

DOING THE RIGHT THING: THE INTERNATIONAL CRIMINAL COURT AND SOCIAL ENGINEERING

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Introduction

The Statute for the Creation of the International Criminal Court (ICC) was adopted at a high-level diplomatic conference in Rome, Italy, in July 1998. Just two weeks ago, documents establishing rules of procedure and definitions of criminal conduct were finalized by a preparatory commission in New York.¹ These events culminate a decades-long effort to establish a permanent judicial body to prosecute international crimes and represent a dynamic shift in international politics.² The ICC statute purports to create a judicial mechanism with jurisdiction potentially reaching every individual on the face of the earth, whether or not that individual resides in or is a citizen of a country that has ratified the statute. The statute, furthermore, is now seen by many pressure groups as, perhaps, the principal means of enforcing the multitude of human rights norms generated by the United Nations conference system.

Whether the creation of the ICC should be lauded or deplored is certainly debatable. As I left the final session of the preparatory commission in New York two weeks ago, Roger S. Clark, a professor of law from Rutgers University who represented Samoa during all ICC negotiations, quipped to me from across a hall, "Now, fight fair." His comment reflects the fact, apparently clear to him after interacting with me for two years, that he and I have somewhat differing views regarding the ultimate merits of the court, and that the creation of the ICC is indeed worth a fight. Moreover, while we probably disagree on several points, I certainly concur with Professor Clark that any dispute regarding the merits of the ICC should be fair. Fair consideration of the merits of the ICC, however, must go well beyond the sort of instant analysis so prevalent in modern legal and political discourse.

It is quite easy to support the general notion of an international criminal court. After all, the statute ostensibly deals only with deplorable offenses: genocide, war crimes, and crimes against humanity. ICC supporters, furthermore; fervently believe that the court will deter and punish the commission of these detestable acts.³ It is hard, if not impossible, to argue against such objectives. No compassionate person wishes to increase the burden of human suffering in the world. But wanting to do the right thing is not enough. One must also do the right thing the right way. The ICC, I fear, does not.

As currently structured, the ICC statute transfers a vast amount of decision-making authority from previously sover-

eign nations to an international court that will be remote from and unable to be controlled by the diverse cultures and peoples of the world. It does so by means of language which is vague and, therefore, capable of expansion to conduct well beyond that which, at present, is considered to be within the customary reach of genocide, war crimes, and crimes against humanity. The court's structure, finally, permits pressure groups to obtain ready influence over prosecutorial functions. The net result is that the ICC has the potential to become not a court dealing primarily with "the most serious crimes of international concern,"⁴ but a tool for radical social engineering. This potential is so great that I fear the court may well tread upon the fundamental right of nations to democratic self-determination protected by the UN charter and numerous human rights instruments.

I shall proceed by first quickly tracing the genesis of the ICC. Second, I will outline the jurisdictional scheme established by the ICC statute and discuss how this jurisdictional scheme, under the vague notion of complementarity, transfers decision-making power from national governments to international judges. Third, I will briefly explore some possible abuses of the vague substantive crimes condemned by the statute. Fourth, I will examine the ability of pressure groups to influence prosecutorial functions. I will conclude by questioning whether the ICC's unprecedented intrusion upon national sovereignty is, indeed, consistent with respect for basic human rights.

Genesis of the ICC

In 1951, following the conclusion of the Nuremberg and Tokyo war crime tribunals, a proposal was circulated among members of the newly formed United Nations to create a permanent standing court.⁵ The proposed court would be responsible for prosecuting grave crimes of international concern committed in armed conflict. Nations of the world initially balked at the idea of a permanent court because of the potential ramifications for individual state sovereignty.⁶ The idea, however, continued to resurface whenever the world was confronted with serious war-time crimes. Finally, at the conclusion of the Gulf War in December 1989, the General Assembly of the United Nations passed a resolution calling for the official creation of a permanent criminal court to deal with war-related atrocities.⁷

Public pressure for the creation of a permanent court increased in the early 1990s as the world reacted to reported atrocities in Rwanda and the former Yugoslavia. Informal

meetings on the issue, commencing early in 1990, ultimately resulted in a draft statute for the ICC. As that draft statute emerged, however, the mandate for the proposed ICC slowly but steadily expanded. Instead of dealing solely with well established customary war crimes, the draft text became a veritable handbook on emerging human rights law, weighted with countless provisions never envisioned by the General Assembly's initial resolution to create the ICC.⁸ This complex and convoluted draft statute was presented to UN delegates at Rome during the summer of 1998 for finalization.

The draft statute presented to the diplomatic conference went well beyond the initial draft prepared by the International Law Commission (ILC). The ILC draft, for example, generally restricted the jurisdiction of the proposed international criminal court to nations that had become a party to the treaty creating the court, and limited the substantive reach of the court to customarily recognized international crimes.⁹ The final version of the statute adopted in Rome, however, went well beyond this comparatively modest proposal. The statute created a court with hitherto unprecedented jurisdictional reach, and with substantive authority to adjudicate a long list of crimes previously unknown to the established canon of customary international law.

The ICC'S Intrusion Upon Domestic Law

The jurisdiction claimed by the ICC is unquestionably novel. Not since the Treaty of Westphalia in 1648 has a treaty ever purported to bind parties who are not signatories to the treaty. The ICC statute, however, does just that.

As adopted in Rome, the ICC statute asserts jurisdiction over defendants so long as either the "state on the territory of which" a crime was committed or "the state of which the person accused of the crime is a national" has ratified the statute.¹⁰ Accordingly, the statute asserts jurisdiction over a large potential class of defendants residing in nonsignatory states. So long as the crime is committed in a signatory state, nonratification of the ICC statute by the state in which a purported criminal defendant resides will not defeat jurisdiction. As a result, a decision in one state to engage in conduct that has an impact in a second, ratifying state will subject the conduct to prosecution—even if the first state has not ratified the statute. This notion is often referred to as inherent or universal jurisdiction.

The concept of inherent or universal jurisdiction can be very broad indeed. In its most expansive form, such jurisdiction supposedly confers power upon a nation to prosecute an alleged criminal for an act regardless of where the act occurred and whether or not the alleged criminal is a citizen of, or even present in, the prosecuting state. Proponents of the court often argue that this broad notion of universal jurisdiction is well established.¹¹ This assertion, however, is unfounded.

Before the adoption of the statute, various international theorists had used the term *universal* to describe a state's

power to prosecute a limited class of exceptionally serious customary offenses, such as piracy, slavery, genocide, and war crimes.¹² But any use of this term to describe a state's customary power over these crimes is highly questionable. While there is sound support for the notion that all nations could prosecute an individual for the crime of piracy—no matter where the crime of piracy occurred or what the nationality of the pirate was¹³—there is virtually no evidence that states possessed such broad jurisdictional power with regard to any other offense. Indeed, Professor Clark, after scouring international cases, texts, and treatise writers for evidence of universal state jurisdiction over piracy, slavery, genocide, and war crimes, concludes that "universal state jurisdiction applies to the exceptional case of piracy and otherwise finds no support whatever in the texts."¹⁴

The notion of universal jurisdiction adopted in the ICC statute, therefore, represents a clear departure from established international legal theory. This departure, moreover, deals a serious blow to the concept of national sovereignty. By asserting that the International Criminal Court can claim jurisdiction over a nonsignatory state and its citizens, the ICC statute makes an unabashed claim of international supremacy over the actions of domestic policymakers. Inherent in this claim is the startling conclusion that the International Criminal Court, as an organ of international government, has the power to coerce and command a previously sovereign state, regardless of that state's assent to the treaty creating the court. It has been standard law for centuries that "treaties cannot create obligations for states who are not parties."¹⁵ By declaring the contrary, the ICC statute, in the words of the government of India on the final night of the ICC diplomatic conference, has "claimed a victim of its own—the Vienna Convention on the Law of Treaties."¹⁶

One could argue, of course, that all criticisms of universal jurisdiction based on pre-ICC legal theory and state sovereignty are beside the point. That is, no matter what the customary law once was, the nations of the world have now come together to alter the previous world view; whatever the sovereign powers of nation-states once were, a portion of those powers has now been delegated to an international body. These arguments are subject to at least two serious objections.

First, the ICC statute, along with its dramatically expansive view of the court's jurisdiction, becomes operative once it is ratified by a mere sixty nations.¹⁷ Even if one were to concede that nations can readily delegate their sovereign power to a newly created international entity—a proposition that I seriously question¹⁸—the ICC statute hardly represents a worldwide concession of such powers to the court. Adoption of the Rome statute by fewer than one-third of the recognized nations of the earth is hardly sufficient consensus to cast aside the legal structure established by hundreds of years of developments in customary international law.

Second, and more importantly, reason and prudence dictate against disregarding the established boundaries of international law. The International Criminal Court's expansive jurisdiction seriously endangers the right of the people residing in nation-states throughout the world to govern and order their own affairs and to respect and/or alter their own cultural and religious traditions. This threat to national self-determination should not be dismissed lightly.

The statute, according to its terms, is designed to be "complementary to national criminal jurisdictions."¹⁹ As such, the court is designed to take jurisdiction only when a nation is "unwilling or unable" to act.²⁰ This language appears to protect national sovereignty, and is invoked by proponents of the court to calm concerns that the court might seriously intrude upon questions such as culture and religious practice that, according to the UN Charter, are "within the domestic jurisdiction" of a nation-state.²¹ But, while it sounds reassuring, the notion of complementarity is a legal shadow. Rather than protecting national sovereignty and local democratic self-determination, the concept of complementarity operates much like an international supremacy clause.

A recently issued manual for the ratification and implementation of the Rome statute explains that "the ICC is no ordinary international regulatory or institutional body."²² Indeed, in order to comply with the dictates of complementarity, the manual asserts that modifications must be made to a state's "code of criminal law . . . and human rights legislation."²³ Why? Because if national law diverges in any important detail from the law established by the ICC statute, that nation will invite the international court to step in and take action. As the manual states, "should there be a conflict between the ICC legislation and existing [state] legislation," international law established under the ICC "takes precedence."²⁴ Accordingly, the manual declares that "it would be prudent" for states "to incorporate all acts defined as crimes" into their own "national laws."²⁵

Other court advocates are even more blunt. A booklet issued by the Women's Caucus for Gender Justice asserts that "ratification of the treaty creating the court will necessitate in many cases that national laws be in conformity with the ICC statute."²⁶ The caucus states that implementation of the ICC statute will provide an opportunity for groups "all over the world to initiate and consolidate law reforms."²⁷ Indeed, the gender caucus asserts that "[i]t is this aspect of the court — the possibility of national law reform — which may present the most far-reaching potential" for change "in the long run."²⁸ According to the caucus, "States' parties will be required to review their domestic criminal laws and fill in the gaps to ensure that the crimes enumerated in the ICC statute are also prohibited domestically."²⁹

In other words, national law *must* mirror the terms and conditions of the ICC statute, and ultimately the judicial decisions of the ICC itself. Otherwise, a state will find its law

being circumvented by the court, which will take jurisdiction because that state will be found "unable" to act. This is the process by which complementarity becomes, instead of a shield, a sword.

Social Policy and "Criminal" Acts

One might again argue, "So what?" Even if the ICC statute and the court's forthcoming judicial decisions supplant all conflicting national law, the court will only deal with "the most serious crimes of international concern."³⁰ Therefore, there is no real risk that international judges will supplant the policy decisions of national legal systems in areas of true domestic concern. The elastic terms of the ICC statute, however, suggest that the court—rather than occupying itself solely with genocide, mass murder, and other similarly egregious acts—may become the ultimate forum for the resolution of delicate questions of social policy.

The language of the ICC statute is sweeping. Although it purports to reach only serious crimes, the potential breadth of the crimes set out in Articles 6, 7, and 8 is limited largely by the imaginations of international lawyers and the judicial restraint (or lack of it) that will be exhibited by the judges in the court. The crime of genocide, for example, includes not only killing members of a "national, ethnical, racial or religious group," but also "causing serious . . . mental harm to members of the group."³¹ As such, the ICC's machinery conceivably could be called into play to prosecute the racially and religiously charged rhetoric often employed by both sides of the ongoing dispute regarding a Palestinian homeland in the Middle East. While no rational person approves of rhetoric inspired by racial or religious animus, it is far from clear whether such name-calling contests qualify as "most serious crimes of international concern."³²

Of much greater concern are the potentially far-reaching "crimes against humanity" set out in Article 7. The statute condemns as "crimes against humanity" acts such as murder, extermination, enslavement, forcible transfer of population, torture, sexual slavery, persecution, and "other inhumane acts."³³ These crimes certainly sound terrible, but the ICC statute gives very little guidance as to what these words actually proscribe.

For example, the crime of persecution, as set out in the statute and as further refined in the recently issued "Elements of Crimes," condemns the "severe deprivation" of a group's "fundamental rights."³⁴ The crime of inhumane acts criminalizes the infliction of "great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act."³⁵ What do these terms proscribe? At present, it is impossible to say definitively. But, the arguments of some proponents for the court suggest that the reach of these proscriptions will be far broader than a quick reading of the ICC statute might suggest.

Consider some of the rhetoric of activists at the forefront

of society's gender wars. According to one prominent legal theorist, a woman has the choice of "either . . . marrying or . . . aligning herself with a pimp. . . . In both cases she typically becomes emotionally, financially, physically, and sexually dependent on and subordinate to a man."³⁶ Another legal scholar, Dianne Post, in a recent edition of *The Women's Rights Reporter*, has boldly called for the abolition of marriage.³⁷ According to Ms. Post,

Marriage itself originated as a way for a man to have one woman at his beck and call. For a woman, it was at first a relief to be responsible only to one man, who was obligated to provide for her, rather than to the entire tribe or clan as was a single woman. Feminist rhetoric that the only difference between a prostitute and a wife is that the wife has sold herself to only one man has a basis in history.³⁸

In other parts of her article, Ms. Post argues that marriage constitutes unjustifiable persecution of women on economic and other grounds.³⁹

Were Ms. Post or others of similar ideological ilk to serve as the judges and prosecutors for the International Criminal Court (a distinct possibility),⁴⁰ the crimes of inhumane treatment and persecution could be used to indict government or religious⁴¹ policies dealing with marriage and dissolution of marriage. Laws and religious practices that promote marital union, for example, arguably impose "great suffering" and "serious injury" to the mental health of a spouse who wishes to dissolve the relationship, thus constituting "inhumane acts." Similar arguments, centered upon the claim that autonomy is a fundamental right, could be made under the rubric of the crime of persecution.

While these and related arguments unquestionably press the outer boundaries of the ICC's plain language, they cannot be dismissed. In Rome, the Women's Caucus for Gender Justice boldly attempted to use the ICC's judicial machinery to create a worldwide right to abortion. It did so by inserting the previously unknown crime of forced pregnancy into the statute.⁴² The premise of this crime was straightforward: if a woman became pregnant and was unable to terminate the pregnancy because national law prohibited or regulated access to abortion, the woman would be unlawfully forced to be pregnant.⁴³ Because of its novelty and obviously far reaching impact, the issue of forced pregnancy became one of the most contentious at the entire Rome conference. And, although the caucus' effort to obtain global abortion on demand ultimately failed,⁴⁴ the very attempt makes clear that the ICC statute can be used not just to prosecute criminals but to create social policy.

Accordingly, eleven Arab nations, during a December 1999 preparatory commission meeting held to draft "Rules of Procedure and Elements of Crimes," introduced a proposal which, among other things, insured that the ICC would not be used to prosecute "family matters."⁴⁵ The document also

sought to protect the "rights, duties, and obligations incident to marriage" as well as fundamental "religious principles" from becoming subject to prosecution.⁴⁶ In March of this year, the Women's Caucus for Gender Justice responded by issuing two documents: 1) a booklet that explains how the ICC can be used to enforce the Beijing Platform for Action,⁴⁷ and 2) recommendations and commentary on crimes against humanity.⁴⁸ These documents demonstrate that, whatever its plain language, the ICC statute can be used to restructure family life and religious practice.

During the past decade, the United Nations system has negotiated numerous platforms, agendas, and declarations setting out aspirational goals for member states in virtually every area of human life. The Women's Caucus for Gender Justice unquestionably intends to use the International Criminal Court to enforce these previously soft law norms. As the caucus' March booklet explains, "the creation of the world's first permanent criminal court" provides "an opportunity to codify as international law . . . many of the strategic objectives outlined and committed to by governments in [such documents as the Beijing Platform for Action."⁴⁹ The ICC, in short, could transform previously unenforceable and often broadly worded norms into indictable criminal conduct. In the caucus' view, the ICC is not merely or even primarily a court to deal with the "most serious crimes of international concern."⁵⁰ Rather, the ICC is an institution with which to achieve "many of the commitments in the [Beijing] Platform for Action *as well as a mechanism through which to achieve others.*"⁵¹

Therefore, if the gender caucus is to be taken at its word, the ICC statute can and will be used to reengineer social policies throughout the world. In fairness to the proponents of the ICC, any use of the statute to reach beyond clearly established international crimes will be difficult. The recently completed preparatory commission meetings on the court's rules of procedure and elements of crimes tightened up numerous restrictive elements of the statute.⁵² But I have been a lawyer and a law professor long enough to know that almost any verbal knot can be untied if the lawyers and judges engaged in the task are infused with enthusiasm and ingenuity. The NGO and legal communities that support adoption of the ICC have plenty of both—and to spare.

Judicial action that refashions social norms has become quite commonplace in the United States, Canada, and the European Union. The impact of such judicial tinkering is now becoming clear in the decaying family and social structures in these parts of the world. The International Criminal Court could well become the mechanism by which the Western innovation of judicially—rather than legislatively—crafted social policy and its accompanying consequences are exported to the rest of the world.

One of the most important characteristics of a sound judicial structure is judicial impartiality.⁵³ In Rome, however, certain groups made it quite clear that they intended to use the court to enforce and further their particular (and debatable) social agendas. Perhaps the largest interest lobby at the conference espoused the vague concept of gender sensitivity as a litmus test for judicial selection. As a result, the draft ICC statute required gender balance on the court and mandated that *any* judicial nominee must possess “expertise on issues related to sexual and gender violence.”⁵⁴ These selection criteria were problematic because they have no well established, universally recognized, and cohesive legal meaning. Gender balance could have created a gender quota for the court that would undermine *any* selection system based primarily on merit, and could have even required that judges be selected precisely because of their particular sexual orientation. The requirement of expertise on sexual and gender violence had equally ambiguous ramifications.

Expert gender judges and prosecutors, of course, might be expected to be receptive to the kinds of arguments proposed by legal scholars who would subject domestic family law to the perceived human rights strictures gleaned from the ICC statute’s list of crimes against humanity. As adopted, however, the ICC statute does not require specific gender expertise. Instead, the statute mandates that “States parties shall . . . take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”⁵⁵ One can only wonder how judges with legal expertise regarding violence against women and children will receive arguments asserting that various cultural and religious practices violate international humanitarian law.

But even assuming the International Criminal Court is graced with the most impartial and gifted judges the world has ever known, the prosecutorial structure established by the ICC statute raises serious concerns. As adopted, the statute grants the prosecutor *proprio motu* powers;⁵⁶ that is, the prosecutor has the power (subject only to review by a panel of ICC judges) to initiate an investigation and prosecution completely on his/her own authority and without oversight or control by any national or international power.⁵⁷ While this provision was purportedly designed to prevent the prosecutor from being swayed by political concerns, experience in the United States suggests that there is more to fear from a politically unaccountable prosecutor than from a politically accountable one.

Following the resignation of President Richard Nixon, the United States embarked upon a well-intentioned experiment with *proprio motu* prosecutors. Fearing that prosecutors under the control of the president would be unable to effectively prosecute executive branch wrongdoers, the U.S. Congress passed the Ethics in Government Act of 1978, which

authorized the appointment of independent prosecutors.⁵⁸ But, rather than demonstrating a penchant for apolitical and unsullied prosecutions, the history of the independent prosecutor’s office demonstrated just the contrary. An independent prosecutor may not be answerable to established political organs, but such a prosecutor is in fact readily swayed by general political currents, popular sentiments, and personal political predilection.⁵⁹ Accordingly, America’s experiment with independent prosecutors has now been abandoned.

In conformity with this experience, the United States, along with a few other countries, argued that the ICC prosecutor should be permitted to proceed only upon referral of a case by a nation/state or an appropriate UN body.⁶⁰ That proposal was rejected, and the ICC statute, as drafted, confers expansive investigational and prosecutorial authority on the prosecutor.

This broad prosecutorial power, rather than being immune to political considerations, may be particularly subject to the most corrosive kinds of political influence. Article 44 of the statute allows the prosecutor to accept “any . . . offer” of “gratis personnel offered by States Parties, intergovernmental organizations, or nongovernmental organizations.”⁶¹ Gratis personnel are personnel paid for by third parties. But, while their salary is paid by a third party, such personnel are nevertheless performing the “work . . . of the organs of the court.”⁶² One can expect that many of these gratis personnel will be supplied by well funded international NGOs who are hostile to religion and traditional values.⁶³ An independent prosecutor’s office free from any real governmental control is dangerous enough. An independent prosecutor’s office staffed by NGOs with ideological axes to grind is positively frightening.

Conclusion: Sovereignty at the Crossroads

As I have outlined above, the International Criminal Court transfers a vast amount of decision-making power to judges who will be guided by vague language and driven by a politically unaccountable prosecutor. This intrusion upon national sovereignty is unprecedented. As set out at the start of this essay, whether or not this unprecedented development constitutes doing the right thing the right way depends, in large measure, upon the respect one holds for the very notion of sovereignty. I also realize that, in many national and international legal circles, respect for the notion of sovereignty is at an all-time low. Therefore, in the end, whether or not creation of the International Criminal Court is doing the right thing the right way depends upon whether national sovereignty, itself, deserves preservation. I believe that it does.

Respect for national sovereignty is a bedrock principle of the UN Charter. Article 2, paragraph 7 of the United Nations Charter provides:

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.

We now stand at the historic point where an international organ will have the inherent power to intervene in domestic social policy. Those who applaud this development, and there are many,⁶⁴ expect the nations of the world to willingly surrender important aspects of national sovereignty in the name of human rights. This is a dangerous course. National sovereignty, rather than being inimical to human rights, is fundamental to the preservation of those rights.

Key among fundamental human rights are the rights to democratic self-governance and self-determination, the right to maintain diverse cultural and religious practices, and even the right, if people so choose, to vote their conscience and to establish governments based on religious principles. These rights are set forth in numerous UN pronouncements, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁶⁵

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. . . . The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections.⁶⁶

Everyone has the right to freedom of thought, conscience and religion; this right includes . . . freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.⁶⁷

These human rights and individual freedoms are best served if countries preserve their sovereignty and the right to govern their own domestic affairs. An autonomous international court will not be responsive to the culturally diverse peoples of the world. Moreover, governance by judges is inherently undemocratic. The power to determine the contours of domestic policies must be kept close to home—close to the people being governed.

The process of evolution toward democracy and greater freedom and equality has taken and will continue to take place. This process is inevitable as modernization occurs, communications improve, and the peoples of the world become better educated. It is as inevitable for women as it is for men. The UN, as an international forum for expressing human

rights principles and encouraging their adoption, has doubtless helped to speed this process along. But, notwithstanding the important contributions of the UN, each nation must have the freedom to undertake this evolution in its own manner, in ways adapted to its own unique culture. The Western nations have had this freedom; it must be allowed to all.

Many human rights issues are, fundamentally, political questions that should be answered by the political processes within each country. The often difficult debates surrounding many newly established and/or emerging human rights such as family rights, abortion, and same-sex marriage should not be resolved by giving an international court the power to declare that its ideological opponents are criminals.

The UN was not designed to possess, let alone exercise, sovereign powers. The UN Charter does not give the UN the power to enforce human rights ideas upon sovereign nations. Rather, the Charter calls upon the United Nations merely to “promot[e] and encourag[e] respect for human rights.”⁶⁸ It would be a tragic irony if, in the name of human rights, the nations of the world give potentially despotic power to a court that will be remote from the individual people of the world, but that will have the power to prosecute and punish them for social crimes.

NOTES

1. After a series of meetings spanning two years, the preparatory commission for the International Criminal Court completed work on the Rules of Procedure and Evidence (PCNICC/2000L.2/Add.1) and the Elements of Crimes (PCNICC/2000/L.2/Add.2) on 30 June 2000.

2. The ICC, as conceived, is not formally a part of the United Nations system, although it will have a close financial relationship with the UN.

See, e.g., Manual for the Ratification and Implementation of the Rome Statute, published by the International Centre for Human Rights and Democratic Development (Montreal, Quebec, Canada) and The International Centre for Criminal Law Reform and Criminal Justice Policy (Vancouver, British Columbia, Canada) at 2.

3. *Ibid.* at vii.

4. ICC Statute, Art. 1.

5. Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 Pace Int'l L. Rev., 1998.

6. *Ibid.*

7. Agenda Item 152, G.A. Res. A144/195, 1989.

8. Marcus R. Mumford, *Building Upon A Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 J. Int'l L. & Prac. 151, pp. 166–170, 1999.

9. European Law Students' Association, Handbook on the Draft Statute for an International Criminal Court, 2d ed. 1998. For a listing of the “customary international law of human rights” at the time the ICC Statute was adopted, see Restatement (Third) of Foreign Relations Law, §702, 1986 (asserting that a “state violates international law if, as a matter of state policy” it “practices, encourages, or condones” genocide, slavery, murder, torture, prolonged arbitrary detention, systematic racial discrimination or engages in “a consistent pattern of gross violations of internationally recognized human rights”).

10. Final ICC Statute Art. 12(2).

11. See, e.g., Marcus R. Mumford, *Building Upon A Foundation of Sand: A Commentary on the International Criminal Court Treaty*

Conference, 8 J. Int'l. L. & Prac. 151, pp. 180–181, 1999.

12. See, e.g., Restatement (Third) of Foreign Relations Law, § 404, 1986.

13. Roger S. Clark, "Countering Transnational and International Crime: Defining the Agenda, in 6 Hume Papers on Public Policy (Nos. 1 & 2) (Peter J. Cullen, William C. Gilmore, ed.) at 25 (noting that the power of "any State anywhere" to prosecute the crime of piracy "seems to have been found in customary law").

14. Roger S. Clark, "Countering Transnational and International Crime: Defining the Agenda, in 6 Hume Papers on Public Policy (Not. 1 & 2) (Peter J. Cullen, William C. Gilmore, ed.) at 28

15. Marcus R. Mumford, *Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 J. Int'l L. & Prac. 152, 183 (1999) (quoting the U.S. Delegation's Final Intervention at the ICC Conference, 17 July 1998).

16. Id. (quoting Statement of Dilip Lahiri of India).

17. Final ICC Statute, Art. 126 (providing that the ICC statute "enter[s] into force" 60 days after the sixtieth state has ratified the Statute).

18. Sovereign power, in my view, and in the view of numerous international human rights documents, proceeds from the people. See, e.g., Universal Declaration of Human Rights, Article 21. § 3 ("The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections"). There is a serious question, therefore, whether a state or nation can delegate its sovereign power without the direct consent "of the people." *Ibid.* Moreover, as I discuss in the final section of this essay, a state's delegation of its sovereignty to an international institution poses a dramatic risk of diminishing the power of the people to "self-determination" and the right to "freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights, Article 1, § 1; International Covenant on Economic, Social and Cultural Rights, Article 1, § 1. See also Marcus R. Mumford, *Building Upon A Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 J. Int'l. L. & Prac. 151, pp. 182–184, 1999.

19. Final ICC Statute, Art. 1.

20. Final ICC Statute, Art. 17(1)(a).

21. UN Charter, Art. 2 paragraph 7. Compare Manual for the Ratification and Implementation of the Rome Statute, published by the International Centre for Human Rights and Democratic Development (Montreal, Quebec, Canada) and The International Centre for Criminal Law Reform and Criminal Justice Policy (Vancouver, British Columbia, Canada) at 2 (asserting that the "Court will not . . . encroach on an individual State's jurisdiction over crimes covered by the Statute").

22. UN Charter, Art. 2 paragraph 7 at 9

23. *Ibid.* at 10.

24. *Ibid.* at 12.

25. *Ibid.* at 91.

26. Women's Caucus for Gender Justice, *The International Criminal Court: The Beijing Platform in Action (Putting The ICC On The Beijing +5 Agenda)* at 8.

27. *Ibid.* at 9.

28. *Ibid.* at 22.

29. *Ibid.* at 25.

30. Final ICC Statute, Art. 1.

31. Final ICC Statute, Art. 6(b).

32. Final ICC Statute, Art. 1.

33. Final ICC Statute, Art. 7(1).

34. Report of the Working Group on Elements of Crimes, PCNICC/2000/WCEC/L.1/Add. 1 at 7 (setting forth the elements for the crime against humanity of persecution); compare Final ICC

Statute, Arts. 7(1)(h) and 7(2)(g).

35. Report of the Working Group on Elements of Crimes, PCNICC/2000/WCEC/L.1/Add. 1 at 9 (setting forth the elements for the crime against humanity of inhumane acts); compare Final ICC Statute, Art. 7(1)(k).

36. See, e.g., M. Frug. Postmodern Legal Feminism at 134.

37. Dianne Post, *Why Marriage Should Be Abolished*, 18 Women's Rts. L. Rep. 283, 1997.

38. *Ibid.*

39. See generally *id.* at pp. 302–309 (describing marriage as an inherent form of economic discrimination and physical and mental abuse of women).

40. See Section IV, below.

41. Article 7's "crimes against humanity" are *not* limited to actions of a state. On the contrary, individuals who violate any of Article 7's proscriptions are subject to prosecution so long as their actions are pursuant to an "organizational policy." Final ICC Statute, Art. 7(2)(a).

42. Marcus R. Mumford, *Building Upon A Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*. 8 J. Int'l. L. & Prac. 151, pp. 167–168, n. 57, 1999 (detailing the efforts to create an abortion right).

43. *Ibid.*

44. The crime of "forced pregnancy" ultimately was limited by a narrowing definition, which provided that the ICC Statute "shall not in any way be interpreted as affecting national laws relating to pregnancy." That the gender caucus sought to use the ICC Statute to create an abortion right is indisputable. The caucus, in fact, characterizes the insulation of national abortion laws from attack under the Statute as "[a]n unfortunate disclaimer." Women's Caucus for Gender Justice, *The International Criminal Court: The Beijing Platform in Action (Putting The ICC On The Beijing +5 Agenda)* at 13.

45. PCNICC/1999/WCEC/DP.39, 3 December 1999.

46. See, e.g., PCNICC/1999/WCEC/DP.39 at Art. 7(1)(g) (1)(4) and Art. 7(1)(g)(2)(3).

47. Women's Caucus for Gender Justice, *The International Criminal Court: The Beijing Platform in Action (Putting The ICC On The Beijing +5 Agenda)*.

48. Women's Caucus for Gender Justice, *Recommendations and Commentary to the Elements of Crimes, Submitted to the Preparatory Commission for the International Criminal Court*, 13–20 March 2000.

49. *Supra* note __, at 6.

50. Art. 1.

51. *Supra* note __, at 8 (emphasis added).

52. The definitions of several crimes against humanity have been tightened by the work of the preparatory committee. Prior to the conclusion of the June 2000 session of the committee, there was some concern that crimes such as "enslavement" and/or "sexual slavery" could be used to deconstruct the institution of marriage. The Women's Caucus for Gender Justice, for example, asserted that "servile status" constituted enslavement, and that the crime of sexual slavery should be broadly defined as "the exercise of a power of ownership involving control over the victim's sexuality." Women's Caucus for Gender Justice, *Recommendations, and Commentary for the Elements of Crimes (Based on the Rolling Text PCNICC/L.5/Rev.1/Add. 2)* at 9 (submitted to the Preparatory Commission for the International Criminal Court, 13–31 March 2000. So defined, the crime of sexual slavery might have criminalized the very institution of marriage, because marriage (at least in the view of some scholars) reduces women to "servile status" and affords husbands certain "control over a person's sexuality." See, e.g., Dianne Post, *Why Marriage Should Be Abolished*, 18 Women's Rts. L. Rep. 283, 1997.

The preparatory committee, however, rejected the broad definitions proposed by the gender caucus and, instead, provided that

the crimes of enslavement and sexual slavery require the type of conduct defined in the Supplementary Convention on the Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery. September 7, 1956, TIAS 6418. This Treaty bans certain non-consensual marital practices (such as forced marriage and inheritance of wives), but goes no further. *Id.* at Section I, Art. I, paragraph (c). So limited, the crimes of enslavement and/or sexual slavery should not ready tools for reworking the incidents of consensual marriage.

The preparatory committee also provided a general chapeau (or introductory paragraph) to definitions of crimes against humanity which emphasizes that the crimes punishable under the ICC statute must be “strictly construed.” PCNICC/2000/WCEC/L. 1/Add. 1 at 2 (“Introduction” at paragraph 1). This provision, along with the general requirement that crimes against humanity must constitute an “attack directed against a civilian population,” provide protection that the ICC will not be diverted to wholly ideological baffles. *Id.* at 2 (“Introduction” at paragraph 3). It is important to note, however, that an “attack directed against a civilian population . . . need not constitute a military attack.” *Id.* Therefore, it is quite clear that the organized actions of churches and other groups *can* fall within the proscriptions of the ICC Statute.

53. *See, e.g., Aetna Life Ins. Co. v. LaVoie*, 106 S.Ct. 1580, 1986.

54. *See, e.g., Part 4, Art. 37, Para. 4 (Option 2) subparagraph (b)(8) (draft ICC statute).*

55. Final ICC Statute, Art. 36(8)(b).

56. “Of his own volition.”

57. Final ICC Statute, Art. 15(1).

58. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 1988.

59. *See, e.g., id.* (Scalia, J., dissenting).

60. Marcus R. Mumford, *Building Upon A Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 *J. Int'l L. & Prac.* 151, p. 179, 1999.

61. Final ICC Statute, Art. 44(4).

62. *Ibid.*

63. *See generally*, Richard G. Wilkins, *Bias, Error and Duplicity: The UN and Domestic Law*, *The World & I*, pp. 287–305, Dec 1996.

64. *See generally*, Symposium Issue: The International Criminal Court, 8 *J. Int'l L. & Prac.* 1, 1999.

65. International Covenant on Civil and Political Rights, Article 1, para 1; International Covenant on Economic, Social and Cultural Rights, Article 1, para. 1.

66. Universal Declaration of Human Rights, Article 21, paras. 1, 3.

67. Universal Declaration of Human Rights, Article 18.

68. United Nations Charter, Article 1, paragraph 3.