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The Rome Treaty for an International Criminal Court: A Flawed but Essential First Step

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For a few fleeting weeks in 1997, the world may have had an opportunity to bring to justice one of history's bloodiest butchers. Pol Pot led the Khmer Rouge regime responsible for the slaughter of more than a million Cambodians in the 1970s.¹ In 1997 the government of Cambodia, unable or unwilling to prosecute him, invited the United Nations to put him on trial.² But the UN—fifty years after Nuremberg—still had no criminal court before which to bring Pol Pot. Although the Security Council had established special courts for war crimes in Yugoslavia and Rwanda, China made clear that it would veto any UN court for its Khmer Rouge comrade.³

The United States wanted Pol Pot prosecuted but had no legislation clearly authorizing his trial in the U.S. Washington turned publicly to Canada, which has such legislation, but Ottawa was not interested.⁴ Within a few weeks, the internal political situation in Cambodia changed.⁵ The window of opportunity closed. Pol Pot was never brought to justice.⁶

Can such a lapse be avoided in the future?

Last summer more than 150 UN member states met in Rome to negotiate a treaty to establish a permanent international criminal court. Following years of preparatory meetings in New York and five weeks of negotiation in Rome, they voted 120 to seven, with twenty-one abstentions, for a treaty to establish an International Criminal Court (ICC)⁷ to hear future cases of genocide, serious war crimes and crimes against humanity. Most of the world's democracies—western and central Europe together with countries like Argentina, Australia, Canada, Costa

Rica, South Africa and South Korea—supported the ICC. Only two democracies—the U.S. and Israel—voted against, thereby joining the likes of China, Iraq and Libya.

Before going into effect, the treaty must be ratified by sixty states. Especially in view of U.S. opposition, that will take years, at minimum. As of this writing, eighty-one states have signed the treaty, but only two, Senegal and Trinidad and Tobago, have ratified it.

A product of extensive compromise, the ICC is far from perfect. Most significantly, it may lack jurisdiction in some cases over atrocities committed by tyrants against their own peoples. It may also allow too much room for national governments to delay, obstruct and avoid credible international prosecutions. But contrary to Washington's objections, the ICC presents little risk of frivolous or politically motivated prosecutions of U.S. officials or troops deployed abroad in peacekeeping or humanitarian missions. Despite its flaws, the ICC should be supported as an essential first step.

The Need for a Court

For too many, this has been a century of sorrow. The victim count is numbing. In addition to those slain on Cambodia's killing fields, civilian victims include 6 million Jews gassed or gunned down by Nazis, millions of peasants starved by Stalin, nearly 1 million Tutsis hacked to death by Hutus in Rwanda, and over 100,000 indigenous Guatemalans slaughtered by scorched-earth anti-guerrilla tactics—and these merely illustrate the mass atrocities of our time.

In some countries assassinations have been more selective, targeting individuals on political grounds. Such victims include more than 10,000 Argentines, more than 3,000 Chileans, and leaders like Archbishop Oscar Romero in El Salvador and Steven Biko in South Africa. Countless victims were also tortured, while survivors were subjected to the psychological torment of having their loved ones "disappeared."

The continued commission of such crimes—fifty years after Nuremberg promised "never again"—calls out for an effective ICC. All the more so because these abominations generally go unpunished. Like Pol Pot, most perpetrators and most masterminds go free. Idi Amin struts in Saudi Arabia; General Raoul Cedras lives comfortably in Panama. One survey of the last half-century found no legal redress whatsoever for gross violations of human rights in 133 of 182 internal conflicts, including both civil wars and state terror and repression.⁹ Where legal redress is afforded, it is usually scant.¹⁰

Nothing Else Works

Existing institutions have proved as incapable of delivering justice for most crimes

against humanity as they were in Cambodia. Rarely do nations prosecute their own malefactors. Not only leaders but followers are almost always shielded from prosecution, whether by fear, threats, misplaced patriotism, corrupt and inefficient judicial systems or, when all else fails, by amnesty laws.

Those few countries which do undertake prosecutions are often engaged in victor's justice, further tainted by unfair procedures, as in Rwanda and Ethiopia. Other national prosecutions are incomplete and constrained, as in Argentina, where a handful of junta leaders were prosecuted and then freed after only a few years in prison.¹¹

Nor has prosecution by third-party countries proved reliable. Treaties and, arguably, customary international law, recognize universal jurisdiction over torture and disappearances. Yet U.S. and Canadian inability or unwillingness to take

Pol Pot, and the political controversy and mixed judicial rulings on Britain's detention of General Pinochet for possible extradition to Spain,¹² reveal the vulner-

Why did the UN create a court that could and did indict Radovan Karadzic but not Pol Pot? The answer is simply Chinese veto power. Whatever the reason in a given case, ad hoc tribunals are simply not reliable guarantors of justice for the most serious international crimes.

ability of prosecution by third-party states. Prospects for such trials are at best highly uncertain, even for gross offenses and even for offenders who, like Pinochet, grant themselves amnesties from prosecution at home.

Moreover, while third-state prosecution is preferable as a last resort where necessary to avoid impunity, the risks of abuse are sobering. Setting all nations loose to arrest one another's former leaders could inflame international tensions.

International prosecutions, even on an ad hoc basis, are thus better. But ad hoc courts are not reliably up to the task of international justice. Whatever their merits on other grounds, the Nuremberg and Tokyo tribunals, established by the winning side in World War II, were tainted by the perception and reality of victor's justice.

Less partisan are the UN special courts for genocide, serious war crimes and crimes against humanity in the former Yugoslavia and Rwanda. But even disregarding damaging start-up delays caused by diplomatic and administrative problems, these courts, too, raise questions of selective prosecution. Why did the UN create a court that could and did indict Radovan Karadzic but not Pol Pot? The answer is simply Chinese veto power. Why is there a UN court for ethnic murders in Rwanda but not in neighboring Congo? In part because by the time of the atrocities in Congo in 1997, the UN was beset by "tribunal fatigue." Whatever the reason in a given case, ad hoc tribunals are

simply not reliable guarantors of justice for the most serious international crimes.

Other international approaches are no substitute for criminal prosecution. The so-called World Court—the International Court of Justice in The Hague—hears lawsuits between nations, but does not prosecute individuals. Regional human rights courts in Europe and the Americas hear cases based on individual complaints against states, and may order governments to pay damages, but do not prosecute perpetrators. Truth commissions can help establish broad historical truths, promote national reconciliation, make recommendations and vindicate victims. But they are not courts and do not meet due process standards. Even where they identify wrongdoers, as in El Salvador, they cannot prosecute them.

If the most serious of international crimes are to be prosecuted, then, no vehicle short of a permanent international criminal court is adequate.

What a Court Could Do

An effective ICC could contribute to justice, deterrence, diplomacy, global norms and, ultimately, to a more humane world. Because of the compromises made in Rome, time will reveal the extent to which the ICC—assuming it garners the necessary ratifications—achieves these benefits in practice.

On the most basic level, the ICC could achieve a measure of felt justice for victims and survivors. This is clearest where states comply with its orders to arrest suspects, so that the ICC may fairly try and, upon conviction, proportionately punish defendants. Indeed, the political will and capacity to capture many, if not necessarily all suspects, will be vital to both the perceived effectiveness of the ICC and the credibility of the international commitment to justice.

But even in cases where the ICC cannot secure the arrest or trial of a suspect, it may nonetheless achieve meaningful justice for victims. Consider, for example, the case of former Bosnian Serb leader Radovan Karadzic, indicted for atrocities by the International Criminal Tribunal for the Former Yugoslavia (ICTY), but who eludes capture because NATO forces are to date unwilling to arrest him. His mere public indictment by an international tribunal, coupled with his fear to face its credible judgment, offers a degree of authoritative vindication to victims and survivors. It makes untenable the lie that they, not he, did wrong.

It also imposes disgrace and punishments short of imprisonment: As an international fugitive, Mr. Karadzic cannot travel outside his small ethnic enclave, for fear of arrest. He has also been removed from office, because the Dayton Peace Accords demanded at least that much respect for his indictment by a UN tribunal—a demand eased by his inability to be a negotiator, because he could not travel to Dayton without being arrested.

In addition, Mr. Karadzic lives in constant uncertainty; at any moment, NATO may surprise him. Or his erstwhile colleagues, torn by factionalism, may betray him. And his Sword of Damocles is perpetual. There is no statute of limitations for crimes against humanity. Just as aging Nazis are put on trial a half-century after Nuremberg, so too Mr. Karadzic, in some future decade, may yet find himself in the dock.

The credible prospect of prosecution may also deter some would-be perpetrators of atrocities. Granted, since there has never been an ICC, there is as yet no empirical data upon which to prove or disprove its deterrent effect. Fanatics like the Khmer Rouge will not, in any case, be deterred by a court. But not all malefactors are madmen.

The potential for deterrence is enhanced by the fact that a credible court can be a tool in the hands of UN peacekeepers and other international mediators on the scene. As the former head of Civil Affairs for UNPROFOR in Yugoslavia during 1992–94 recounts, “We told the local Belgrade and Zagreb authorities that if they did not act, we would either tell the press or go to a higher authority: the secretary-general, the Security Council, or some future tribunal.... Our interlocutors plainly were skeptical that the ‘international community’ would do anything.” He concludes, “Had there been, from the start in Yugoslavia, a high probability of judicial punishment for those who committed crimes against humanity, there would have been less barbarism.... Those who tried to mitigate some of the horrors... would have found their hand greatly strengthened.”

Even where the ICC does not succeed in deterring crimes against humanity, it may have helpful diplomatic consequences in their aftermath. The exclusion of indicted Bosnian Serb leader Radovan Karadzic from the Dayton negotiations, and international insistence that he step down as official leader of the Bosnian Serb entity, were not only made easier by his indictment by the ICTY; they probably would not have happened without it.¹³

On the other hand, legitimate concern has been expressed that ICC indictments of warring leaders could impede peace negotiations. This concern, however, is substantially mitigated by the Rome treaty, which grants the UN Security Council the right to defer ICC investigations and prosecutions for one-year periods, renewable indefinitely.

Finally, a credible ICC can contribute to raising global normative consciousness. Its very existence will be a constant reminder of the world's supreme moral condemnation of crimes against humanity. Its every indictment and judgment will reinforce the message. As a result, public opinion may be sensitized and government policy options constrained. Simply ignoring atrocities, or bargaining them away in peace negotiations, will become more difficult. Witness the Clinton Administration's reluctance even to use the word “genocide” during the Rwandan bloodbath in 1994, for fear that it might trigger public demands for effective intervention.

None of these beneficial impacts will guarantee the safety of humanity in the next century. But together, they could save many lives.

The Rome Treaty

The ICC agreed to in Rome is intended to prosecute “the most serious crimes of international concern,” in cases where national authorities are unable or unwilling to do so. It will be located in The Hague. It will have an independent prosecutor and eighteen judges, three of whom will sit full-time, with others on call as needed. The ICC will be governed by the state parties to the treaty, and not directly by the UN. Its funding will come from state parties, possibly supplemented by the UN, especially for crimes referred to the ICC by the Security Council.

Crimes may be referred to the ICC by the Security Council, by a state party, or by the court’s prosecutor on her own initiative, subject to procedural safeguards. ICC investigations and trials must meet international human rights standards of due process. For the most heinous crimes, life sentences but not the death penalty may be imposed. Otherwise the maximum sentence is thirty years, to be served in a national prison designated by the ICC after taking into account, among other factors, “widely accepted international treaty standards” for prisons.

ICC Crimes

The ICC will have power to try only crimes committed after it comes into being; it will thus be a court for the twenty-first and not the twentieth century.

Its initial core jurisdiction will cover genocide, serious war crimes and crimes against humanity. Compared to current international law, the definitions of these crimes for purposes of ICC jurisdiction take some steps forward and some back. The ICC statute accepts the current definition of genocide, that is, killing and other violent or coercive acts committed with intent to destroy, in whole or part, a national, ethnic, racial or religious group. There was controversy, however, over US efforts at the February 1999 preparatory commission to further specify this definition as part of “elements of offenses” for the ICC.¹⁴

The ICC statute consolidates recent developments in international law by defining war crimes to cover both international and internal armed conflicts. However, especially in internal wars, some crimes now arguably recognized—such as collective punishments, slavery and starvation of civilians—are omitted from ICC jurisdiction. Technically they may still be prosecuted by other tribunals, but their omission from the ICC may cause other courts to question their international legal status.

The ICC statute also helpfully clarifies that crimes against humanity—

widespread or systematic attacks on civilian populations, carried out by specified violent or coercive means—are not limited to wartime; the ICC can prosecute such acts committed in peacetime as well. And crimes against humanity expressly include “enforced disappearance of persons.”

Finally, the ICC statute defines gender crimes more explicitly than heretofore. Crimes against humanity include “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”; a similar definition is given for war crimes.

The ICC may also be empowered to prosecute cases of “aggression”—if and when a definition of this crime can be agreed to and ratified by seven eighths of the state parties. In addition, seven years after the Rome treaty enters into effect, international drug trafficking, terrorism and other crimes may be considered for inclusion, again subject to ratification by seven eighths of the state parties.

Loophole for Dictators?

The Rome treaty leaves a number of questions about the effectiveness of the ICC’s legal design. Two are perhaps most important.

First, the ICC may not always have jurisdiction over crimes committed by dictators against their own peoples. If the UN Security Council finds a threat to international peace and security and refers a crime to the ICC, no dictator is immune. But what if a veto powers blocks referral, as China did in the case of Pol Pot?

The ICC could still hear the case if it is referred by a state party or the prosecutor—but only if it has the consent of either the state where the crime occurred or the state of nationality of the alleged perpetrator.

Consider how the state consent requirement might apply to a future Saddam Hussein. If he invades Kuwait and commits atrocities there, Kuwait can give consent for the ICC to hear the case. But what if he commits crimes against his own people, on Iraqi soil? Then the state of the crime and the state of nationality are one and the same—Iraq, whose leader is unlikely to consent to be hauled before the ICC. Unless the Security Council steps in and refers the case, our future Saddam cannot be brought before the ICC.

At first blush, this gap is potentially serious. It is mitigated, however, by three factors. First, by ratifying the Rome treaty, a state thereby accepts ICC jurisdiction over all the core crimes.¹⁵ Thus, if a previous government ratified the treaty before a Saddam Hussein comes to power, he may remain bound by its prior consent.¹⁶ Second, once he leaves power, a successor government may consent to his prosecution, as the Cambodian government did in 1997 for Pol Pot. Third, if foreign nationals are also victimized, their states may consent to ICC

jurisdiction. Some seventy Spanish citizens, for example, were among the thousands of victims of General Pinochet's repression in Chile. Not all dictators, then, can count on escaping the ICC's reach.

Going through the Motions

Another potentially significant flaw in the legal architecture is that the ICC must defer to national investigations and prosecutions. It cannot take a case referred by a state party or the prosecutor unless national courts are unable or unwilling to investigate.

For governments acting in good faith, this makes sense. Why send a Lieutenant William Calley (convicted for the My Lai massacre) to The Hague if he can be tried at home? For such governments, the less the ICC is used, the more effective it may be. If the mere potential of its use prods governments to clean their own houses, the ICC will have accomplished its purpose.

But what about governments acting in bad faith, as one might expect of regimes guilty of atrocities? If such a government purports to investigate a crime, the ICC cannot take the case unless the prosecutor can show that the national proceedings are "for the purpose of shielding" the accused, or were conducted or delayed in a manner "inconsistent with an intent to bring the person concerned to justice."

Unless a government is foolish enough to conduct a transparently sham investigation or prosecution, the prosecutor may be hard pressed to prove a purpose to shield, or to negate an intent to do justice. Especially at the outset, all governments can be expected to plead that they need time to conduct a thorough investigation. How can the prosecutor prove—in advance—that the investigation will be a sham?

Once a government acting in bad faith is ceded initial jurisdiction over a case, it can then be expected to go through the motions, doing just enough to create a smoke screen of an investigation or prosecution. And in the process, time will pass, witnesses can be tampered with, and physical evidence lost. By the time the prosecutor can finally persuade the ICC to step in, she may find it difficult to pick up the pieces.¹⁷

This is a real risk. The ICC's effectiveness may well depend on how much evidence of bad faith the judges demand of the prosecutor, and how swiftly they are prepared to pierce a sham.

The United States and the ICC

On the fiftieth anniversary of the Nuremberg trial in 1995, President Clinton became the first U.S. President to endorse the creation of an ICC. But when the negotiations culminated in the Rome treaty, the U.S. voted against it.

Some American opposition is reflexive. Most prominently, Senate Foreign Relations Committee Chair Jesse Helms declared that any treaty for an ICC that might prosecute Americans would be “dead on arrival” on Capitol Hill. No argument is likely to change his mind. And the rest of the world, of course, will not agree to an ICC from which Americans are uniquely exempt.

The Clinton Administration position, in part reflecting Pentagon views, is less rigid but no less adamant. The heart of its concern is that the ICC exposes U.S. troops on peacekeeping or humanitarian missions overseas, or officials who authorize them, to potentially politically motivated prosecutions.

Contrary to Pentagon pretensions, however, the US is not uniquely exposed. As of mid-1998 in Bosnia, for example, US troops represented less than 20 percent of NATO forces and only 10 percent of the International Police Task Force.¹⁹ Yet Britain, France and other NATO nations support the ICC.

The US objection is in any event difficult to sustain in view of the Rome treaty’s extensive safeguards against frivolous or politically motivated prosecutions. First, the prosecutor and judges will be selected not by the UN General Assembly, but by state parties to the treaty, who will be heavily weighted by democracies. For example, by April 1999, the seventy-eight signatories to the treaty included states as Australia, Costa Rica, France, Germany, Italy, the Netherlands, New Zealand, South Africa, and the United Kingdom. They did *not* include states such as China, Cuba, Iran, Iraq, Libya, Myanmar, North Korea or Sudan.¹⁶

The Rome treaty requires these predominantly democratic states to select a prosecutor of high competence and extensive practical experience in prosecuting criminal cases and judges of “high moral character, impartiality and integrity” qualified to sit on their national supreme courts, and competent and experienced in criminal or international law. A majority vote is required to elect the prosecutor, and a two-thirds vote to elect the judges. This is not a system calculated to select people prone to frivolous or politically motivated prosecutions.

There are also extensive procedural safeguards. If the Security Council contemplates referring a case to the ICC, the U.S. can veto it. In cases referred by states or by the prosecutor on her own motion, before investigating an American, she must notify the U.S. The U.S. may then undertake its own investigation. If so, the ICC is precluded from taking the case—even if the U.S. investigation or trial exonerates the suspect—unless, as discussed above, the prosecutor proves that the U.S. proceeding is a sham.

Even if the U.S. consented to an ICC investigation, the prosecutor faces substantive and procedural hurdles. She cannot initiate an investigation unless first she, and then a three-judge pretrial chamber, finds a “reasonable basis to proceed.” The U.S. can challenge the admissibility of the case before the three-judge panel and, if necessary, can appeal to a five-judge appeals chamber.

Once the investigation is concluded, the prosecutor cannot take the case to trial without going before the pretrial chamber again and obtaining a finding

of “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”

In short, nothing about the ICC procedures easily lends itself to frivolous or politically motivated prosecutions. No judicial system can be entirely insulated from such risks, but this one comes close.²⁰

Among other objections, the U.S. also protests that American peacekeepers overseas may be subject to ICC jurisdiction even if the U.S. does not ratify the treaty. That is because, as noted earlier, consent to ICC jurisdiction can be given either by the nationality state (the U.S. for Americans) or by the state where the crime takes place. Thus, if a U.S. soldier commits a war crime in Iraq, Iraq can consent to ICC jurisdiction.

Legally this objection is unimpressive. Today, if a U.S. soldier commits a war crime in Iraq, he can be prosecuted by Iraq. There is nothing novel about the state on whose territory a crime takes place exercising jurisdiction over the crime. And if Iraq can prosecute the criminal in Baghdad, why can it not delegate its prosecutorial authority to an ICC in The Hague?

Practically the objection is equally dubious. As a practical matter, if a U.S. soldier is to be prosecuted for a war crime committed in Iraq, would not both he and the U.S. government vastly prefer that he be tried fairly by the ICC in The Hague, rather than railroaded by Saddam Hussein’s courts in Baghdad?

Washington’s real concern here is presumably more subtle: the U.S. would face little international pressure to turn over an American to Saddam, but might

The real U.S. objection boils down to a desire to avoid the embarrassment of having to initiate an unwanted investigation in Washington.

pay a diplomatic price if it refused to turn over an American to the ICC. But even this is tenuous, because the U.S. could block the ICC investigation by simply investigating the case itself. Thus the real U.S. objection boils down to a desire to avoid the embarrassment of having to initiate an unwanted investigation in Washington. This objection, so thin that it is spoken only in corridors, is understandably omitted from public statements on the ICC.

Constitutional questions have also been raised by members of Congress and by commentators, for example, whether trial of an American civilian before ICC judges would violate the U.S. constitutional right of trial by jury. While such questions are ultimately for the Supreme Court, the Departments of State and Justice have raised no constitutional impediments to the Rome treaty.

Conclusion

The ICC is far from ideal. Its coverage is incomplete and its powers constrained. Time will tell how effective its current legal design will be in practice. But it is an essential first step toward international justice in a world where national justice has failed. It merits support, and all governments should be pressed to cooperate with it.

U.S. objections to the ICC, and our consequent isolation from nearly every other democracy in the world, may fairly be viewed as due above all to the hubris of superpower. Disappointing but not surprising, these quibbles are cut from the same cloth as Washington's lonely opposition to other widely supported and useful treaties, such as the conventions against land mines and on the rights of the child. The near certainty that the U.S. will not ratify the Rome treaty during the Clinton Administration, or during the tenure of Chairman Jesse Helms, should not preclude American participation in some more enlightened future. No significant national interest weighs against joining the ICC, and the call of humanity counsels in favor. ❧

Notes

1. In 1996 the director of the Cambodian Genocide Program at Yale put the figure at "close to 1.7 million Cambodians" murdered, worked to death, or killed by enforced starvation during 1975 to 1979. Ben Kiernan, "Genocide Unpunished," *San Diego Union-Tribune*, 14 July 1996.

2. "Cambodia Requests UN To Set Up Tribunal For Khmer Rouge Pol Pot," *Deutsche Presse-Agentur*, 23 June 1997.

3. Barbara Crossette, "Beijing Says It Won't Go Along With Creation of Pol Pot Tribunal," *New York Times*, 25 June 1997. As this article was going to print, efforts continued to establish a special court to try surviving Khmer Rouge leaders. See, for example, Keith Richburg, "Support Grows for the Trail of Khmer Rouge," *The Washington Post*, 7 February 1999; "Hun Sen's China Visit Could Scuttle Khmer Rouge Trial," *Deutsche Presse-Agentur*, 9 February 1999.

4. Heather Scofield, "Canada Looks for UN Sanction on Pol Pot Trial," *The Herald* (Glasgow), 25 June 1997.

5. Colin Donald, "Why The Killing Fields Trial Will Never Happen," *The Scotsman*, 31 July 1997.

6. He was subjected to a show trial by his Khmer Rouge colleagues. "Cambodia. Out of the Shadows," *The Economist*, 2 August 1997, 32. As of early 1999, UN efforts to arrange some form of international prosecution of surviving Khmer Rouge leaders continue. See letter of Secretary-General Kofi Annan to President of the Security Council, dated 15 March 1999, UN Doc. A/53/850, S/1999/231, 16 March 1999, accessible at <<http://www.un.org>>.

7. Iain Guest, "Beyond Rome — What are the Prospects for the International Criminal Court?,"

On The Record, 1, no. 23 (27 July 1998), accessible at <http://www.igc.apc.org/icc>.

8. For a carnal catalogue of the last half century, see Jennifer L. Balint, "Appendix A: Conflict, Conflict Victimization, and Legal Redress, 1945-1996," 59 *Law and Contemporary Problems* 231 (1996). Earlier years are covered by the sources cited by Balint, *id.* at note 2, especially R. J. Rummel, *Death By Government* (1994).

9. Balint, 247 *supra*note 1.

10. *E.g.*, Douglass Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities," 59 *Law and Contemporary Problems* 197, 198, n. 11 (1996). For perhaps the best case of prosecuting tyrants, see Nicos C. Alivizatos and P. Nikiforos Diamandouros, "Politics and the Judiciary in the Greek Transition to Democracy," in A. James McAdams, *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997) 27.

11. See generally Carlos H. Acuña and Catalina Smulovitz, "Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts," in McAdams, 93.

12. The most recent Law Lords ruling, as of this writing, is *Regina v. Bartle and Others ex parte Pinochet*, 24 March 1999, accessible at <http://www.parliament.the-stationery-office.co.uk/pa>.

13. Cedric Thornberry, "Saving the War Crimes Tribunal," 104 *Foreign Policy* 72, 77, 81 (1996).

14. See Edith M. Lederer, "US Accused of Undermining Tribunal," Associated Press, 24 February 1999 (on file with author).

15. State parties are allowed to "opt out" of the ICC's war crimes jurisdiction, but only for an initial seven-year period, and not for genocide or crimes against humanity. Statute art. 124.

16. Governments may withdraw from the treaty, negating the prior consent. However, the withdrawal becomes effective only after one year, and the ICC retains jurisdiction over any cases referred during the year. Statute art. 127. Withdrawal may also entail diplomatic costs, even risking Security Council intervention.

17. Mindful of such problems, the Rome treaty allows the prosecutor to limit information given to a state in order to "protect persons, prevent destruction of evidence or prevent the absconding of persons." She may also ask the state to keep her periodically informed of progress, and may review her deferral within six months or when there is a significant change of circumstances. Statute art. 18. The pretrial chamber may also authorize the prosecutor to interview witnesses or obtain evidence when there is a unique investigative opportunity which may not be available later. Statute art. 56. Such safeguards, while helpful, do not eliminate the problems.

18. Testimony of Amb. Robert Gelbard before House International Relations Comm., 23 July 1998, Federal News Service, accessible in LEXIS News Library, Curnws File, 15.

19. See list at <http://www.igc.apc.org/icc/rome/html/ratify.html>.

20. Ambassador David Scheffer, chief U.S. negotiator at Rome, says that he is not persuaded that the procedural safeguards leave "no plausible risk to U.S. soldiers," and adds, "We could not share in such an optimistic view of the infallibility of an untried institution." *U.S. Dept. of State Dispatch*, October 1998, 17. If the test for U.S. participation is to be "no plausible risk" or "infallibility," then few if any institutions—domestic or international—could pass muster.