

The Self-Defeating International Criminal Court

Jack Goldsmith†

Great expectations greeted the opening of the International Criminal Court (ICC) on July 1, 2002. Kofi Annan captured these expectations when he expressed the hope that the new ICC would “deter future war criminals and bring nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity.”¹ Chris Patten, the European Union Commissioner for External Relations, echoed this theme when he stated that the new Court’s purpose was to “ensure that genocide and other such crimes against humanity should no longer go unpunished.”² Scores of other world officials, human rights activists, and international law experts made similar predictions.

These are unrealistic dreams. They are unrealistic for many reasons. But perhaps the most salient reason is that the ICC as currently organized is, and will remain, unacceptable to the United States. This is important because the ICC depends on U.S. political, military, and economic support for its success. An ICC without U.S. support—and indeed, with probable U.S. opposition—will not only fail to live up to its expectations. It may well do actual harm by discouraging the United States from engaging in various human rights-protecting activities. And this, in turn, may increase rather than decrease the impunity of those who violate human rights.

I lay out the mechanisms of ICC futility and perversity as follows. Part I shows why the ICC will be incapable of punishing serious human rights abusers. Part II shows how the ICC will likely lead to less rather than more punishment for human rights abusers. Part III asks why the ICC framers might have designed a self-defeating institution. The Conclusion qualifies the analysis and points to larger lessons.

† Professor of Law, The University of Chicago. Thanks to participants at workshops at the University of Chicago Law School and the University of Virginia School of Law, and to Curtis Bradley, Rosa Ehrenreich Brooks, Ryan Goodman, Jim Haynes, Derek Jinks, David Martin, Duncan Snidal, Peter Spiro, Paul Stephan, and Adrian Vermeule for helpful comments, and Mark Mosier for outstanding research. This Essay was completed before Professor Goldsmith took a leave of absence to serve as Special Counsel to the General Counsel of the U.S. Department of Defense. The views expressed in this Essay are those of Professor Goldsmith and do not reflect the official policy or position of the Department of Defense or the United States Government.

¹ Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, NY Times A3 (July 1, 2002).

² Chris Patten, *Why Does America Fear This Court?*, Wash Post A21 (July 9, 2002).

I. FUTILITY

The ICC was created in 1998 at an international conference dominated by weak and middle powers and by nongovernmental organizations (NGOs).³ The Court has jurisdiction over genocide, crimes against humanity, war crimes, and (at a later date) aggression. As the opening quotations suggest, the ICC's aim is to punish and deter individual perpetrators of these crimes.⁴

The ICC founders hoped to minimize political influence over ICC decisionmaking. The ad hoc tribunals for the former Yugoslavia and Rwanda were created by the UN Security Council. The United States argued in Rome (the site of the ICC's founding conference) that ICC prosecutions should be similarly limited to cases referred by the Security Council. But the prevailing parties in Rome believed that the Security Council—and in particular the opportunistic votes of veto-wielding permanent members—was part of the problem. They believed the Security Council's failure to establish international tribunals for crimes in other trouble spots demonstrated that a Security Council gatekeeper would preclude legitimate prosecutions and thus undermine the aim of universal justice. Even worse, the permanent member veto would make the permanent five (U.S., France, United Kingdom, Russia, and China) and their close allies immune from prosecution.

The ICC founders thought that the selective justice inherent in such big-power politics would discredit the ICC process.⁵ So over U.S. objections, they created a prosecutor and court with powers entirely independent of the Security Council. To be sure, the ICC treaty gives the Security Council concurrent power to refer prosecutions to the ICC.⁶ It also gives the Security Council the power to delay a prosecution for twelve-month renewable terms.⁷ But this latter provision, if successful, marks a significant change in the architecture of international politics. It reverses the burden of Security Council inertia by

³ The main force at the conference was a group of sixty "like-minded" nations made up primarily of European and commonwealth countries. See William A. Schabas, *An Introduction to the International Criminal Court* 15 n 53 (Cambridge 2001) (listing countries). The like-minded nations insisted on two of the ICC's core, and controversial, features: the diminution of a Security Council veto and an independent prosecutor. See *id.* at 15. So too did the over eight hundred NGOs represented at the conference.

⁴ See also Rome Statute of the International Criminal Court (ICC) preamble ¶¶ 4-5, online at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) (visited Jan 10, 2003) ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.").

⁵ See Schabas, *International Criminal Court* at 65 (cited in note 3).

⁶ ICC Art 13(b).

⁷ ICC Art 16.

permitting an ICC case to go forward as long as a single permanent member supports prosecution and thus vetoes any delay. More broadly, it means that an international institution not beholden to the Security Council will have decisionmaking power over many of the same peace and security issues typically governed by the Security Council alone.⁸

The ICC can exercise its independent jurisdiction over perpetrators of international crimes if the crimes are committed (a) by a national of a signatory party, or (b) on the territory of a signatory party.⁹ Two important consequences follow. The first is *territorial liability over non-signatories*. The ICC has jurisdiction over crimes committed by a non-signatory nation in the territory of a signatory nation. The second is the *traveling dictator exception*. Leaders of non-signatory nations can commit crimes in their territories without fear of prosecution. Even if human rights abusers from non-signatory nations vacation in The Hague, they cannot be arrested and tried by the ICC.

Why would the ICC founders reject jurisdiction over non-signatory nations who commit crimes in their own territory, but embrace jurisdiction when those countries commit a crime in the territory of a signatory nation? This result was a compromise. Many nations wanted the ICC to have universal jurisdiction, which would have abolished the traveling dictator exception by allowing any signatory nation to arrest anyone who committed an international crime anywhere. But other nations objected to universal jurisdiction as having an uncertain basis under international law and as an excessive threat to national sovereignty. The United States went further, objecting both to universal jurisdiction and to non-signatory liability for crimes committed in a signatory nation. Most nations in Rome disagreed with the United States. The final compromise—one designed both to satisfy some U.S. objections and to maximize ratifications—jettisoned the relatively controversial universal jurisdiction idea but retained the relatively (but only relatively) uncontroversial non-signatory liability for crimes committed in a signatory state.¹⁰ The framers also went further in the direction of non-signatory liability by allowing a non-signatory nation to consent to the ICC's jurisdiction with respect to

⁸ See Schabas, *International Criminal Court* at 66 (cited in note 3).

⁹ See ICC Art 12(2).

¹⁰ The latter idea is *relatively* uncontroversial because it is premised on a signatory state's territorial jurisdiction, which is delegated to the ICC. The delegation component is novel, but territorial jurisdiction over crimes is not. For a more critical perspective on the delegation component, see Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 *L & Contemp Probs* 13, 43–47 (2001).

“the crime in question” committed on its territory by another non-signatory nation.”

This is the fatal compromise that I believe will ensure that the ICC fails in its aim of ending—or even diminishing—impunity for international crimes. One reason why is obvious. The most salient class of human rights violators during the past century has been oppressive leaders who abuse their own people within national borders. Under the traveling dictator exception, the ICC does not touch this class of offenders, even if they travel abroad. Unless oppressive regimes ratify the ICC (something few are expected to do), the ICC simply fails to address the most serious human rights abuses.

There is an important qualification to the traveling dictator exception. If the Security Council refers a case involving an ICC non-signatory to the ICC under Chapter VII of the UN Charter, it can override national sovereignty and legitimate a prosecution against a non-signatory or some other state otherwise outside ICC jurisdiction.¹² However, such a referral remains subject to the permanent member politics that so worried ICC supporters. And even when Security Council inertia can be overcome for purposes of establishing ICC jurisdiction, the ICC itself lacks the institutional resources to ensure that the defendants actually show up in The Hague.¹³

Notorious human rights abusers tend to hide behind walls of national sovereignty, where they are hard to reach. Even with a Security Council referral, the ICC is unlikely to punish the Husseins and future Milosevics of the world because it is unlikely to get its grip on them. The ICC has no inherent enforcement powers. It depends completely on member states to arrest and transfer defendants. So the efficacy of even Security Council-initiated prosecutions in this context depends on the uncertain resolve of nations to use military or economic force to extricate an oppressive leader from his country.

Consider the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. The Tribunal has had modest success in trying war criminals, and it is currently prosecuting

¹¹ ICC Art 12(3) (cited in note 4). The ICC Preparatory Commission has tried to soften this provision with its Procedural Rule 44(2), which provides that a State filing an Article 12(3) declaration “accept[s] . . . jurisdiction with respect to the crimes referred to in Article 5 of relevance to the situation.” ICC Rules of Procedure and Evidence Art 44(2), online at <http://www.un.org/law/icc/prepcomm/prepfra.htm> (visited Jan 10, 2003). This vague provision does not, as many have stated, guarantee that Article 12(3) parties will consent to jurisdiction for all crimes related to the consent. But even if it did, the Iraqs of the world could consent under Article 12(3) and simply not show up. Rule 44(3) improves the anomaly of Article 12(3), but does not fix it.

¹² See ICC Art 13(b).

¹³ The analysis that follows also applies to leaders of signatory states that commit human rights abuses but do not travel abroad.

Milosevic. But it was not the gravitational pull of the ICTY Charter that lured these defendants to The Hague. Rather, it was U.S. military, diplomatic, and financial might. U.S. military and diplomatic power ousted Milosevic's and other unattractive regimes in the Balkans, making a trial of Balkan leaders a possibility. And it was the United States's threat to withhold a half-billion dollars in U.S. and International Monetary Fund (IMF) aid to the successor regime in Yugoslavia that led to Milosevic's actual transfer to the ICTY.¹⁴

The ICTY example illustrates the importance of military and economic force to international criminal justice when human rights abusers hide behind national borders. It also illustrates the obstacles to the use of such force. Nations do not lightly expend national blood and treasure to stop human rights abuses in other nations. The Europeans were unwilling and unable to do so in the Balkans for years. When the United States finally used extensive force in Kosovo in the summer of 1999, it did so haltingly and in large part to protect the viability of NATO. The United States did not intervene to stop equal or greater humanitarian tragedies in Chechnya, Rwanda, and Sierra Leone. The brute fact is that despite hundreds of thousands of deaths caused by human rights abuses during the past decade and despite millions of such deaths in the last century, no wellspring of support for intervention has developed in the industrialized democracies that possess the military muscle to intervene and stop the abuses.

Bringing the most notorious human rights abusers to the ICC would thus be hard enough even if the United States fully supported the ICC. But for reasons we shall explore below, the United States does not support the ICC. It openly and aggressively opposes it. The United States' opposition will greatly magnify the ICC's inherent enforcement gap. The United States can sometimes be persuaded to engage in humanitarian intervention if the intervention comports with certain strategic interests. The leading contender to replace the United States as world policeman, the European Union, lacks the budgetary and political will to conduct *any* serious military actions outside Europe. (Despite much talk in recent years, there is no foreseeable prospect of the EU transforming itself to do otherwise.) So at best, ICC power over recalcitrant oppressors will depend on uneven enforcement efforts by the United States when it suits U.S. strategic interests (and when—if ever—the United States can overcome its objections to ICC participation). It is much more likely that the ICC will fail to assert jurisdiction over recalcitrant oppressors at all, either be-

¹⁴ See Paul Ames, 'A Historic Moment' for Yugoslavia: \$1.28 Billion is Pledged for Reconstruction Fund, *Houston Chron* A25 (June 30, 2001); Irena Guzelova and Stefan Wagstyl, *US Decides to Continue Giving Aid to Belgrade: Yugoslavia White House Move Is Latest Sign of International Approval After the Arrest of Milosevic*, *Fin Times* 8 (Apr 3, 2001).

cause it lacks a Security Council referral and thus will lack jurisdiction, or because no nation will be willing to bring the defendants to The Hague.

These are the main reasons why the ICC is not likely to end impunity for human rights abusers or deter future war criminals. Of course, even if the ICC cannot try big-time human rights abusers, it might be able to try less significant ones. There may be times when signatory states (Nigeria and Sierra Leone are two possibilities) have civil wars that involve gross human rights abuses, and in which the prevailing or successor regime sends the defeated party to the ICC. Or there may be a cross-border dispute in which a signatory captures a perceived war criminal and sends him to The Hague.

These are the most likely possibilities, but they are far from certain. In the civil war context, victors will not lightly send losers to the ICC for fear of dampening national conciliation efforts. (Recall that the post-Milosevic regime sent Milosevic to The Hague only in the face of extraordinary U.S. financial and diplomatic pressure; the Yugoslav government's decision to do so was unconstitutional under domestic law,¹⁵ and continues to divide rump Yugoslavia today.¹⁶ International tribunals are not, as a general matter, viewed with favor by regimes that succeed oppressors.¹⁷) When the losers are so broadly detested that an ICC transfer seems desirable, the ICC's additional penal effect is minimal. A similar analysis applies to potential defendants captured during cross-border wars. And in any event, cross-border wars have not been the primary source for massive human rights abuses in modern times; and any such abuses are not likely to involve the self-selected ICC signatories.

I am not arguing that the ICC will have no effect whatsoever. Surely it will. As the Palestinian response to Israeli military attacks in July 2002 indicates, it will be a focal point for rhetorical assertions about criminality even in cases in which the ICC clearly lacks jurisdiction.¹⁸ And its existence will make it easier (though perhaps not much easier) to pressure signatory nations to turn over alleged human rights abusers in their jurisdictions. The ICC will gather its share of defendants—especially low- to mid-level human rights violators from signa-

¹⁵ See Carlotta Gall, *Hague Tribunal Chief Says Yugoslavia Still Isn't Cooperating*, NY Times A8 (Oct 23, 2001).

¹⁶ See Daniel Simpson, *Milosevic Trial Leaves Most Serbs Cynical*, NY Times A8 (Aug 9, 2002).

¹⁷ See Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crime Tribunals* 286–88 (Princeton 2000); Jack Snyder and Leslie Vinjamuri, *Principle and Pragmatism in Strategies of International Justice* at *16–35, working paper (2002) (on file with author).

¹⁸ See Harvey Morris, *Legal Move to Halt Israeli Assassinations*, Fin Times 13 (July 26, 2002). The ICC clearly lacks jurisdiction over this case because the occupied territories are neither a state party to the ICC nor a state capable of an Article 12(3) declaration.

tory nations—caught traveling in Europe or another signatory nation. My point thus far has been simply that the ICC will not achieve its aims of eliminating, or even much reducing, impunity for human rights violations.

II. PERVERSITY

I now turn to consider how the ICC might actually diminish human rights protections. This perverse result could occur because the ICC's actions may have a chilling effect on U.S. human rights-related activities.

The main reason why the United States opposes the ICC is the fear that its unique international policing responsibilities will expose it to politically motivated prosecutions before an unaccountable court. To be sure, the ICC's safeguards to prevent rogue prosecutions are all ultimately subject to ICC interpretation. The most notable safeguard is complementarity. Complementarity requires that the ICC dismiss a case under investigation "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."¹⁹ But the ICC has the final word on what counts as a "genuine" investigation based on its judgment whether the domestic proceedings are "inconsistent with an intent to bring the person concerned to justice."²⁰ The perceived efficacy of complementarity and other ICC safeguards turns on the level of trust a nation has toward the ICC. The United States has little. This lack of trust is magnified by the ICC's assertion of jurisdiction over non-signatory nations and the more favorable immunities the ICC provides to signatory nations (most notably, the option for a seven-year immunity from war crimes prosecution²¹).

These are genuine bases for U.S. concern, but they strike me as secondary. The real concern is that the indeterminateness of international criminal law makes it easy to imagine the ICC and the United States having genuine, principled disagreements about whether a particular act is an international crime.

The most likely basis of disagreement relevant to the United States concerns war crimes arising from military strikes. The ICC has jurisdiction, for example, over a military strike that causes incidental civilian injury (or damage to civilian objects) "clearly excessive in relation to the concrete and direct overall military advantage anticipated."²² Such proportionality judgments are almost always contested.

¹⁹ ICC Art 17(1)(a).

²⁰ ICC Art 17(2)(b).

²¹ France exercised this option in ratifying the ICC treaty. See Barbara Crossette, *U.S. Accord Being Sought on UN Dues and on Court*, NY Times A6 (Dec 7, 2000).

²² ICC Art 8(2)(b)(iv).

The prosecutor for the NATO-dominated ICTY, for example, seriously considered prosecuting U.S. and NATO officials for (among other things) high-altitude bombings in Kosovo that accidentally killed civilians. The prosecutor's staff apparently advised her to pursue these charges,²³ and her memorandum declining to do so seems tenuous because it takes all of NATO's factual assertions, in their best light, as true. Especially during a war in which irregular combatants hide among civilians, it is easy to imagine a prosecution on this basis. And who knows what might be included in the prohibitions on "severe deprivation of physical liberty in violation of fundamental rules of international law,"²⁴ or on "[d]estroying or seizing the enemy's property unless . . . imperatively demanded by the necessities of war,"²⁵ or on "inhumane acts of a similar character [to crimes against humanity that] intentionally caus[e] great suffering, or serious injury to body or to mental or physical health."²⁶

There are many other bases for prosecution of U.S. officials.²⁷ Nonetheless, the ICC's procedural safeguards, when combined with the threat of U.S. retaliation, make it unlikely that a U.S. official will actually end up in the ICC dock. Why, then, is the United States so worried about the ICC? How can an institution that will have little effect on rogue nations affect the calculations of the world's most powerful nation?

There are two plausible answers. First, U.S. troops do not hide behind U.S. borders. Hundreds of thousands of them are spread across the globe and can much more readily be nabbed and whisked away to The Hague. The possibility of capture is thus much more salient for U.S. troops or officials. Even a remote chance that one of them may be

²³ See Lee A. Casey, et al, *The United States and the International Criminal Court: Concerns and Possible Courses of Action* 21 (Federalist Society Feb 8, 2002), online at <http://www.fed-soc.org/Publications/Terrorism/ICC.pdf> (visited Jan 10, 2003).

²⁴ ICC Art 7(1)(e).

²⁵ ICC Art 8 (2)(b)(xiii).

²⁶ ICC Art 7(1)(k).

²⁷ Here is another example. The ICC Statute makes it a crime to willfully deprive a POW "or other protected person of the rights to a fair and regular trial." ICC Art 8(2)(a)(vi). The United States and most in the "international law community" have a genuine disagreement about the status and trial rights of the Taliban Guantanamo Bay detainees. If Afghanistan were an ICC signatory (it is not), it would be easy to imagine an ICC prosecution not only for denying the Guantanamo detainees their trial rights, but also for "unlawfully confin[ing]" them, and perhaps also (who knows?) for treating the prisoners "inhuman[ely]" or for "wilfully causing [them] great suffering." ICC Art 8(2)(a)(ii)-(iii). U.S. exposure to these alleged crimes is not limited to acts committed in signatory states. As noted above, non-signatories can consent to ICC jurisdiction under Article 12(3) for crimes committed by non-signatories on their territories. Many have noted that this will permit any non-signatory nation that suffers an attack from the United States to invoke ICC jurisdiction opportunistically against the United States. See, for example, David J. Scheffer, *The United States and the International Criminal Court*, 93 Am J Intl L 12, 18-20 (1999). See also note 11.

prosecuted will understandably concern U.S. leaders. Second, even if no U.S. official ends up in The Hague, the ICC can affect the United States by merely investigating alleged crimes and engaging in official public criticism and judgment of U.S. military actions.

Whatever the source of U.S. opposition, the fact that opposition runs deep is clear. The otherwise-internationalist Clinton administration opposed the treaty that emerged from Rome, and although Clinton nonetheless signed the treaty on the last day possible, he also called it flawed and advised President Bush not to send it to the Senate for ratification. In the spring of 2002, the U.S. officially informed the UN that “the United States does not intend to become a party to the treaty” and that “[a]ccordingly, the United States has no legal obligations arising from its signature on December 31, 2000.”²⁸ The Bush administration has openly opposed the treaty since then. Most notably, in the summer of 2002, it played a game of chicken with the UN over the exposure of UN peacekeepers to ICC jurisdiction. The game was resolved when the Security Council, in the face of significant criticism from ICC supporters, exercised its prerogative under the ICC treaty to immunize UN peacekeepers from ICC investigation for twelve months.²⁹

Just as important, the Senate has been steadfastly opposed to the ICC since the July 1998 vote to create it. Few senators have expressed support for the treaty that emerged from Rome,³⁰ and most, including prominent Democrats such as Tom Daschle, Hillary Rodham Clinton, and Joseph Biden, have opposed it.³¹ The House is, if anything, less supportive. In 2002, Congress enacted the American Servicemembers’ Protection Act (ASPA).³² ASPA is sometimes dubbed “The Hague Invasion Act” because it authorizes the President to use “all means necessary and appropriate” to bring about the release from captivity of U.S. or Allied personnel detained or imprisoned by or on behalf of the

²⁸ International Criminal Court: Letter to UN Secretary General Kofi Annan, State Dept Press Statement (May 6, 2002), online at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> (visited Jan 10, 2003).

²⁹ See UN Security Council Resolution 1422 (July 12, 2002), online at <http://www.un.org/Docs/scres/2002/sc2002.htm> (visited Jan 10, 2003) (allowing for yearly renewals of this immunity “for as long as may be necessary”).

³⁰ See International Criminal Court: Hearings Before the House Committee on International Relations, 106th Cong, 2d Sess 31 (2000) (testimony of John Bolton) (stating he is unaware of any senators supporting the ICC as drafted). But see 147 Cong Rec S 12620 (Dec 7, 2001) (statement of Sen Wellstone) (voicing his support for the ICC).

³¹ Senators Daschle, Clinton, and Biden voted in favor of the conference report on the American Servicemembers’ Protection Act (ASPA), discussed below. See 148 Cong Rec S 7282 (July 24, 2002). Clinton and Biden voted in favor of the Senate’s version of ASPA, while Daschle was absent and did not vote. See 148 Cong Rec S 5194 (June 6, 2002).

³² See Bruce Zagaris, *U.S. Enacts Anti-ICC Law and Signs First Article 98 Agreement with Romania*, 18 Intl Enforcement L Rep (Sept 2002); American Servicemembers’ Protection Act of 2002 (ASPA), 116 Stat 899, Pub L No 107-206.

Court.³³ ASPA also prohibits any cooperation with (including financial support for) the ICC.³⁴ It bars military aid to nations that support the ICC³⁵ (except for NATO countries and other major allies).³⁶ And it requires the President to certify that U.S. forces that participate in peacekeeping will be safe from ICC prosecution.³⁷ ASPA also gives the President a number of options to waive its requirements.³⁸

We can now finally begin to see the perverse effects of the ICC. The first component of the central ICC compromise leaves in place international human rights' dependence on United States political support, funding, and military might. The second component of the fatal compromise exposes the United States, a non-signatory nation, to liability for crimes committed in signatory nations or in non-signatory nations that temporarily invoke Article 12(3). But this latter part of the compromise will lead the United States to limit its human rights enforcement activities. And the first enforcement activities to go will be ones involving human rights crises that lack a powerful U.S. welfare-enhancing justification.

We have already seen these perverse effects in the United States' threat to pull out of UN peacekeeping missions unless U.S. troops receive immunity before the ICC. However this is resolved, peacekeeping will suffer at least at the margin. To the extent that ad hoc international tribunals have been important in protecting human rights, they too have suffered, and will continue to suffer, from a general U.S. withdrawal for reasons already canvassed. But perhaps the greatest effect will be on U.S. humanitarian and quasi-humanitarian interventions, such as in Haiti, Kosovo, Bosnia, and Somalia. Human rights advocates increasingly view such interventions as legitimate and necessary to protect human rights.³⁹ It is hard enough to generate domestic support in the United States for these interventions when there is no threat of liability. U.S. intervention will now be much harder. Such interventions invariably involve combat against irregular forces interspersed in civilian populations and thus invariably run the risk of war crime accusations. The fatal compromise appears to expose the only

³³ See ASPA § 2008(a), 116 Stat at 905.

³⁴ See *id.* at § 2004(e), (f), 116 Stat at 903.

³⁵ See *id.* at § 2007(a), 116 Stat at 905.

³⁶ See *id.* at § 2007(d), 116 Stat at 905.

³⁷ See *id.* at § 2005(c), 116 Stat at 904.

³⁸ See *id.* at §§ 2003, 2007(b), 116 Stat at 901–02, 905.

³⁹ See, for example, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* 31 (International Development Research Centre 2001); Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, Public Law and Legal Theory Working Paper No 39 (FSU College of Law, Nov 2001), online at <http://papers.ssrn.com/id=291661> (visited Jan 9, 2003).

nation practically able to intervene to protect human rights to the greatest potential liability for human rights violations.

So in the end the ICC will likely have two ironic consequences. It will affect the generally human-rights-protecting, but globally active, United States more than rogue human rights abusers who hide behind national walls and care little about world opinion or international legitimacy. And it will have the greatest chill on U.S. military action not when important U.S. strategic interests are at stake (as they are now in Afghanistan), but rather in quasi-humanitarian situations (such as in Kosovo) where the strategic benefits of military action are lower and thus a remote possibility of prosecution weighs more heavily.

III. WHY PERVERSITY?

If my analysis of the ICC's perverse effects is correct, it raises the question: Why would the ICC framers design a self-defeating institution? There are two plausible answers.

The first has to do with the ICC framers' commitment to the equality of all nations before international criminal law, and their related aversion to double standards and selective justice. This commitment pervaded the negotiations in Rome. And it remained present even after the U.S.-UN-ICC confrontation over UN peacekeeping. Following this episode, Philippe Kirsch, the Chairman of the ICC Conference, stated that the episode "harm[ed the] equality of all before the law, which is one of the pillars of the ICC statute."⁴⁰ German Justice Minister Herta Däubler-Gmelin was more explicit: "Special rules for strong countries, particularly when the issue at stake is the global pursuit of the worst human rights violations, are inappropriate and not compatible with the principles of the rule of law."⁴¹

This commitment to equal justice and the "rule of law" might have produced perverse effects in several ways. The ICC founders might have assumed that abstract normative principles, once embodied in international law, will influence nations in favorable directions independent of their power and economic and political interests.⁴² Or perhaps the ICC framers possessed a commitment to equal justice that rendered consequentialist concerns irrelevant. This is unlikely, because the framers compromised along several margins, and they consistently asserted a concern for ending impunity for human rights

⁴⁰ Jim Wurst, *Prep Com Chair Comments on U.S.*, UN Wire *12 (July 15, 2002), online at <http://www.unfoundation.org/unwire/2002/07/15/current.asp> (visited Dec 2, 2002).

⁴¹ Judy Dempsey, *UN Balancing Act on Criminal Court Wins Scant Applause*, Fin Times 8 (July 15, 2002).

⁴² This assumption might be described as the Carr-Morgenthau fallacy. See generally Edward Hallett Carr, *Twenty Years' Crisis: 1919-1939* (MacMillan 1940); Hans J. Morgenthau, *Positivism, Functionalism and International Law*, 34 Am J Intl L 260 (1940).

abusers. A related possibility is that the framers viewed the structure of equal justice as an end to be valued more than punishing human rights abusers. But this is also unlikely to have motivated the ICC framers, who probably thought they could have both equal justice and human rights progress without any tradeoff. It is more likely that they were influenced by what Robert Merton calls “the imperious immediacy of interest.”⁴³ This results when “the actor’s paramount concern with the foreseen immediate consequences excludes consideration of further or other consequences of the same act.”⁴⁴ The ICC founders’ paramount interest may have been in creating a permanent international criminal court that embodied the rule of law. And this interest may have led them to fail to consider fully the institution’s indirect causal consequences.

The final “equal justice” possibility is that the ICC delegates made a simple design mistake. The Canadian Foreign Minister present in Rome described the ICC’s delegates’ choice set as follows: “The choice was [a] to do what we did and hope that the U.S. will someday decide to join,” or [b] to “so undermine the court that it makes an eventual American buy-in not worth it.”⁴⁵ Here “undermine the court” means establish a court with effective immunity for the United States. The implicit assumption is that ICC framers had the following preference ordering: (1) create an institution immediately acceptable to the United States based on equal justice for all; (2) create an institution based on equal justice for all and hope the United States eventually overcomes its opposition; (3) create an institution of selective justice acceptable to the United States. The framers believed that option (2) was closer to their ideal institution than option (3). But they may have committed the fallacy of approximation—that is, the fallacy of thinking “that the best policy is the one that approximates an unobtainable ideal as closely as possible.”⁴⁶ As it turns out, the best policy from the perspective of promoting human rights looks like option (3) rather than option (2), even though (2) may have seemed like a closer approximation to (1).

The second explanation for the ICC’s apparent perversity is more cynical, but perhaps more persuasive. On this view, the middle powers—and especially the middle powers in Europe—who controlled the

⁴³ Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 *Am Soc Rev* 894, 901 (1936).

⁴⁴ *Id.*

⁴⁵ Alessandra Stanley, *US Dissents, but Accord Is Reached on War-Crime Court*, *NY Times A3* (July 18, 1998).

⁴⁶ Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 *U Chi L Rev* 421, 431 (2003). See also Robert E. Goodin, *Political Ideals and Political Practice*, 25 *British J Polit Sci* 37, 37–38 (1995).

ICC process were less concerned with punishing serious human rights abusers than they were with increasing their relative influence by inhibiting and controlling militarily powerful nations.⁴⁷ This is the explanation that fits most neatly with the outcome of the Rome process. It is consistent with the ICC's unprecedented attempt to check the power of the Security Council. It is also consistent with the uneven actions of the two weakest permanent members, France and the United Kingdom. These countries were on the fence in Rome but eventually signed on. However, they later backed away from a full ICC commitment by agreeing to controversial Security Council limitations on ICC power and by invoking special ICC immunity rules.⁴⁸

The cynical interpretation also makes sense of the ICC's otherwise paradoxical combination of (a) imposing liability on non-signatory nations who engage in military excursions across borders, while at the same time (b) immunizing non-signatory domestic human rights abusers who are typically perceived as the greatest threat to human rights. It also helps explain the current pattern of ratification. For it is not only the United States that is unlikely to ratify the ICC treaty; eight of the world's other most powerful and/or populous nations (Russia, China, Japan, Turkey, Indonesia, India, Pakistan, and Israel) have not signed or are unlikely to ratify the ICC treaty as well.⁴⁹ And finally, it is consistent with a broader pattern of middle power (and especially European) efforts to use international law to limit the power of militarily superior nations.⁵⁰

CONCLUSION: OTHER EFFECTS AND LARGER LESSONS

There are many possible objections to my arguments. In this conclusion I address two, and then reflect on the broader significance of ICC perversity.

The first objection is that I have overlooked other unanticipated consequences of the ICC that may affect my analysis. For example, I have relied heavily on the "indispensability" of U.S. might to the success of international tribunals. But it is possible that U.S. opposition to the ICC will provoke the EU to reorganize itself to assume this role. Or perhaps U.S. opposition to the ICC might undermine European support in a confrontation against Iraq or, more broadly, in the war on terrorism, thereby either harming U.S. security or causing the United States to rethink its position about the ICC. Or maybe the ICC will ef-

⁴⁷ On middle power internationalism generally, see Cranford Pratt, ed. *Middle Power Internationalism: The North-South Dimension* (McGill-Queen's 1990).

⁴⁸ See notes 21 and 29.

⁴⁹ See David R. Sands, *U.S. Finds Unusual Allies in Opposing Court*, Wash Times A12 (July 3, 2002).

⁵⁰ See Robert Kagan, *Power and Weakness*, 113 Pol Rev 3, 11 (June-July 2002).

fect no change. The United States is busy securing Article 98 and related agreements that might give it adequate comfort with the ICC.⁵¹ If this happens, the United States may embrace the ICC enthusiastically, and in a few years it may look like the Security Council-dominated permanent criminal tribunal the United States sought in the first place.

I doubt that these consequences—especially the first two—will come to pass. Even the most optimistic predictions about the EU do not involve the development of a military or political capacity to use significant force outside of Europe. It is hard to see how the United States' ICC stance would affect multilateral security cooperation, since each nation's contribution tends to be based on case-specific national security assessments and little more. And even if the United States gets blanket Article 98 protection, it will likely continue to view the ICC with at least some suspicion. I may of course be wrong about these predictions. The danger with any unintended consequences argument is that consequences can spill out in many different directions with reverberations that are themselves often affected by unforeseeable events. I have simply sketched what I view as the ICC's most likely and immediate consequence for human rights enforcement. As the time horizon widens and as unforeseen events change the world, intervening variables proliferate and prediction becomes less certain.

The second objection is that my analysis of the ICC's perversity effects is lopsided. I have taken the U.S. position as static and focused on the decision strategies of the ICC victors. This is a fair point. There are at least two significant actors here—the dominant parties at the ICC and the United States. The United States' position was not static, and there are at least two questions one should explore for a more complete analysis of what happened in Rome. The first would begin with the fact that in the early- and mid-1990s, the Clinton Administration and the Senate strongly supported an international criminal court. One might even say that the United States was instrumental in bringing about the Rome conference. Clearly what emerged from Rome was an unintended consequence of this early U.S. support. Second, one could examine the United States' preferences and bargaining strategies at Rome to see how it ended up with a court it could not accept.

This raises a related point. I have argued that the ICC as constituted will likely harm human rights on balance. One could respond

⁵¹ See Christopher Marquis, *U.S. is Seeking Pledges to Shield Its Peacekeepers From Tribunal*, *NY Times* A1 (Aug 7, 2002). Under Article 98(2), the court must respect an agreement between two states that requires one state to receive the consent of other state before surrendering one of its citizens to the court. In order for the court to proceed, it must first receive the consent of the other state.

that it is not the ICC that causes this harm, but rather the United States' opposition to the ICC. I have assumed that the United States' opposition to the ICC is non-derogable, and that the ICC framers could have reached a different result. But ICC proponents could be just as adamant in their position, and perhaps more so, than the United States, and the ICC may be more difficult to move than the United States.

These are valid points, to an extent. The thrust of my argument has been that the ICC will likely fail; in some sense this failure is attributable to all parties, and my analysis no more suggests that ICC proponents should cave to U.S. demands than it suggests that the U.S. should cave to ICC demands. My analysis does, however, assume a baseline of national sovereignty. The United States has no duty either to join a treaty regime not in its interest or to commit its troops and diplomatic prestige in contexts that it views to be harmful on balance to its welfare. It is unrealistic for an international institution to expect the United States to acquiesce in the new legal jeopardy imposed on it without its consent, and to continue with a human rights enforcement role that exacerbates its legal jeopardy. To the extent that the ICC framers did this, the error is (from the baseline of sovereignty) theirs alone.

Along these and other dimensions, much more work must be done to figure out the origins and implications of the ICC. And yet from a consequentialist perspective, it is already hard not to view the ICC as at least a partial failure. As a general matter, international institutions work either by facilitating self-enforcing behavior (like ambassadorial immunity or communication protocols) or by making it easier for powerful nations to coerce weaker nations into action (as NATO did in Kosovo, the UN did in Iraq, and the IMF arguably does with third-world development). The ICC does neither. It is not self-enforcing because the nations needed to make it work lose more than they gain from participating. And it lacks the ability to harness coercive power for reasons already canvassed.

The ICC is an intricate, and in some respects impressive, legal edifice. But a legal edifice devoted to international peace and stability is worthless without some plausible mechanism of enforcement. The price for a more plausible enforcement mechanism in the ICC context is to make the United States functionally immune, at least in the ICC (as opposed to domestic and other fora), from the enforcement of international criminal law. The ICC's refusal to countenance this may seem quite reasonable. And yet from a consequentialist perspective, the half-loaf of justice that accords with the interests of the nations that can enforce it may be all we can hope for and certainly seems better than little or no justice at all.

This conclusion does not entail what Morgenthau derided as a “Machiavellian utopia”—the view that international relations depend on power alone and that considerations of justice and morality are irrelevant.⁵² If this view were right, the United States itself would not so frequently invoke rule-of-law rhetoric and would have executed captured human rights abusers on sight rather than try them before international tribunals in Nuremberg, Rwanda, and The Hague. Rule-of-law and equal justice rhetoric is not empty and is not irrelevant to international law and politics.⁵³ It often genuinely reflects the values and commitments of the nations uttering it.

The problem is that these moral commitments are difficult, if not impossible, to square with the realities of international politics described above. This problem has been a persistent one throughout the history of international relations. One relatively rare solution has been to design institutions in which moral commitments are self-enforcing. The Peace of Westphalia and the modern European human rights system are two possible examples.⁵⁴ A more frequent solution has been to establish a kind of benign hypocrisy that appears to reconcile rule-of-law values with the enforcement asymmetries of international politics.⁵⁵ Examples here include the UN Security Council, sovereign equality, humanitarian intervention in Kosovo, and U.S. enforcement of the slave trade prohibition in the nineteenth century. The ICC founders’ real failure was their inability to forge a benignly hypocritical compromise court that could try egregious human rights abusers from nations in transition, while at the same time effectively immunizing human rights enforcers. Perhaps such a scheme can be worked out through the back door via Article 98 agreements and related mechanisms. Or perhaps the United States will change so much that membership in the ICC, even without immunity, will become a possibility. If not, the ICC may well follow its spiritual cousins, the League of Nations and the Kellogg-Briand Pact, to the grave.

⁵² Hans J. Morgenthau, *The Machiavellian Utopia*, 55 *Ethics* 145, 145 (1945).

⁵³ This was a point frequently emphasized by Carr and Morgenthau, and one that is forgotten or suppressed by modern realists.

⁵⁴ See Jack Goldsmith and Stephen D. Krasner, *The Limits of Idealism*, *Dædalus* *26–28 (forthcoming Winter 2003).

⁵⁵ Compare Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 20, 31 (Princeton 1999).