A CRITICAL VIEW OF THE PROPOSED INTERNATIONAL CRIMINAL COURT

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Very little has excited the international legal and human rights communities as much in recent years as the prospect of establishing an International Criminal Court (ICC). After much political and legal labor, a Statute of such a court was adopted in Rome on July 17, 1998, by an overwhelming vote.[1] In my opinion, the ICC as outlined in the Statute cannot possibly work as envisaged. This is not because technical problems have been carelessly handled, although there do seem to be some questions, as must be expected in such a work. It is because the ICC is based on a model of the international legal order that seems unrealistic. In concentrating on using the positive law[2] to provide a tribunal intended to enforce the "moral law," the framers of the ICC have created an organization that cannot do what is expected of it.

Exactly what are the organs of the institutions created by the ICC Statute? Is the world really willing to give the necessary authority to those organs?

First is the Prosecutor. His authority is to initiate investigations when there is "a reasonable basis to believe that a crime [*sic*] within the jurisdiction of the Court has been or is being committed; ... [unless] (c) there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[3] The word "justice" is used in other provisions of the Statute. But nowhere does it appear that the word "justice" is conceived in its normal sense as essentially a word in the moral order, in which it has many different meanings. Aristotle addresses the concept of justice in his *Nichomachean Ethics*[4] and isolates several different meanings, such as "commutative justice," "distributive justice" and "rectificatory justice." Each overlaps the others in part but not completely.

Nor is legal justice a clear concept. To Aristotle, law was not necessarily related to justice. "Natural law" was not related to morality and was self-enforcing, like the law of gravity.[5] As to the positive legal order, it seemed obvious to Aristotle and seems obvious today that various tribunals have different conceptions of justice and apply them differently with no clear uniformity.[6] Each party before any of these tribunals seeks justice defined in ways different from the justice sought by other parties under their own definitions. For example, if a child is killed by a national liberation group, there will be parents

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who insist that justice is not done unless all those involved in the group are condemned to death to do "distributive justice;" others will be satisfied that "commutative justice" has been done if only the direct perpetrator is condemned. Still others will argue that "commutative justice" can be done only if a child of the perpetrator is killed by the state; others that a death penalty is an unjust remedy because it cannot rectify the injury, which is not rectifiable but perhaps compensable, which is as close as reality can come to "rectificatory justice" in the circumstances.

Aristotle himself proposes mathematical ratios to measure rectificatory and commutative justice (which at least one of his translators calls "reciprocity justice"). The examples can be multiplied *ad infinitum*. What this all means is that the Prosecutor is given the authority to determine very important things, like justice, that are not capable of determination to universal satisfaction. It explains in part why Thomas Jefferson once commented: "I tremble for my country when I reflect that God is just."[7]

The argument that lawyers are trained to grapple with such dilemmas and are more trustworthy than politicians to come to generally acceptable answers has many flaws. First, lawyers are people like everybody else, and, like everybody else, they disagree over major moral issues. Nor are they trained in morals as much as they are trained in rhetoric. Nor is it clear that even appeals to morality will resolve problems that have baffled thinkers of the power of Aristotle for over 2,000 years.

Second, the notion that lawyers or judges form an elite to which we can refer the most complex social dilemmas is deeply inconsistent with fundamental rules of democratic governance. It is a throwback to Plato's notion of rule by guardians who are by nature superior to those of us who must live by their rules. It is not necessarily a foolish notion, but it is not a framework for governance that should be adopted without much thought. For example, it is frequently forgotten that to Plato nobody was fit to be a guardian who would want the role.[8] But all of the supporters of the ICC whom I know think that he or she would do well as the Prosecutor or a judge in it. The point is too deep for mockery; we are dealing with a real Statute setting up what its supporters expect to be a real tribunal with real authority.[9] This is not to say that Plato was right, but neither was he clearly wrong. He raised an argument based on insight and character. In a sense, he was posing a natural law argument based on the inborn nature of people.

Third, in calling "war crimes" crimes against international law by individuals, there seems to be a fundamental notion that armed conflict, whether international or not, is governed by rules that can be overseen by an impartial umpire or referee. But when people are willing to die for a cause or see their own children killed, the matter is too serious for a games approach.

Fourth, the idea that judges or lawyers can fill in the gaps of an incompletely expressed bit of legislation might serve well in areas such as economic regulation where a mistake can be digested within the system as long as the rules are made clear. But where life or personal freedom is involved, the return to

common law crimes, i.e., crimes defined by judges after the event, is deeply disturbing. In the United States, common law crimes dropped out of consideration in 1816 when the executive branch refused to prosecute an individual whom some judges (particularly Joseph Story) thought might be convicted on the basis of non-legislated rules adopted by judges, with knowledge of those rules attributed by judges to all members of society.[10] It is very distressing to many Americans to see the common law crimes approach resurrected under other names and rationales by those who fancy themselves the governors, or at least the political beneficiaries, of the new system.

There is a much deeper problem that seems to have received only polemical attention: Is the object of the ICC to do justice or to help attain and preserve peace? To many, justice as they perceive it is a prerequisite to peace. To others, peace as they conceive it is a prerequisite to justice. I would suggest that assertions on both sides are simplistic and distort more complex relationships.

Peace is not the result of justice; it is the result of implied consent to a social structure (possibly, in some cases, analogizeable to a social contract) under which the alternatives to peace are believed worse than the injustice that might be unavoidable under any current conception of a human social order. No doubt in both municipal and international legal orders peace can be attained by a draconian criminal law system—"just" or "unjust," depending on the value judgment of each evaluator—under which dissent is immediately punished. Such a peace is politically unacceptable to Americans and many others whose value systems give great weight to open political speech, disruptive of stability or not.

The international legal order, as currently conceived, considers attempts to alter municipal legal orders by force to be beyond the legal control of international society as long as international peace and security are not threatened.[11] Civil wars are not illegal as a matter of international law; they are always, possibly by definition, illegal under the municipal law of the society whose authority structure is under attack.[12] While the variations in reality might be limitless, it is clear that such revolutions as have recently occurred in the former Soviet Union are now occurring in many states[13] and are considered to lie beyond the authority of the international community.

The Statute of the ICC would seek to make criminal, as a matter of international law, violations of the limits of a soldier's privilege in armed conflicts not of an international character agreed by Common Article 3 of the 1949 Geneva Conventions.[14] Under the Geneva Conventions, no state had the standing necessary to support diplomatic correspondence or intervention in any such cases. The provisions were acceptable to existing states because they could not, as a matter of law, be applied except polemically by outsiders or as "moral" imperatives brought to their attention by nongovernmental organizations, like Amnesty International or the International Committee of the Red Cross. But the polemics and moral arguments have always been available to outsiders. And bolstering those arguments by embodying the moral rules in positive documents in the form of "legal" commitments was accomplished in 1949. But agreement

as to moral rules or rules that all municipal orders should enforce against people within their respective jurisdictions to prescribe is not the same as allowing those moral rules to be transformed into criminal law by a third party, and giving that party not only jurisdiction to prescribe, but also jurisdiction to enforce and jurisdiction to adjudicate. The great change now will be the creation of an organ empowered to oversee the internal affairs of states parties and to limit the application of force used either in revolution or to suppress that revolution.

The ideal commends itself, but it is very difficult to see how this arrangement can work in the current legal and political order. Who should arrest the generals in command of the forces defending an authority structure, whether established or revolutionary—Ariel Sharon, Saddam Hussein, Yasser Arafat, a Russian general involved in the Chechnya campaign, the Chechen leaders? Surely the evidence of recent experience in Somalia and elsewhere makes it clear that even foreign troops sent in as world police occasionally commit acts which amount to indictable war crimes.[15] In most cases, municipal military organizations can govern their own troops. But this is not true in all cases. Nor can municipal military organizations effectively govern the generals in command.

Can a Prosecutor under Article 53 of the Statute be placed in a position as the referee of revolutions? Even if the positive law placed a Prosecutor in that position, the states agreeing to the Statute would refuse to carry out the obligations that a diligent and objective Prosecutor would need fulfilled in order to perform his or her statutory functions. Indeed, in Article 54 of the Statute, the authority of the Prosecutor seems to be restricted. A Prosecutor is authorized to "request the presence" of witnesses but not compel it; to "seek the cooperation of any State" but not to demand it and not to act within a state's territory without its permission. I doubt that these provisions can be strengthened to give the Prosecutor the necessary authority at the expense of states parties to the Statute. It is even more doubtful that a Prosecutor could assert the necessary authority over revolutionary groups that are not parties to the Statute and thus not subject to its obligations.

With regard to international armed conflicts, the situation created by the ICC is also untenable. Suppose, in an international armed conflict like the Gulf War of 1991, a military leader in the position of General Norman Schwarzkopf were to be arraigned for ordering the bombing of what later turned out to be a civilian bomb shelter. Would a state in the position of the United States not argue that its own legal order was capable of handling the situation? Would the relatives of those civilians who had been killed, or anybody else, believe that assertion? And if somebody in the position of General Schwarzkopf were to be surrendered to the ICC for trial, how could he defend himself without revealing information that the United States would feel should not be revealed on the ground of national security?[16]

If the Prosecutor waits until the battle or war is finished, the situation would be just as bad. Could a victorious general be surrendered for international judgment when he is a national hero? It is frequently forgotten that Admiral Karl Dönitz, the Nazi successor to Hitler, was convicted of declaring unrestricted submarine warfare following a submission by America's own Admiral Chester

Nimitz that he had done the same thing in the Pacific war on December 7, 1941.[17] The point is not that Dönitz should have been acquitted of the charge or that Nimitz should have been tried; it is that without a world government it would have been politically impossible to arraign Nimitz, a national hero of the victor state, before any tribunal for the very act for which Dönitz was convicted. It is not difficult to see the equivalent political impossibility of an international trial in analogous situations arising in the future.

While this skims the surface of why the ICC Statute is unlikely to help achieve the results that its advocates expect from it, it ignores alternatives that have also been ignored by the legal and human rights communities that have pushed so hard to have their value systems institutionalized in the international legal order by means of the positive law. While the ICC does not foreclose parallel possibilities that might be more successful in actually enforcing that value system, it undercuts those parallel possibilities by making them seem poor alternatives that withhold "justice" from the aggrieved by making "justice" a legal instead of a moral term. Every normative order has its own enforcement techniques. If the default is regarded as a matter of positive law, then the enforcement techniques of the positive law must be used.

Until now, the accommodation of the positive international legal order to the quest for enforceable moral standards has been to encourage states in the international legal order to agree to general rules, usually masquerading as legal principles but actually moral principles, and to enforce them through their own interpretation in their own municipal legal orders. That is why the 1949 Geneva Conventions contain their uniformly incomplete provisions wherein the "High Contracting Parties [i.e., states] undertake to enact any legislation necessary to provide effective penal sanctions" and to "search for ...[and] hand ... over for trial" persons accused of "grave breaches" of one or other of the Conventions. It is also why, in the Genocide Convention of 1948, the enforcement provision says:

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Conventions and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated ....[18]

And the following Article states,

> Persons charged with genocide ... shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.[19]

Until now, i.e., for about 50 years, no state has accepted the jurisdiction of any international tribunal for such acts although, under severe political pressure, the Serbian, Croatian and Muslim parts of the Bosnian state appear to have

done so. It should perhaps be noted that the Serbian part of the Bosnian state is argued to have authorized the spokesperson of the Republic of Yugoslavia (Slobodan Milosevic) to accept such an obligation for it. How the other parties to the pertinent international accords construe themselves into making definitive interpretations of a document of delegation to which they are not parties is a bit mysterious as a matter of law, however simple it might seem as a matter of politics.[20] Whether any state accepting the ICC Statute conceives that it will apply to its own leaders acting in its own territory remains to be seen. Whether other states parties will send their young people to be killed and spend their own taxpayers' money to enforce the mandate of an international tribunal applied in the territory of a second state and affecting only the people of that state also remains to be seen.

The overarching problem confronting the statesmen and lawyers of the world is probably not that of reducing war to aberrational cases and creating a tribunal to punish some atrocities. War itself is atrocious; it kills innocent people, hurts others, destroys property and in many cases is temporary in its political results. Attempts to stop it by law have always failed. The "civilized" world celebrated with joy the Kellogg-Briand Pact that was supposed to end recourse to war as an instrument of national policy in 1928. It was followed by two decades of bloodshed and misery. The current United Nations Charter requires international disputes to be settled by peaceful means and forbids the threat or use of force in international relations.[21] It is only when these provisions of the positive law are violated or evaded[22] that atrocities can occur that cross international boundaries. Today, the greater number and extent of atrocities, like genocide, occur wholly within the boundaries of a single state, like Bosnia or Rwanda. Thus even the useless positive law remedies are, by their own terms, inapplicable. The real question is whether positive international law as such is capable of addressing these situations.

The obvious answer is no. With regard to international conflict, the positive law remedies are already in place and, as noted above, have notoriously failed. The situation of internal atrocities is analogous to the situation of child abuse within a municipal legal order—everybody condemns it and would like to do something about it, but the conflicting social values involved in some institutional oversight over family life, and the difficulties of finding people whom society could trust to make decisions in the best interest of society, make the resolution of child abuse issues too difficult to be satisfactorily resolved in any state in Western society. Now, it appears as if the magic solution would be to have the international equivalent of child abuse, genocide, policed by the very system that has failed so obviously in municipal societies: the courts.

Let me make a radical suggestion. Some problems are not capable of being resolved by the application of positive international law. Some social problems are municipal law problems; some are moral problems and better resolved through the application of remedies provided in the moral order, not the legal order.

In some cases, the enforcement tools of municipal positive law can be brought into play when there has been a military atrocity. Criminal trials by the

municipal legal order of the state whose own people have committed or suffered the atrocity might be a state's response in its own interest. Rather than conducting trials of foreigners for committing atrocities on other foreigners abroad, a state would be better positioned to conduct trials of people subject to its own jurisdiction for committing atrocities against anybody whom that jurisdiction considers within the range of its protection. This would allow reciprocal authority to other municipal orders under current conceptions of the equality of all sovereigns before the law.

This solution does not involve international tribunals; it involves the same national tribunals that the normal laws of war prescribe—national tribunals, possibly military courts martial but not necessarily so. The application of municipal law in those circumstances is undertaken not because international law compels it, but because national interest makes it the best solution. An example is the U.S. Civil War of 1861-1865, during which the Union never declared or acknowledged the legal capacity of the Confederacy to engage in war, but nonetheless issued the first great modern codification of the laws of war, the Lieber Code.[23] The United States Supreme Court in 1877 gave its opinion that those laws were applied as a "concession ... made in the interests of humanity, to prevent the cruelties which would inevitably follow mutual reprisals and retaliations."[24] There are many other reasons that could be added, but this is not the place for further elaboration.

The positive law of a state might not be appropriate in some cases, either because the state itself is prepared to violate its commitments under the 1949 Geneva Conventions or other sources of a positive international legal obligation, or because it cannot politically discharge that obligation. For example, if the requisite level of opprobrium does not flow, if the wicked find haven among their like-thinking fellows, then it is hard to see how peace and security would flow from the application of positive law sanctions to the wicked.

There are two obvious problems. First, the wicked constituents might want to defend their wicked leader; military activity with its attendant atrocities on all sides is the most likely result of attempts to arrest him or her. Second, if legal justice in the normal municipal criminal law sense is to be done in some cases, only chaos would be the likely result. For example, to do what some demand as justice in Rwanda, every Hutu who killed an innocent Tutsi and every Tutsi who killed an innocent Hutu should face trial and punishment. Failing that, the hordes of unhappy survivors would threaten to make peace and reconciliation impossible. How many hundred thousand trials and how many prisons should there be? Or will the world apply its sanctions only to a select few? Who selects the few? A Prosecutor applying objective standards? What standards? What is objective in these circumstances that would permit the murderer of a child to go free while the inciter or political leader who killed nobody goes to prison?

Finally, who is the world? Slightly more than one-fifth of the world's population is Chinese and seems more or less content to live under a government whose conception of human rights seems very different from that of the framers of the ICC Statute. The same may be said of the slightly less than one-fifth of the world's population that is Hindu, or the similar percentage who

participate in revealed religious traditions, organizations or sects whose divine law perceptions forgive or even encourage the killing of nonmembers of their clan or society. Three-fifths is a majority. And while it might be argued that not all Chinese, Hindus or adherents to absolutist religions would agree with their spokespeople in matters relating to human rights, it can equally well be argued that not all Americans and other participants in the European enlightenment agree with their political leaders about such questions.[25] So let us abandon majority rule and move to rule by the enlightened few: us. But that was Plato's answer, and it is inconsistent with ideals of democratic governance we also purport to have.

But if the atrocity is viewed as a moral default, then a truth and reconciliation commission might be the best way to achieve the closure that peace requires, with moral opprobrium and social ostracism the sanction. In some cases, openness leading to moral examination of value systems is probably the closest we can come to justice if peace is really our aim in this imperfect world.

The obvious remedy in the moral order for genocide is exposure and the opening of borders by concerned others to grant at least temporary haven to the victims. In some cases, the moral remedy might indeed involve revolution or even an international armed conflict. That appears to have been the case when Idi Amin was accused of presiding over the butchering of a significant part of the population of Uganda. In that case, the moral imperatives appear to have overcome the legal imperatives forbidding recourse to force in international affairs. And nobody but Idi Amin and his supporters complained. Similarly, complaints about North Vietnam's occupation of Cambodia to end the unspeakable regime of Pol Pot were muted by the realization that nothing and nobody else would do the job. Morality turns out to be a counterweight to the positive law, and the dominant system in some cases. Perhaps it is what Cicero had in mind when he wrote of the "true law [*vera lex*]" that should be obeyed even if inconsistent with the positive law, the decrees of the Roman Senate.[26] But this does not involve trials or application to individuals of a presumed universal positive international law.

Yet another response, although hardly a solution, might be the most difficult of all: do nothing. That is the Waldheim response. Kurt Waldheim was secretary general of the U.N. for two full terms and then president of Austria. Many now believe him to have known about atrocities committed by the Nazi army in the Balkans during the Second World War and to have falsely denied involvement or even knowledge of them. He has never been brought to trial and it is now highly unlikely that he ever will be. However, he cannot easily leave Austria and is unlikely to receive the prizes and adulation that his record at the U.N. and in Austria might have otherwise earned. Those who lead their countries into positions that outsiders find morally abhorrent, like the apartheid-era leaders of South Africa, find foreigners reacting to them in ways they did not expect. Nobody in the current world wants to deal with a bigot, so the United States, for example, enforced its Sullivan Rules to limit American investment in South Africa to that which could withstand moral scrutiny.

Isolation of morally dubious individuals and municipal, unilateral adjustment of legal relations with morally dubious legal orders neither fix the perceived injustices nor apply foreign law to them. Rather, these responses indicate the abhorrence of other states and trading partners, thus putting political as well as moral pressure on the persons and legal orders whose actions seem questionable. The persons or legal orders that feel victimized by those steps of ostracism can respond if they like. It might be that the outsiders are wrong, or fail to understand the complexities of the actions or system they condemn. In that case, explanation and openness might result in a relaxation of the condemnations. But it might not; politics frequently acts on the basis of misperceptions more than facts. It is also possible that the Waldheims or former masters of a racist South Africa feel themselves morally justified even though the facts seem to others to indicate morally dubious behavior or outright bigotry. But what is the alternative? Invasion that kills people and destroys property? Criminal charges in a tribunal that has no positive law to rely on but finds law in the moral indignation of a Prosecutor and a majority of judges who, as human beings, are also fallible?

I should conclude by wishing that objective justice were clear and available via a tribunal or scholars to be selected by some natural process. But until society in general is prepared to attribute infallibility to its lawyers, such solutions seem beyond our reach. The conclusion is not pessimistic, but realistic. Much can be done through various municipal legal orders, but it is better to do nothing in the international legal order than to confuse it with individuals' moral orders and attempt to enforce our view of morality as if binding on others in an hypothesized universal criminal law. ■

Notes

[1] A/CONF.183/9 of July 17, 1998, [http://www.un.org/icc]. The vote is reported as 120 in favor, 7 opposed, with 21 abstentions. Apparently the vote of each participant was not directly recorded, so the identities of the voting participants must be derived from their statements in explanation of the vote or other sources. For present purposes the totals are enough.

[2] I define positive law as the "law" that is "binding" because uttered by a lawmaker authorized by the constitutional law of a legal order to make "law" for those participating in that order.

[3] ICC Statute Article 53(1)(a) and (c). See also Article 53(2)(c).

[4] Aristotle, "Nichomachean Ethics," in *Introduction to Aristotle*, ed. Richard McKeon (New York: Random House, 1947), 402-411 (1131-1134a). There are, of course, other definitions of parts of what some analysts consider "justice."

[5] Aristotle, *Nichomachean Ethics*, trans. H. Rackham (Cambridge: Harvard University Press, 1939), 295. The point is rather obscurely made and it is necessary to read much more of Aristotle's *Ethics and Politics* to understand it. See Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge, UK: Cambridge University Press, 1997), 6-8 for a start, with footnotes.

[6] "Some hold that the whole of justice is of this [natural] character. What exists by nature (they feel) is immutable, and has everywhere the same force: fire burns both in

Greece and in Persia; but conceptions of justice shift and change." Aristotle, *Nichomachean Ethics*, 294 (Greek)/295(English). Aristotle goes on to imply that perhaps to the gods there is an identity between natural law and justice, but human conceptions of justice, being mutable, and human (positive) law being uttered at the will of the legislator, who is human and therefore fallible, is not capable of such precision. The subject is worth deeper study than this essay will allow.

[7] Thomas Jefferson, "Notes on the State of Virginia" (1781-1785) Query 18 as quoted in *Bartlett's Familiar Quotations* 14th ed. (Boston: Little, Brown, 1968), 471a.

[8] Plato, *The Republic*, trans. Desmond Lee, 2nd rev. ed.(New York: Penguin, 1974), 88-89.

[9] I say this harshly because of the notable application of political polemics to the discussions by some advocates of the ICC. See, for example, the comments by Jerome J. Shestack and David Stoelting, respectively president of the American Bar Association and chairman of its Coordinating Committee on the ICC, dismissing as "myth" the bases for various objections to the ICC. (Jerome J. Shestack and David Stoelting, "The International Criminal Court: Setting the Record Straight," 1 *On the Record* 21, 16 July 1998.) In my opinion, Shestack and Stoelting misrepresent for polemical purposes the objections they mention and dismiss even those few as if they were all and without serious examination.

[10] See *United States v. Coolidge*, 14 US (1 Wheaton) 415 (1816); in the United Kingdom, common law crimes still exist in theory, but scholarly lawyers normally cite Matthew Hale, *Pleas of the Crown* (1678) for the definitions of crimes not defined by parliament in legislation. In civil law countries, the issue does not exist any longer. In the ICC Statute, Articles 22 and 23, Grotius's well-know aphorisms are cited as if beyond dispute and without attribution: *Nullum crimen sine lege*, and *nulla poena sine lege*. There is no discussion as to precisely what is meant by "lege" — whether it includes common law or is confined to statutory law. If it is intended to reduce the "crimes" to those already defined by judges, these articles seem inconsistent with the authority given to the tribunal elsewhere, notably Article 21(1)(b) of the Statute, which authorizes the tribunal to find its law in otherwise undefined "principles and rules of international law," among other sources. Nor is it clear that "notice" is the aim of a published criminal law; few criminals read the penal law statutes before committing a crime. The primary reason for abandoning "common law crimes" seems to have been the theoretical need to separate the role of legislator from that of judge.

[11] See the U.N. Charter Articles 2(1): "The Organization is based on the principle of the sovereign equality of all its Members," and 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter ..." Many, if not most, if not all the Members of the United Nations owe their current authority structure to a violent revolutionary change somewhere in their history.

[12] I suppose it is possible to conceive of a society that includes revolutionary struggle against its authority structure be a lawful part of its authority structure, but I know of nonesuch in reality.

[13] For example, in Russia, where the status of Chechnya has been the subject of horrible fighting; in the Democratic Republic of the Congo, where a civil war seems to have broken out in the eastern areas and has reached the point at which it is acknowledged by the central government. There are distressingly many such situations.

[14] The texts of those Conventions are usefully collected in Dietrich Schindler and Jiri Toman, eds., *The Laws of Armed Conflicts*, 3rd rev. and completed ed. (Dordrecht, the Netherlands: Martinus Nijhoff, 1988).

[15] It seems to be fear of third party condemnation of such acts by "peace-keepers" that

moved the United States to refuse to accede to the Rome Statute. See the statement by Ambassador David Scheffer in explanation of the U.S. position on the U.S. State Department Web site, www.state.gov.

[16] See ICC Statute Article 72(6):

> Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself result in such prejudice to the State's national security interests.

There are several other pertinent provisions of the ICC Statute, none of which would help the Court significantly in the situation posed. And if the ICC could legally demand the information, it would nonetheless be refused because its exposure would be at the expense of the national security of the state involved as that state sees matters. It is difficult to imagine any state submitting itself to an outside evaluation of its own national security interests, certainly not exposing the information to outsiders before an internally binding internal evaluation.

[17] W.T. Mallison, *Submarines in General and Limited Wars* (Newport, Rhode Island: Naval War College Press, 1966), esp. appx. B at 192-195 (Interrogation of Fleet Admiral Chester W. Nimitz on May 11, 1946, taken from 40 International Military Tribunal 109-111). Mallison's book is vol. 58 of the Naval War College "Blue Book" series of International Law Studies.

[18] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, Article V.

[19] Ibid., Article VI.

[20] For a fuller analysis of this and many other oddities of the arrangements under which a tribunal was established at The Hague to try people involved in atrocities in the former Yugoslavia, see Alfred P. Rubin, "Dayton and the Limits of Law," *The National Interest* 41 (1997): 46. The weaknesses of the tribunal's system were apparent from the moment of its creation. See Alfred P. Rubin, "An International Criminal Tribunal for Former Yugoslavia," *Pace International Law Review* 7 (1994): 6.

[21] U.N. Charter Articles 2(3) and 2(4). The Charter is a treaty, and these provisions are normally considered binding as a matter of international customary law. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissability, Judgment, I.C.J. Reports 1984*, p. 392, para. 76 at p. 425, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, para. 14 at p. 38, and decisions 3, 4, 5, 6, and 8 in the latter case, holding American violations of "customary international law" to exist in various acts which also violated articles 2(3) and 2(4) of the U.N. Charter.

[22] A common evasion is when authority over territory is involved and both sides regard the dispute as internal to themselves. An example is the Falklands/ Malvinas war between Argentina and the United Kingdom. See Alfred P. Rubin, "Historical and Legal Background of the Falkland/Malvinas Dispute," in Alberto R. Coll and Anthony C. Arend, eds., *The Falklands War* (Worcester, MA: Allen & Unwin, 1985), 9-21. That is probably the reason why Iraq categorized Kuwait as legally part of Iraq before the invasion of 1990 that led to the Gulf War of 1991.

[23] General Orders No. 100 promulgating the Instructions for the Government of Armies of the United States in the Field. In Schindler and Toman, *The Laws of Armed Conflicts*, 3.

[24] *Williams v. Bruffy*, 96 U.S. 176 at 186; 24 L.Ed. 716 at 718 (1877). To those reasons

can be added the importance of maintaining a sense of moral superiority among the fighters' constituents; among the constituents of allies; maintaining discipline among the troops themselves; and many other advantages.

[25] The morality and political utility of abortion and the death penalty are only two of many examples of such disagreement in "enlightened" countries concerning matters that many would regard as aspects of "human rights."

[26] Cicero, *De Re Publica* and *De Legibus*, trans. C.W. Keyes (Cambridge: Harvard University Press, 1928, 1977), 210 (Latin)/211 (English).