberg is the model invariably cited. But an international criminal court [will be] nothing like Nuremberg."⁴ Consider how the Nuremberg trials actually worked. They followed the unconditional military and political surrender of the Axis powers. Prospective defendants were already in custody, and extensive documentary and physical evidence was readily available. Moreover, the Allies shared a common vision of what the postoccupation government should look like, and the defeated peoples endorsed the legitimacy of the war crimes process. Simply reciting that history shows how different Germany and the Nuremberg tribunal were from contemporary cases, like Bosnia and the Yugoslavia tribunal. Bolton points out that

the outside powers share no consensus about their ultimate objectives or how [the Yugoslavia tribunal's] war crimes trials fit into an overall political resolution [in Bosnia]. Indeed, precisely because there was no clear military defeat, the future status of the warring parties is not finally decided. . . . Moreover, most key defendants are not in custody and not likely to be brought into custody in the foreseeable future. Evidence is unquestionably being concealed and destroyed in widespread fashion.⁵

Alfred P. Rubin, professor of international law at the Fletcher School of Law and Diplomacy at Tufts University,

has a similar view of the Nuremberg comparison. He explains, "There is a frequently cited precedent for using a legal tribunal and the notion of war crimes to bring 'justice' to a legal order that seems incapable of enforcing the rules outsiders regard as vital: Nuremberg. But the precedent fails because the two situations are not analogous. . . . Nuremberg was a victors' tribunal."⁶ Rubin adds that Nuremberg was also in the middle of Germany and its greatest success was in exposing to the German people themselves the crimes committed by their government. Furthermore, at Nuremberg the Nazi archives were open to the defense as well as to the prosecution, and the need for Allied secrecy did not inhibit the ability of the defense to present evidence. But the proposed ICC will not be a "victors' tribunal," and it will encounter many of the same problems the Yugoslavia tribunal does. Rubin explains that

the documents and testimony needed for an effective defense are hard to expose and bring to the tribunal; there is no reason to expect the Bosnian Serbs to publish their internal records, and no reason to think that the Serbian Serbs would want those records, or their own Cabinet minutes that might reflect those records, exposed. Nor is there any reason to expect the Bosnian Muslims or Croats to volunteer their own records, which might exculpate some low-level defendants by incriminating higher-level officials.⁷

Nonetheless, many proponents of the ICC suggest that the existence of the court will still have a deterrent effect on potential war criminals. Former president Jimmy Carter, for example, says that "the most important thing in knowing that the international criminal court is there, I think would be a great deterrent among those who might be inclined to perpetuate these kinds of crimes."⁸ Similarly, Norman Dorsen of the Lawyers Committee for Human Rights and Morton Halperin of the Twentieth Century Fund argue that the ICC is needed "to deter those who would contemplate such horrendous crimes."⁹ But according to Rubin, there is no evidence that holding war crimes trials reduces the number of threats to international peace and security. If anything, the opposite is true: making war less atrocious makes it more likely. The creation of war crimes courts, he concludes, seems really "to have been aimed at making lawyers the 'guardians' of a violent society, in which war is all right as long as it is played by rules to which the con-

cerned lawyers can agree."¹⁰

Complementarity and Diminished Sovereignty

Proponents of the ICC also argue that the court is meant to complement, not replace, national criminal justice systems. The court theoretically would take action only when national courts fail to fulfill their legal responsibilities. In fact, the preamble to the ICC draft statute states that the court "is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective." The determination of a domestic system's "ineffectiveness," however, is one of the areas where the rationale for the ICC breaks down. If the ICC cannot readily supersede national courts, a state that wants to avoid having its soldiers prosecuted for war crimes by the ICC need only organize a national trial or pass a law that makes it virtually certain that they will be acquitted.¹¹ If states can get away with that, however, the whole point of the ICC is defeated; that is, war crimes will continue to go unpunished. On the other hand, if the ICC gets to invalidate national trials by deciding what constitutes an "effective" or "ineffective" trial, the international court will exercise a kind of judicial review power over national criminal justice systems. In other words, the ICC will have de facto supreme judicial oversight.

The ICC will also become an unavoidable participant in the national legal process. Indeed, because it will set precedents regarding what it considers "effective" and "ineffective" domestic criminal trials, the ICC will indirectly force states to adopt those precedents or risk having cases called up before the international court. That constitutes an unprecedented change in the sources of national lawmaking, one that diminishes the traditional notion of state sovereignty.

But the prospect of diminished sovereignty does not worry many advocates of the ICC. Legal scholar Sandra Jamison, for example, argues that the United States and other nations must be prepared to cede some of their traditional sovereignty in pursuit of a potent international criminal court. "The absolute doctrine that a state is supreme in its own authority, and need not take into account the affairs of other nations," she says, "is no longer tena-

ble."¹²

Similarly, Lloyd Axworthy, Canada's minister of foreign affairs and a proponent of the court, maintains,

[There is] an acute dilemma for the United Nations, which finds itself torn between intervening in severe humanitarian crises and respecting national sovereignty. To date, it has responded largely on an ad hoc basis, although always with the terrible lessons of Central Africa and the former Yugoslavia in mind. Gradually, though, new ways of thinking are emerging that address this dilemma. . . . A key element of this new thinking is what has been called "human security." Essentially, this is the idea that security goals should be primarily formulated and achieved in terms of human, rather than state, needs. . . . [We start] from the premise that the threat to life and limb of millions of individuals should take precedence over military and national security interests.¹³

Finally, Judge Gabrielle Kirk McDonald, an American judge sitting on the Yugoslavia tribunal, admits that the proposed ICC creates tension between "state sovereignty and world order,"¹⁴ but she nevertheless insists that the ICC must be able to employ "an element of compulsion" in order "to redress gross violations of human rights and international law."¹⁵ She also says that the ICC treaty "should be one of principle and not of detail. . . . [It should] be a flexible statute based on principles which may be developed by the court as the circumstances require while still providing sufficient guidance to establish an international framework within which the court can work."¹⁶ But how is the public to judge the merits of the ICC if its proponents, like Judge McDonald, cannot explain the details?

The Threat of Expansive Jurisdiction

Although the preamble of the ICC draft statute states that the "court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole," many advocates of the court do not want to limit its purview to the core offenses of war crimes, crimes against humanity, and genocide. In fact,

there has been a tendency on the part of advocates of the ICC to try to transfer human rights violations and violations of other international prohibitions to the domain of the court.

Efforts to Expand the ICC's Purview

For example, Amnesty International, a nongovernmental organization supporting the establishment of the ICC, says not only that the court should handle war crimes, crimes against humanity, and genocide but that the "perpetrators of human rights violations must be brought to justice" there as well.¹⁷ Embracing that view, the ICC draft statute contains wording that would elevate unlawful imprisonment and political incarceration to the status of international crimes. Although those activities are deplorable, including them in the final ICC statute will establish the precedent that the international court exercises "complementary" jurisdiction not only over war crimes, crimes against humanity, and genocide but over matters of domestic law enforcement and internal security as well.

A number of countries also want to have the crime of "aggression" included in the final ICC statute. For instance, Germany's representative to the Preparatory Committee for the Establishment of an International Criminal Court, Rolf Welberts, says that his delegation is encouraged by the broad support for its initiative to include the crime of "aggression" in the future court's statute and that the statute would be blatantly incomplete without the inclusion of that crime.¹⁸ Similarly, the Russian Federation's representative, Aleksander Zmeevsky, says that his country believes that the court's jurisdiction should cover acts threatening the maintenance of international peace and security and that such crimes include planning, preparing, initiating, and carrying out a war of aggression.¹⁹ Libya is even arguing that the crime of "aggression" should be defined to include confiscation of property and establishment of settlements in occupied territories.²⁰ That wording would have direct implications for the United States, which continues to freeze Libyan assets, and for Israel, which continues to build settlements on the West Bank.

According to the proposed wording of Article 5 of the ICC draft statute, the term "aggression" could also include such things as the "bombardment by the armed forces of a

State against the territory of another State" and "the blockade of the ports or coasts of a State by the armed forces of another State." Including those actions under "aggression" will reduce the military options available to the United States by outlawing preemptive strikes and the kind of naval blockade President Kennedy employed during the Cuban Missile Crisis. That could effectively tie the hands of U.S. policymakers. As Department of Defense spokesman Kenneth Bacon explains, "What we're concerned about is that the court not be set up in a way that gives it very broad authority to pursue a vague definition of aggression that could be confused with legitimate defensive action to protect our national security interests or the national security interests of other countries who back the idea of setting up an international criminal court."²¹ Moreover, in a three-page memo circulated to foreign military attachés in March 1998, the Pentagon stated that

we are concerned that an ICC lacking appropriate limits and checks and balances could be used by some governments and organizations for politically motivated purposes. . . . We understand the laudable intent of some who would support the inclusion of the offense of "aggression" in the statute. However, this offense is necessarily political in nature, and its inclusion only encourages use of the court as a political tool.²²

What is more, notes Freedom House president Adrian Karatnycky, if the final ICC statute also includes "attacks against nonmilitary targets" in its definition of war crimes, "U.S. officials worry that American peacekeepers could be brought up on charges if their operations result in civilian casualties," especially if "the U.S. military could be investigated at the behest of such rogue states as Libya or Iraq, against whom the United States has been involved in hostilities that have resulted in the loss of civilian life."²³

The Potential for a Jurisdictional Leviathan

Some proponents of the ICC want "terrorism" and "international drug trafficking" to be added to the court's purview.²⁴ But the U.S. Department of Justice worries that that could end up interfering with the crime-fighting operations of its Federal Bureau of Investigation and Drug En-

forcement Agency, especially if the ICC's investigators unknowingly conduct competing investigations. To avoid that problem, the FBI and the DEA could inform the ICC of their investigations, but letting an outside organization know about their sensitive work would increase the security risk that confidential information will be unintentionally leaked and investigations compromised. What is more, putting the offense of "drug trafficking" under the court's jurisdiction further entrenches the ill-conceived drug war and throws up another obstacle to a long-overdue reconsideration of drug prohibition and its alternatives.

Other proponents of the ICC want to go even further and have the final ICC statute include "forced pregnancy" as an international crime.²⁵ Typically, "forced pregnancy" has been understood to mean repeated rape for the purposes of impregnation, like those incidents reported during the war in Bosnia. But Brigham Young University law professor Richard Wilkins fears that the wording could be abused to bring lawsuits against countries that do not have liberalized abortion laws, noting that the lawyers opposing Utah's abortion control laws argued that "requiring a woman to give a reason for a termination of her pregnancy constituted what they called a compelled or forced pregnancy."²⁶

Some proponents of the ICC even want the final statute to contain wording that would give the court jurisdiction over a host of new "crimes," including "committing outrages upon personal dignity"²⁷ and causing "serious threats to the environment . . . [such as] the Chernobyl and Bhopal disasters."²⁸ Given that the definitions of those "crimes" are not settled as a matter of international law, they are not likely to be included in the final ICC statute, but a review clause will probably be included, allowing states to meet periodically to expand the court's purview to include them. Some advocates of the ICC clearly want to expand the court's domain to include those and other crimes, but they recognize that many states are wary of having their government officials and corporate leaders called before an international court. Accordingly, those groups have made a deliberate decision not to push for adding noncore crimes to the court's purview until after a treaty is ratified. Donald W. Shriver Jr. of the Faith-Based Caucus for an International Criminal Court, for example, explains that

we will never have an ICC or any other effective world court if powerful nations . . . insist on

always being judge in their own cases. This resistance, shared by many other peoples, is itself an argument for keeping the list of crimes against humanity rather short at the beginning, if only to get national publics around the world to begin to distinguish between ordinary and extraordinary criminals.²⁹

In other words, the treaty that comes out of the Rome conference is only the beginning.

Financing the Court and Potential Bureaucratic Empire Building

According to Article 50 of the ICC draft statute, "The judges, the prosecutor, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided by the Assembly of States Parties."³⁰ In other words, the compensation packages for employees of the court have not been worked out yet. So how much will the court cost? It is difficult to estimate, but DePaul University published a study in 1997 estimating the cost of the court at \$60 million to \$115 million annually.³¹ It should be noted, though, that the UN budgeted more than \$130 million this year for the Yugoslavia and Rwanda tribunals.³² As the registrar for the Rwanda tribunal, Agwu Ukiwe Okali, pointed out in a speech before the UN Preparatory Committee on the Establishment of an International Criminal Court, international tribunals are a lot larger than most people realize:

One of the most common misapprehensions about the ICTR [the Rwanda tribunal], and I am sure the same goes for the ICTY [the Yugoslavia tribunal], is as to its size. When people think about the tribunal, they think actually of a court and when they think of a court, they think of a few judges with some support staff--20, 30, maybe 40 people altogether. Nothing prepares them for the actual size of the operation--a staffing strength of over 600 and an annual budget of nearly 60 million dollars. What is the point here? The point is that we are speaking, not of a small cottage operation, but of a large and extensive organization.³³

Okali went on to argue that the ICC should have employ-

ment terms and conditions that attract the best qualified candidates. "A catalogue of entitlements, therefore, would be to the benefit of both the court and the individual judges concerned. Such a catalogue should aspire to be as exhaustive as possible, addressing for example, pension and travel entitlements, installation and education allowances, and disability and survivor's benefits." ³⁴

A Troubling Heritage of Mismanagement

Then there are the unforeseen costs of possible UN mismanagement of the court. The track record with regard to the special tribunals is not encouraging. In 1997, for example, UN inspector general Karl Paschke uncovered widespread waste and incompetence at the Rwanda tribunal's administrative headquarters in Arusha, Tanzania. He also cited neglect of the problems by UN officials in New York. Paschke concluded that the tribunal was dysfunctional in every administrative area. Among his findings:

- The cash fund at the tribunal's offices in Arusha and in Kigali, Rwanda, sometimes totaled as much as \$600,000, but there were no written rules for disbursing it.

- Payroll procedures were so erratic that, while some staff went months without receiving their wages, others were paid twice for the same work. One staffer had his contract extended while he owed the UN \$34,000 for improper pay.
- Administrators routinely hired employees who failed to meet UN requirements, including a finance director who had no degree in finance, accounting, or administration and a procurement chief who had no experience in UN procurement procedures.
- Andronico Adede of Kenya, the tribunal's chief administrator, spent half of his time on duty traveling in the region on official business, which drew him away from the woes at the tribunal.³⁵
- A plane chartered at a cost of \$27,000 went to pick up suspects detained in a West African country but had to return empty because no agreement had been reached in advance for that country to turn over the prisoners.³⁶

Unfortunately, such abuses and incompetence are consistent with a long, dreary pattern of conduct at the United Nations. In May 1998 Paschke released a report describing widespread corruption and cronyism among UN purchasing officers in Angola that wasted millions of dollars. "The audits disclosed serious management deficiencies and apparent breaches of financial regulations and rules as well as improprieties and irregularities in the procurement process," explained Paschke.³⁷ Among his findings:

- UN officials tried to issue more than \$15 million in unnecessary purchase orders to middlemen who would have reaped huge commissions.
- Several unnecessary "rush" buying trips to South Africa cost more than \$1 million each.
- UN buyers paid nearly \$7 million for substandard equipment and then had to pay an additional \$1 million to make it usable.³⁸

Vast Potential Obligations

Added to the possible cost of the court are the virtually unlimited obligations associated with Article 73 of the ICC draft statute. According to that article, the court would not only try and convict international criminals but also "recommend that States grant an appropriate form of . . . rehabilitation" to the victims and witnesses of war crimes.³⁹ Because that could involve hundreds of thousands of people in the future, the costs of Article 73 could prove staggering. Nevertheless, there is widespread support for the measure. For example, Human Rights Watch, a nongovernmental organization that supports the formation of the ICC, argues,

The ICC must be empowered to provide support . . . to victims and witnesses. Evidence from the International Criminal Tribunals for the Former Yugoslavia and Rwanda overwhelmingly indicates that witnesses face serious security, psychological, and medical concerns. Victims of gender-based crimes who testify may experience profound stigma and shame. For these reasons, HRW supports the creation of a Witness Support and Protection Unit within the Registrar's Office to protect the physical and psychological well-being of witnesses--particularly victims--and their family members, before, during, and after trial proceedings.⁴⁰

Similarly, in a speech before the UN Preparatory Committee on the Establishment of an International Criminal Court, Okali maintained,

Our experience in the Rwanda tribunal dealing with the aftermath of the 1994 genocide has brought us face to face with a different reality. While vigorously pursuing the suspects and other accused perpetrators of the genocide and as we see and hear witness after witness recounting the horrors of that event, including women victims of gross sexual violations, many of whom, after giving testimony, turn to us with that awkward and plaintive question "What happens to me now?," we have come to realize that in parallel with the efforts to exact retribution on the perpetrators something else needed to be done urgently to alleviate the immediate plight of the surviving victims. Assistance to such victims in the form of medical

treatment, psychological and legal counseling and rehabilitatory support would not only help to restore or "make whole" these victims, which will be an expression of restitutive justice in action.⁴¹

The Goal of Mandatory Contributions

There has been some discussion of making state contributions to the ICC voluntary, but in a speech before the UN Preparatory Committee on the Establishment of an International Criminal Court, the registrar for the Yugoslavia tribunal, Dorothee de Sampayo Garrido-Nijgh, argued that "since reliance on voluntary contributions will make [the court's] activities subject to the generosity of donors, and could compromise, or appear to compromise, the continuity and autonomy of the court's activities, . . . [i]n my view, it is essential that assessed contributions of state parties be sufficient to finance the court's activities and that reliance on voluntary contributions should be avoided."⁴²

If ICC funding is not voluntary, and historical contribution rates apply, 25 percent of the court's cost will likely be passed on to the United States, which the UN says already owes \$1.6 billion in unpaid back contributions.⁴³

Interference with Peacekeeping Operations

Many proponents of the ICC want to extend the power of the court beyond deciding guilt or innocence and into the domain of awarding reparations. For example, Amnesty International maintains,

The court must have the power to award victims and their families reparations, including restitution [and] compensation. . . . The court itself should have the power to award such reparations since it is unlikely that national courts, which were unable or unwilling to bring the person responsible to justice, will be able or willing to award reparations or to enforce the award.⁴⁴

Likewise, Human Rights Watch argues,

Victims and their representatives have a right to

reparations under international law in respect of the serious violations within the jurisdiction of the Court. The most efficient way for the international community to make effective the exercise of this right would be through the ICC. Consistent with emerging international legal norms, reparations must be understood, in a broad sense, to include restitution [and] compensation.⁴⁵

France and the United Kingdom worked together during the last ICC Preparatory Committee meeting and introduced a joint proposal on reparations to victims of war crimes. Although the two countries had slightly different positions on the court's power to order reparations, the two governments held extensive consultations with nongovernmental organizations to discuss their proposals.

Reparations language was ultimately included in Article 73 of the ICC draft statute. But allowing the ICC to award reparations could easily destabilize peacekeeping operations. For instance, if the court decides that one formerly warring faction must pay reparations or return conquered territory to another, peacekeeping troops could find themselves in the messy situation of either carrying out or refusing to carry out the court's judgment. Either way, one faction will be upset and the peacekeepers will be caught in the middle.

There is also the more subtle possibility that the court will indirectly interfere in how peacekeeping operations are conducted by changing the dynamics of military decisionmaking and the focus of command responsibility. In December 1997, for example, a dispute broke out between France and the Yugoslavia tribunal. French defense minister Alain Richard stated that France would refuse to permit its officers who served in the multinational peacekeeping force during the war in Bosnia to answer subpoenas and testify before the tribunal. He said that France is unwilling to expose its officers to possibly adversarial questioning that could implicate French military personnel in not stopping the war crimes they witnessed.⁴⁶ As the French realized, allowing an international tribunal to subpoena peacekeeping troops could interfere with how peacekeeping commanders make their decisions in the future; that is, commanders would feel pressure to put their soldiers in harm's way when they otherwise would not, or risk being second-guessed if they or their soldiers were called before an international court to provide testimony about crimes they witnessed but did not stop. As a result, peacekeeping troops could find themselves effectively forced into combat situations to avoid a court-induced perception that they were negligent bystanders.

Finally, there is the added concern that charging a nation's political and military leaders with war crimes will undermine efforts to resolve international conflicts.

Indeed, if a wartime leader were sufficiently angered by an ICC indictment, he might well decide to stay away from the

negotiating table altogether. That result would lead to more death and destruction, not less.⁴⁷

The Specter of Uneven Justice

The prospect of the ICC also raises the nettlesome problem of uneven justice. For example, 22 Rwandans were publicly executed on April 24, 1998, after being convicted in local courts of crimes committed during the genocide campaign orchestrated by the previous Rwandan government. Of the 346 people who have been tried in Rwandan courts, about a third have been sentenced to death and another third to life in prison. The rest have received lesser sentences. Only 26 have been acquitted, and there are about 125,000 people still awaiting trial.⁴⁸

The week following the 22 public executions, Jean Kambanda, prime minister of Rwanda during the 100 days when majority Hutus sought to exterminate the Tutsis, admitted before the Rwanda tribunal that he was guilty of committing a crime against humanity and five other genocide-related charges. Kambanda is the highest former government official being held by the tribunal, which has captured 25 suspects accused of playing major roles in connection with massacres in which at least half a million Tutsis and their sympathizers were killed. Under the Rwanda tribunal's rules, Kambanda cannot be tried in Rwandan courts for the same crimes and therefore faces a maximum sentence of life in prison because the tribunal does not apply the death penalty. But one tribunal prosecutor has speculated that Kambanda may eventually get reduced prison time if he cooperates in other cases.⁴⁹ The fact that Kambanda may get a reduced sentence while lesser perpetrators are publicly executed upsets many Rwandans. As Australian journalist Pamela Bone points out,

The people being tried under the Rwandan justice system are mostly not the principals of the genocide. These are being tried in Arusha, Tanzania, by the United Nations International Criminal Tribunal for Rwanda. The UN tribunal is yet to secure a conviction. And the UN is . . . opposed to the death penalty. This means that those who planned and incited the genocide will, if convicted, spend some years in European jails, while the lesser criminals will be put to death. This does not seem like justice to most Rwandans.⁵⁰

The issue of the unevenness of justice has also been raised in the Yugoslavia tribunal where convicted war criminal Dusko Tadic received the same sentence for his role in the brutal murder of four people--life imprisonment--that Rudolf Hess received for his role in the Nazi Holocaust.

Lost Rights?

Looking at the Yugoslavia tribunal as a model of what to expect from the ICC--and, where it is specific, the ICC draft statute itself--it appears that many of the legal safeguards Americans enjoy under the Bill of Rights, particularly Fifth and Sixth Amendment protections, would be unavailable if Americans were brought before the International Criminal Court. There are numerous examples of such potential deprivations.

The Fifth Amendment to the U.S. Constitution states: "No person shall . . . be compelled in any criminal case to be a witness against himself." The Yugoslavia tribunal recognizes no such right. The court can call on the accused to provide evidence against himself or herself, and if the accused refuses, the court can interpret that as evidence of guilt.

The Fifth Amendment also states: "No person shall . . . be deprived of life, liberty, or property, without due process of law." One of the rights embodied in the concept of "due process" is that to clear notice beforehand that certain acts are unlawful.⁵¹ Laws that are unclear or otherwise ambiguous violate the due process clause and are therefore "void for vagueness." In Jordan v. De George (1951), the Supreme Court explained its reasoning this way:

The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct. This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law.⁵²

Under the ICC draft statute, there is no such right because many of the noncore crimes being proposed in it are not settled as matters of international law. Nevertheless, prosecutions of such crimes will be authorized.

The Fifth Amendment further states: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." The ICC draft statute recognizes no such right. As was explained earlier, if the ICC has the de facto authority to decide what constitutes an "effective" or "ineffective" national trial, then the accused conceivably stands to be tried twice for the same crime or crimes.

The Sixth Amendment to the U.S. Constitution states: "In all criminal cases, the accused shall enjoy the right to a . . . trial by an impartial jury." The ICC draft statute recognizes no such right. Instead, the accused will face a panel of UN-appointed judges.

The Sixth Amendment also states: "In all criminal cases, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Yugoslavia tribunal recognizes no such right and has adopted a provision known as Rule 75, which stipulates that the court can "order appropriate measures for the privacy and protection of victims and witnesses."⁵³ In practice, Rule 75 allows some witnesses to remain anonymous, not only to the public but to defendants and their lawyers. But as Diana Johnstone notes in the Nation, when "witnesses are granted anonymity . . . [and] cannot be cross-examined or charged with perjury," the consequences of a lie will be "particularly grave in proceedings [like those of the Yugoslavia tribunal] where verbal testimony rather than material proof is the basis for conviction."⁵⁴ That is especially true, she says, given the fact that most of the Yugoslavia tribunal's evidence is furnished by the same Bosnian authorities who convicted one Sretko Damjanovic in 1993 of genocide in the murder of two Muslim brothers. Four years later, it was discovered that the two genocide victims, Kasim and Asim Blekic, were alive and well and living in a Sarajevo suburb. According to Johnstone, the Bosnian "court has not considered the fact that his 'victims' were never murdered as grounds for granting Damjanovic a new trial."⁵⁵

The Sixth Amendment further states: "In all criminal cases, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." Again, the Yugoslavia tribunal recognizes no such right. In fact, Mikhail Wladimiroff, lead defense attorney in the case against Dusko Tadic, remarked that even though the court "understood very well the issues we raised about the fairness of the trial if we were not able to produce the evi-

dence as we wished . . . they could not take away a lot of limitations, such as the fact that there was no legal instrument to compel a witness to come to The Hague." Wladimiroff added that that limitation caused an imbalance in the presentations of the prosecution and defense cases because "those people who were victims of Dusko Tadic were eager to have him tried and convicted and therefore they were quite pleased to step forward and tell their story. . . . But no one who was involved with him would step forward and witness for the simple reason that they will point at [i.e., incriminate] themselves." That imbalance was compounded by the fact that "there were so many things that we could not investigate. . . . Too little money was designated to be used for funding of the defense. Much more was designated to be used for the prosecution."⁵⁶

All of that led Nick Kostich, an American defense attorney for Tadic, to conclude that the Yugoslavia tribunal--the precursor of the ICC--did not accord his client the right to conduct a fair defense. Tadic "is not being given the right to confront his accusers," and "the defense has not been presented with the names of witnesses," he explained in 1995. "My most vicious, my most heinous client [in the United States] has more rights under the U.S. Constitution," he added.⁵⁷ The clear implication of Kostich's assessment is that Americans brought before a Yugoslavia tribunal-type court--like the proposed ICC--will have fewer rights than under the U.S. Constitution.

Constitutional Barriers

In 1803 Thomas Jefferson defended the supremacy of the U.S. Constitution over treaties when he wrote, "Our particular security is in possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty making power as boundless. If it is, then we have no Constitution."⁵⁸ Jefferson's analysis tends to be supported by the case law, which says that the U.S. federal government cannot enter into treaties that are incompatible with the U.S. Constitution.⁵⁹ Doe v. Braden (1853), for example, asserts that U.S. courts have a legal "right to annul or disregard" the provisions of a treaty if "they violate the Constitution of the United States,"⁶⁰ and the Cherokee Tobacco (1871) decision declares that "a treaty cannot change the Constitution or be held valid if it be in

violation of that instrument."⁶¹ In Reid v. Covert (1957), the Court reaffirmed that it "has regularly and uniformly recognized the supremacy of the Constitution over a treaty," and that

there is nothing in [the Constitution's] language which intimates that treaties do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights--let alone alien to our entire constitutional history and tradition--to construe Article VI [re treaties] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V [re the amendment process].⁶²

More specifically, the Supreme Court has said that the federal government cannot enter into treaties that relinquish the constitutional rights of American citizens. In Geofroy v. Riggs (1890), for example, the Court found that the federal government's treaty power does not enable it "to authorize what the Constitution forbids."⁶³ Later cases, such as U.S. v. Wong Kim Ark (1898)⁶⁴ and Asakura v. City of Seattle (1924)⁶⁵ reiterated the point that constitutionally protected rights are sheltered from the domestic effect of treaties. More recently, in Boos v. Barry (1988), the Court stated, "Rules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them."⁶⁶ Since the ICC draft statute would "give effect" to international laws and provisions contrary to the Bill of Rights--namely, forfeiting wholesale the Fifth and Sixth Amendment rights of Americans brought before it--any ICC judgment against an American is not likely to withstand a constitutional challenge.

But there is a more fundamental question: whether the U.S. Constitution will even allow an American to be tried before the ICC in the first place if his or her offence was

committed on U.S. soil. As attorneys Lee Casey and David Rivkin Jr. point out in Commentary, the relevant case here is Ex parte Milligan (1866).⁶⁷ During the Civil War, U.S. government officials arrested several anti-war politicians in Indiana, including Lamdin P. Milligan. Fearing that weak support for the war in Indiana would lead to an acquittal by an Indiana jury, President Andrew Johnson denied the politicians a civil trial and tried them in a military court. Milligan appealed. The Supreme Court unanimously found in his favor, stating, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."⁶⁸ Since the military court was not "part of the judicial power of the country" under Article III of the U.S. Constitution, its verdict was judged invalid. If the same legal reasoning applies to the ICC, any ICC judgment against an American who committed an offense in the United States will likely be judged unconstitutional because the ICC is clearly not an Article III court of the United States.

The Clinton Administration's Response

Wary of all of those problems, the Clinton administration has pushed for the creation of a court in which any permanent UN Security Council member (e.g., the United States) can stop the referral of a criminal case to the ICC prosecutor. But as Siddharth Varadarajan of the Times of India points out, that position "is tantamount to granting the US (and all 5 permanent Security Council member states) veto rights over any investigation of war crimes committed by itself or its allies."⁶⁹ Many proponents of the court are opposed to the U.S. position and argue that the ICC prosecutor should be able to investigate situations on his or her own initiative and not be solely dependent on a referral by the Security Council.

In August 1997 the UN delegation from Singapore presented a compromise that would require the Security Council to take an affirmative decision to delay ICC proceedings once they had been initiated by the prosecutor's office. The UN delegation from Canada offered an added stipulation that the decision to stop an investigation must be renewed every year. In March 1998 Argentina and Germany proposed that the prosecutor may initiate an investigation after obtaining authorization from the Pre-Trial Chamber by show-

ing that there is a "reasonable basis" for investigating. In short, an international consensus is building up against Washington's vague formula for a Security Council veto.

Nevertheless, the Clinton administration has already put its political eggs in the ICC basket, endorsing the idea many times. In an October 1995 speech at the University of Connecticut, for example, President Clinton said, "A signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law."⁷⁰ And more recently, in a February 1998 speech before the University of Oklahoma College of Law, David J. Scheffer, the U.S. ambassador at large for war crimes issues, stated, "President Clinton is determined to see established, by the end of this century, a permanent international criminal court that will bring to justice future perpetrators of genocide, crimes against humanity and war crimes."⁷¹

In short, the Clinton administration is wary, and at the same time supportive, of establishing the ICC. That "split personality" on the ICC has once again put the administration in the position of negotiating a treaty it probably cannot endorse--much less get ratified by the U.S. Senate. Indeed, as Yale University law professor Ruth Wedgwood points out,

The United States has a penchant these days for joining international negotiations that spin out of control: We went to Kyoto to talk about climate change and discovered we couldn't sign the treaty. We went to Ottawa to talk about land mines and found our military problems ignored by other states. . . . We may be the "indispensable country," as Secretary of State Madeleine Albright likes to say. But we often set ourselves up as Alamo holdouts, criticized as the indispensable country with indefensible positions.⁷²

More curious is how the Clinton administration backed itself into its current policy corner. The administration did not look to the Bill of Rights and the U.S. Constitution as its starting point in negotiating the ICC. Instead, it accepted from the beginning the premise of the UN's International Law Commission that an American citizen's constitu-

tionally protected rights are not absolute rights but tentative or conditional rights. The likely result of that concession will be that the U.S. Senate will face the prospect next year of being asked to ratify an unconstitutional treaty.

Conclusion

Given the foregoing discussion, it is clear that the ICC conference in Rome will probably produce a treaty of dubious merit and unconstitutional content. Specifically, the proposed International Criminal Court threatens to diminish national sovereignty, interfere with peacekeeping operations, produce selective and politicized justice, and grow into a jurisdictional leviathan. Perhaps most worrisome, it appears that American defendants brought before the court will not have many of the crucial protections enumerated in the Bill of Rights.

The long list of problems that are likely to emerge with the formation of the ICC--in any conceivable incarnation--creates reasonable doubt about the wisdom of establishing the court in the first place. The Clinton administration ought to change course and decline to support the treaty that emerges from the Rome conference. If the administration proves unwilling to defend American sovereignty and the constitutional rights of the American people, the U.S. Senate and the U.S. House of Representatives will likely have sufficient grounds to, respectively, refuse to ratify and to fund the ICC. If Congress goes ahead with the treaty, however, it could open a Pandora's box of legal mischief and political folly.

Notes

1. ICC draft statute is available at www.un.org/icc.
2. See, for example, Siddharth Varadarajan, "Imperial Impunity, US Hampers World Criminal Court Plan," Times of India, April 23, 1998; and Norman Dorsen and Morton Halperin, "Justice after Genocide," Washington Post, May 13, 1998, p. A17.
3. Christopher Lockwood, "International: Nuremberg Bids to House World War Crimes Court," Daily Telegraph (London),

April 29, 1998, p. 16.

4. John R. Bolton, "An International Criminal Court Won't Work," Wall Street Journal Europe, March 30, 1998, p. 10.

5. Ibid.

6. Alfred P. Rubin, "Dayton, Bosnia and the Limits of Law," National Interest 46 (Winter 1996-97): 44.

7. Ibid.

8. Jimmy Carter, Interview on CNN Morning News, April 16, 1998.

9. Dorsen and Halperin.

10. Rubin, p. 42.

11. The 1919 Treaty of Versailles called for an international tribunal to try lower ranking German officials for their role in World War I; there was a list of hundreds of suspects. Germany made a counteroffer to have the German Supreme Court try them. The offer was accepted by the war's victors, but the trials, which began in Leipzig in 1921, were a farce; of 901 cases tried, 888 were dismissed or ended in acquittal. See Tina Rosenberg, "Tipping the Scales of Justice," World Policy Journal, no. 3 (1995): 55-64.

12. Sandra L. Jamison, "A Permanent International Criminal Court: A Proposal That Overcomes Past Objections," Denver Journal of International Law and Policy, no. 23, (1995): 432.

13. Lloyd Axworthy, "The New Diplomacy: The UN, the International Criminal Court, and the Human Security Agenda," Address delivered at the Kennedy School of Government, Harvard University, Cambridge, Mass., April 25, 1998.

14. Quoted in Charles Trueheart, "American Heads War Crimes Tribunal," Washington Post, April 12, 1998, p. A22.

15. Gabrielle Kirk McDonald, Speech delivered at the August 11 session of the Preparatory Committee on the Establishment of an International Criminal Court, August 4-15, 1998, United Nations Headquarters, New York.

16. Ibid.

17. Amnesty International, "The Quest for International Justice: Time for a Permanent International Criminal Court," July 1995, www.amnesty.it/eventi/icc/docs/400495_1.htm.
18. "UN: Delegates Differ on Whether Statute of International Criminal Court Should Cover Crime of 'Aggression,'" M2 Presswire, October 24, 1997.
19. Ibid.
20. Ibid.
21. U.S. Department of Defense, News briefing, M2 Presswire, April 16, 1998.
22. U.S. Department of Defense, Memo circulated to foreign military attachés, dated March 27, 1998. Document in author's possession.
23. Adrian Karatnycky, "This Court Should Not Be Called to Session," Washington Post, April 6, 1998, p. A25.
24. See Article 5 of the ICC draft statute.
25. Ibid.
26. Pete Winn, "Will UN Define Forced Pregnancy as a War Crime?" Family News in Focus, www.fotf.org/cforum/fnif/news/a0001382.html.
27. ICC draft statute, Article 5, Section B, Subsection P, Option 1.
28. "UN: Delegates Differ on Whether Statute of the International Criminal Court Should Cover Crime of 'Aggression.'"
29. Donald W. Shriver Jr., "The International Criminal Court: Its Moral Urgency," Monitor, no. 7, www,igc.org/icc/monitor.htm. Emphasis added.
30. ICC draft statute, Article 50.
31. "DePaul Institute Publishes Study on the Cost of Establishing a Permanent International Criminal Court," DePaul University, Press release, January 28, 1997.
32. Trueheart, "American Heads War Crimes Tribunal"; and Agwu Ukiwe Okali, registrar for the International Criminal

Tribunal for Rwanda, Statement to the Preparatory Committee on the Establishment of an International Criminal Court, March 16-April 3, 1998, United Nations Headquarters, New York.

33. Ibid. Emphasis added.

34. Ibid.

35. Craig Turner, "Rwanda War Crimes Tribunal Mismanaged, Report Says," Los Angeles Times, February 13, 1997, p. A8.

36. John M. Goshko, "UN Probe Finds Mismanagement, Waste in Rwanda War Crimes Tribunal," Washington Post, February 13, 1997, p. A20.

37. George Archibald, "UN Officials Wasted Millions on Supplies," Washington Times, May 29, 1998, p. A1.

38. Ibid.

39. ICC draft statute, Article 73, Section 2, Subsection C.

40. Human Rights Watch, Non-Governmental Organization Action Alert, no. 4 (May 1998), www.hrw.org/hrw/campaigns/icc/may98aa.htm.

41. Okali.

42. Dorothee de Sampayo Garrido-Nijgh, registrar of the International Criminal Tribunal for the Former Yugoslavia, Statement to the Preparatory Committee on the Establishment of an International Criminal Court, March 16-April 3, 1998, United Nations Headquarters, New York.

43. For a contrary view, see Cliff Kincaid, "The United Nations Debt: Who Owes Whom?" Cato Institute Policy Analysis no. 304, April 23, 1998.

44. Amnesty International, "The International Criminal Court: 16 Fundamental Principles for a Just, Fair and Effective International Criminal Court," Report IOR 40/12/98, May 1998, www.amnesty.org/ailib/aipub/1998/IOR/I4001298.htm.

45. Human Rights Watch.

46. Charles Trueheart, "France Splits with Court over Bosnia; Generals Won't Testify in War Crimes Cases," Washington

Post, December 16, 1997, p. A22.

47. In fact, Lord David Owen, one of the chief authors of Bosnia's ill-fated Vance-Owen peace plan, notes, "Some observers explain the Pale Assembly decision [to reject the Vance-Owen peace plan in 1993] in terms of a power struggle within the Bosnian Serb leadership between the civilians and the military, with the latter keen to be on top, in part for fear that skeletons in their cupboard, such as massacres and war crimes, would be uncovered by the UN if they accepted the peace plan." David Owen, Balkan Odyssey (New York: Harcourt Brace, 1995), p. 167.

48. James C. McKinley Jr., "As Crowds Vent Their Rage, Rwanda Publicly Executes 22," New York Times, April 25, 1998, p. 1.

49. Stephen Buckley, "Ex-Leader in Rwanda Admits to Genocide: Hutu Premier Pleads before UN Tribunal," Washington Post, May 2, 1998, p. A1.

50. Pamela Bone, "The Roar of the Crowd and the Pitiless Pursuit of Justice," The Age, May 7, 1998, p. 17.

51. See Michael Boos, "The Proposed United Nations International Criminal Court: A Grave Threat to American Freedom, Liberty, and Sovereignty," National Citizens Legal Network, Fairfax, Va., 1998.

52. 341 U.S. 223, 230 (1951).

53. See James Podgers, "The World Cries for Justice," ABA Journal, April 1996, p. 58.

54. Diana Johnstone, "Selective Justice in The Hague," Nation, September 22, 1997, p. 19.

55. Ibid., pp. 19-20.

56. "... And Serious Reform," Wall Street Journal Europe, April 16, 1997, p. 6. Excerpts from an interview by Mirko Klarin, European correspondent for the Belgrade independent daily Nasa Borba.

57. Quoted in Tim Cuprisin, "Area Lawyer Defending Serbian UN Tribunal Accuses His Client of War Crimes against Muslims," Milwaukee Journal Sentinel, August 20, 1995, p. B3.

58. Thomas Jefferson, Letter to Wilson Cary Nicholas, September 7, 1803, in Jefferson Writings (New York: Library of America, 1984), p. 1139.

59. There is, however, some historical ambiguity with regard to this issue because some legal authorities have interpreted treaties as equal or superior to the U.S. Constitution. See, for example, Missouri v. Holland, 252 U.S. 416 (1920), in which Justice Oliver Wendell Holmes wrote, "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention" (p. 433).

60. 57 U.S. (16 How.) 635, 656 (1853).

61. 78 U.S. (11 Wall.) 616, 620 (1871).

62. 354 U.S. 1, 16 (1957).

63. 133 U.S. 258, 267 (1890).

64. 169 U.S. 649, 700 (1898).

65. 265 U.S. 332, 341 (1924).

66. 485 U.S. 312, 324 (1988).

67. See Lee Casey and David Rivkin Jr., "Against an International Criminal Court," Commentary, May 1998, pp. 56-58.

68. 71 U.S. (4 Wall.) 2, 120-21 (1866).

69. Varadarajan.

70. Weekly Compilation of Presidential Documents, October 15, 1995, p. 1843.

71. David Scheffer, "The Clear and Present Danger of War Crimes," U.S. Department of State Dispatch, March 1998, p. 21.

72. Ruth Wedgwood, "The Pitfalls of Global Justice," New York Times, June 10, 1998, p. A35.

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