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Giulio M. Gallarotti

Wesleyan University, ggallarotti@wesleyan.edu

Arik Preis

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Toward Universal Human Rights and the Rule of Law: The Permanent International Criminal Court

*Giulio M. Gallarotti and Arik Y. Preis**
Wesleyan University

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I. Introduction

On July 17, 1998, in Rome, Italy, the community of states voted to create a permanent international criminal court (ICC).¹ Fittingly, the treaty was established in a year that marked the 50th anniversary of the Universal Declaration of Human Rights. The Court was the culmination of a process that goes back to the Red Cross and Hague Conventions on the conduct of warfare in the 19th and 20th centuries. After Nuremberg and Tokyo, momentum built in the U.N to construct a permanent international criminal court, but Cold War rivalries kept the initiative from germinating. Finally, at the request of Trinidad and Tobago (who were animated by problems of drug trafficking), the U.N. revived the issue. Genocide in Cambodia and the construction of *ad hoc* tribunals in Rwanda and the former Yugoslavia imparted greater momentum to the initiative. In 1994 the International Law Commission (ILC) produced a draft statute for a permanent court. The U.N. General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court to begin negotiations on the draft statute. The statute they ultimately produced in 1998 became the basis for negotiations at the Rome Conference which brought the ICC into being. U.N. Secretary General Kofi Annan (1998, p. 13) hailed the ICC treaty as a “monumental step forward in the march towards universal human rights and the rule of law.” David Scheffer (1998), head negotiator for the U.S. delegation in Rome, like Annan, underscored the need for an “international criminal court that would serve the interests of international justice.” However, in Scheffer’s eyes, the ICC created in Rome did not represent an effective “solution” to the problem of administering international criminal justice. Scheffer and Annan’s views represent two sides of an ongoing debate over the efficacy of the ICC.

¹ The treaty, which will come into force after 60 states ratify it, was passed by a vote of 120 in favor, 7 against, and 21 abstentions. While the vote was unrecorded, it has been reported that the United States along with China, Iraq, Israel, Libya, Qatar, and Yemen voted against the treaty.

Supporters see it as a solution to the problems of the present haphazard and unsystematic regime for administering criminal justice at the international level (i.e., law is administered through the sovereign nation-state *cum* occasional *ad hoc* international tribunals like Nuremberg, Tokyo, Rwanda, and Yugoslavia). Under the present regime, there is no ongoing deterrent at the international level for core international crimes. Moreover, the present extradite-or-prosecute system functions ineffectively when states experience impediments to prosecuting suspected criminals. Hence, the ICC would be an escape from an anarchic system of international justice. The ICC's detractors cite the problems which a politicized court could create for the community of states. Fears regarding politicized justice revolve around possibilities that states will use the Court as a diplomatic weapon to attack erstwhile enemies, and that such a use of the Court will render it unable to perform even its most basic judicial functions.

Synthesizing prevailing arguments over the merits of a permanent court, it appears that the effectiveness of the ICC in administering international criminal law is being linked to the Court's potential performance under five criteria: 1) its independence from the U.N. and other international organizations, 2) the extent of its jurisdiction over international crimes, 3) the potential for politicizing the Court, 4) the extent to which it is a substitute for the present system of administering international criminal law (the nation-state *cum ad hoc* international tribunals), and 5) potential support from powerful states.² A strong and effective ICC is commonly portrayed as an institution which is independent of the vagaries (most often political) of the U.N. and other international organizations, has broad jurisdiction over international crimes, allows few opportunities for politicizing justice, is a legitimate substitute for the nation-state and tribunals as overseers of international criminal justice, and is strongly supported by powerful states that possess both the resources and political strength to make the ICC a major player in international law. Alternatively, a weak and ineffective ICC is portrayed as an institution with limited autonomy, limited jurisdiction, and which is highly politicized (i.e., used more as a diplomatic weapon than a court of justice).

This article is an analysis of the ICC according to how it fares under these specific criteria. In carefully assessing the ICC with respect to such categories of performance, this article attempts to provide illumination as to the relative merits of competing opinions on the ICC. The article begins with a brief overview of the ICC statute. Section III analyzes the performance of the ICC under the five criteria. Section IV assesses the findings pertaining to these conventional performance criteria and suggests other modes of judging the merits of the court. The major conclusion of this analysis is that while the present statute creates a court which might be considered weak and able to be politicized, according to the standard criteria, it is nonetheless an institution which is not overly flawed.

² The criteria embody both a representative cross-section of the major goals of advocates who have strongly supported the creation of a permanent court, as well as a number of concerns underscored by detractors. See, for example, U.S. Senate (1993), Lawyers Committee for Human Rights (1998), and Gallarotti and Preis (1998). This analysis draws heavily from these works.

II. The ICC at a Glance

The statute creates a permanent international criminal with a seat in The Hague, Netherlands. As the product of an independent treaty, the Court is neither an organ nor officially part of the United Nations network (UN). The Court is to be financed mainly by contributions from state parties as well as from funds provided by the U.N (Article 115). General oversight of the ICC is provided by an “Assembly of States Parties” whose principal responsibilities include electing the 18 judges that will comprise the Court (the judges being people well versed in criminal and international law, and will be divided among three chambers: Pre-Trial, Trial, and Appeals) as well as amending the statute. A special Preparatory Commission will be formed in 1999 to help operationalize the Court by constructing a set of “Rules of Procedure and Evidence.” The Court is comprised of four organs: the Presidency (administers the Court); the Chambers (Trial, Pre-Trial, Appeals), the Prosecutor (examines information, investigates, and prosecutes suspected crimes); and the Registry (non-judicial aspects of administration and service of the Court). According to Articles 1 and 17, as well as the preamble, the ICC plays a “complementary” role *vis-à-vis* national courts in the administration of international criminal law. Essentially, the ICC is intended to come into use when states with jurisdiction over a situation either cannot prosecute and fairly try a case (because the requisite legal institutions are lacking) or when they are “unwilling” to bring suspects to justice (i.e., shield suspects).³ In fact, for a case to be admissible in the ICC under Article 17, states with jurisdiction would have to be either unwilling or unable to bring a suspect to justice. In this respect, the ICC is not an autonomous institution in the administration of international criminal law, but plays a secondary role to national legal systems.

Article 5 gives the ICC automatic jurisdiction over four broad categories of crimes: genocide, crimes against humanity, war crimes, and aggression. With the exception of aggression (which according to Articles 5 and 121, is to be eventually defined by the Assembly of States Parties with respect to establishing criminal liability), the other (core) crimes are defined in Articles 6-8 and include a wide range of acts, mostly consistent with pre-existing definitions contained in international instruments. Once a case is deemed to be admissible, there are several conditions which must be satisfied before the ICC can exercise its jurisdiction. A situation must be referred either by a state party or the United Nations Security Council, or the Prosecutor must have initiated an investigation of a suspected crime (Article 13). In the case of a referral from a state party or Prosecutor’s investigation, either the territorial state (the state in which the crime took place) or the state of which the suspect is a national must be a member of the ICC. In the case neither of these two states is a member of the Court, one of the states would have to accept the jurisdiction of the ICC in order for the Court to claim such jurisdiction (Article 12). Cases referred by the Security Council have no jurisdictional conditions. Article 15 gives the Prosecutor the power to initiate investigations *proprio motu* on the basis of crimes within the jurisdiction of the ICC. Challenges to the jurisdiction of the Court can come from any one of the following parties: the accused, the

³ According to Article 19, the burden of determining the admissibility of cases falls on the ICC.

state with jurisdiction over a case (on the basis of investigating or prosecuting a case), or from a state whose acceptance of jurisdiction is required under Article 12 (Article 19).

Investigation, pre-trial, trial, and appeal functions of the Court have been designed to be fairly independent. Once jurisdiction and admissibility conditions have been met, investigation is undertaken by the Prosecutor. If the Prosecutor determines that sufficient evidence exists to proceed, he/she can then request the issue of an arrest warrant so that suspects can be brought before the Pre-Trial Chamber for a hearing. Hearings *in absentia* would be permitted if suspects cannot be arrested. Should the Pre-Trial Chamber rule that sufficient evidence exists to bring a situation to trial, a Trial Chamber of not less than 6 judges will be convened to hear the case. Trials are intended to be public and conducted only in the presence of the accused.⁴ Suspects are accorded virtually every right under American due process: refrain from self-incrimination, a speedy trial, guaranteed legal assistance, be informed clearly of charges against them, a standard of proof beyond a reasonable doubt, examine witnesses against them, and be innocent before being proven guilty.⁵

The statute contains various provisions that place significant limitations on the jurisdiction of the ICC. First, according to Article 16 any ICC prosecution or investigation can be suspended for a period of twelve months if the U.N. Security Council, acting under its Chapter VII responsibilities (i.e., addressing threats to the peace), so requests. The suspension can be renewed if the Security Council renews its request. As any substantive matter addressed by the Council, such a request would require that no permanent members veto it. Second, the statute allows a seven-year exemption on war crimes to members after they have ratified the treaty (Article 124). Finally, Article 121 (5) provides that in amending Article 5 (i.e., in defining aggression for the purposes of establishing criminal liability), states will *not* be held accountable for any acts defined by the amendments (by their nationals or on their territories) which they do not recognize.

III. Assessing the Five Criteria

Independence

As a product of an independent treaty, the Court enjoys various advantages. It enjoys greater legitimacy than might otherwise be obtainable as an organ of the U.N. where direct links to the institutional super-structure of the Security Council could subject it to criticism. Furthermore, the statute was more easily negotiated since there was less need for direct interfacing between the statute and the U.N. Charter. Making the Court an organ of the U.N. would have required the difficult task of amending the

⁴ Proceedings may be closed to protect witnesses or sensitive information such as might compromise a state's national security. If the accused is disruptive, he/she can be held outside the courtroom and watch proceedings from a television monitor (Articles 64,68).

⁵ One major exception is the possibility of having testimony electronically conveyed in court (without witnesses being present) for the purpose of protecting witnesses.

Charter. But even if the Court were created by a General Assembly resolution, it would have to be supported by a treaty since such resolutions are not legally binding on conduct which is outside of the U.N. Unlike a resolution, a treaty, once ratified, is accorded the force of law in signatory states. Moreover, such resolutions could be revoked or amended, which is inconsistent with the objective of permanence. A treaty also gives states the flexibility of choosing to join or not, rather than having the statute imposed upon them as a result of their U.N. membership.

The independence created by the treaty mechanism is complemented by a fundamentally independent budget. Article 115 (B) mentions the U.N. as an additional source of revenue, especially for cases referred by the Security Council. To the extent that the Court will not be principally financed through the U.N. budget, it will not be a victim of the vagaries which have afflicted the U.N. in recent times. It is not clear however that independence is so desirable in the budget, as independence itself carries risks as well. While it is free of vagaries of U.N. financing, it also fails to enjoy the moral suasion connected to U.N. budgetary commitments. And if early membership in the Court is small, budgetary problems would appear all the greater. Furthermore, vagaries of U.N. finance may spill over into the Court (e.g., countries reducing layouts to all international organizations). Moreover, situational vagaries may emerge, such as those which, according to Preis (1997), threatened the Yugoslavia Tribunal when Europe appeared reluctant to finance the Tribunal in fear that it threatened the peace in Europe. Quite a variety of financing schemes have been suggested, this reflecting great uncertainty about the most feasible means of instituting an effective budget. Should the scheme be ineffective and insufficiently flexible, budgetary problems could be considerable under an independently financed ICC.⁶

Notwithstanding attempts to distance the Court from the institutional framework of the U.N., complete independence will not be possible. This would occur no matter what the statute creating the Court dictated. Since the Court is a treaty-based institution, and Article 103 of the U.N. Charter states that obligations under the U.N. Charter supercede all other treaty obligations, the Court could not override the institutional imperatives of the U.N.⁷ Hence, Articles 5 and 16 which defer to the Security Council's jurisdiction over matters of peace and war are redundant since according to the Charter the Council has ultimate jurisdiction over such matters. Furthermore, Articles 13 (B) and 16 give the Council broad powers of involvement in international crimes since the Council can trigger the Court's involvement by referring a matter, it can block Court involvement by requesting a 12-month deferral of a case, and of course in cases involving crimes of aggression the Council maintains an uncontestable jurisdiction over determining and dealing with such matters.

⁶ These problems are underscored in United Nations, Report of the Preparatory Committee [hereafter PrepComm] V. I (1996, p. 10).

⁷ Article 103 states that in the "event of a conflict" between U.N. obligations and the obligations imposed by any other international agreement, the former will "prevail" over the latter.

Even with core crimes (genocide, war crimes, and crimes against humanity), the Security Council would possess broad *de facto* possibilities for involvement. This is due to the fact that there are no clear definitions of what constitutes aggression for the purpose of establishing individual criminal responsibility, either in the U.N. Charter or outside of the Charter, so that the Council would have broad interpretive powers to initiate involvement even in core crimes.⁸ This is due to the fact that Article 39 of the Charter grants the Council the right “to determine the existence of any threats to the peace.” While Article 5 of the statute calls for a definition of aggression to be constructed and used to administer criminal law involving aggression, such provisions must be consistent with Chapter VII provisions of the U.N. Charter. Historically, the core crimes have tended to take place in environments involving armed conflict and large-scale violence, so the Council’s jurisdiction over matters of war and peace could be invoked in many instances, even those involving internal conflict. Hence, the effectiveness of the Court would depend on the configuration of political interests among the great powers given these *de facto* “gatekeeping” functions accorded the Council in the statute and the U.N. Charter. In this respect, the Court is not an exception to the rule of power politics: its effectiveness depends upon the political will and cooperation of the leading players in world politics. This would suggest numerous possibilities for politicizing issues of international criminal justice, which legal purists deplore.⁹ We discuss the merits of this purist view below.

Jurisdiction over International Crimes

In terms of coverage, the Court has broad jurisdiction over international core crimes (genocide, crimes against humanity, and war crimes). In addition to being empowered to address crimes of aggression, something considered to be a great victory for advocates of a permanent court, the statute makes some major strides in the areas of war crimes and crimes against humanity. It specifies a broader array of crimes than presently exists in international instruments (crimes such as forcible transfer, forced disappearance, and sexual slavery are included). The statute expands criminal accountability into the area of sex-related offences (forced prostitution, forced pregnancy, sexual slavery) and expands humanitarian law by penalizing conscription of youth. Also, the statute clearly applies war crimes to cases of internal conflict, and applies crimes against humanity outside of armed conflict. This application outside of cases of international conflict and armed conflict has been fueled by provisions in the Geneva Conventions and Protocol II, as well as the precedents set in the Rwanda and Yugoslavia Tribunals. The Rwanda precedent suggests that war crimes can be prosecuted even when they do not involve armed conflict or in cases of internal conflict. The Yugoslavia

⁸ A General Assembly resolution in 1974 did define aggression for the purposes of state-to-state relations, but not in the context of individual crimes.

⁹ This view is especially evident, for example, in Committee on International Law (1997, pp. 109-112).

Tribunal applied crimes against humanity to both situations of armed conflict as well as peace.¹⁰

Such advances, however, are counter-balanced by various limitations. The crime of aggression presents the most difficulties. While there is general agreement on the definition of genocide, no such consensus exists on the crime of aggression for the purpose of establishing individual criminal responsibility. It would be difficult, for example, to distinguish between aggression and humanitarian intervention. Article 5 mandates that the Assembly of States Parties come up with a definition of aggression and agree on conditions under which the Court will have jurisdiction over such crimes. Irrespective of the fact that this will be difficult, as no such definition presently exists in international instruments, no definition can limit the Security Council's absolute jurisdiction over defining and dealing with aggression. This preserves the extensive possibilities for politicizing international justice.¹¹ But crimes of aggression do invariably involve political issues, and it is questionable whether an ICC alone could possess the institutional mechanisms required to deal effectively with such situations (i.e., blind justice is insensitive to politics as well).

The expanded jurisdiction of the ICC over core crimes is hedged by high thresholds and other limitations which are generally inconsistent with present instruments of international law. In the case of crimes against humanity, the crimes must represent, according to Article 7 (1), a "widespread or systematic attack directed at any civilian population, with knowledge of the attack." The terms "widespread" and "systematic" place a burden on the Court to prove that the crimes were either extensive or rationally orchestrated (i.e., which would rule out smaller-scale and idiosyncratic crimes). Actually, the term "attacks directed" is defined in Article 7 (2) (A) in such a way as to require the attacks to be *both* systematic (based on a "State or organizational policy") and widespread ("multiple commissions") acts, hence the *de facto* threshold is much more severe. Specifying a "civilian population" excludes crimes against mercenaries and combatants. The expectation that there was prior knowledge of the crime creates further roadblocks in prosecution. Article 8 (1) is similarly restrictive with respect to war crimes as it designates such crimes as acts which are the result of "a plan or policy or as part of a large-scale commission of such crimes." Once more, the burden would be on the Court to prove that crimes are of sufficient coverage or are the results of some systematic strategy. This threshold is inconsistent with existing international instruments, hence it deviates from present international law in a more restrictive way. While the term "in particular" (that the ICC has jurisdiction over such war crimes in particular) apparently

¹⁰ The ruling in the Appeals Chamber of the Yugoslavia Tribunal on the Tadic case held that customary international law would not restrict crimes against humanity only to armed conflicts. See Committee on International Law (1997, pp. 102-104), PrepComm V. 1 (1996, p. 20), International Law Association (1997, p. 169), and United Nations, Report of the International Law Commission [hereafter Report of the ILC] (1994, p. 75).

¹¹ See, for example, U.S. Mission to the U.N. (1995, p. 3), Hall (1997, p. 179), and Pejic (1995, p. 1765). It is not clear however that sensitivity to politics is undesirable in cases with large-scale political and conflictual consequences. We discuss this below.

gives the ICC some flexibility, the presumption is that jurisdiction will be restricted to war crimes that are widespread and systematic.

Language in Article 8 also restrictively defines specific crimes within the Court's jurisdiction: paragraph 2 (A) (IV) cites attacks on civilian populations "in the knowledge" of the potential damage, and it cites "severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantages anticipated"; paragraph 2 (C) cites "serious" violations in cases of non-international conflict ("serious" is not presently defined under international law); and paragraph 2 (F) cites internal conflict as having to be "protracted." While war crimes are recognized outside of the context of international war, Article 8 (2) (F) excludes "situations of internal disturbances and tensions" such as riots and isolated acts of violence, which would leave many loopholes in cases of smaller-scale conflict and violence. Finally, provisions against the use of weapons of mass destruction as well as chemical and biological weapons have been excluded.

Some major loopholes in the areas of war crimes and crimes of aggression are created by Articles 5, 121, and 124. Article 124 allows each state party a seven-year (after it ratifies treaty) exemption on war crimes. Hence, for seven years a state party need not accept the jurisdiction of the Court over a war crime when committed by a national or on its territory. Article 5 (2) postpones jurisdiction over crimes of aggression until the Assembly of States Parties comes up with a definition related to establishing international criminal responsibility. Article 121 (5) states that in amending Article 5 (specifically, amending it by defining aggression in the context of individual crimes and devising criteria for jurisdiction over such a crime), any state party that does not accept the amendment is not bound by the jurisdiction of the Court with respect to actions relating to the amendment. This would exempt states which did not accept the prevailing definition of aggression from being accountable to the ICC for such actions. Moreover, should the amendment include other crimes (such as treaty-based crimes), non-supporting states would not be subject to the jurisdiction of the Court as well. These exemptions solved some touchy diplomatic problems in negotiating the treaty. The exemption on war crimes was proposed to make the treaty more attractive to France and the U.S.: the U.S.' main concern was with the treaty's impact on its military actions around the world. Exemptions on aggression assure that states are not restricted in the uses of military force which they consider justified (i.e., just wars). Such loopholes allow discretion over attending to national security, and are therefore to be expected in such a statute.¹²

There is an interesting asymmetry in the criminal jurisdiction of the Court in that some of the crimes (war crimes and genocide) are the subject of broad networks of multilateral agreement, while other crimes (aggression and crimes against humanity) are neither as elaborately defined nor governed. This suggests interesting possibilities for the development of law under the Court. Jurisdictional and interpretive points of conflict could be numerous with established agreements and precedents in the case of the former crimes. This will make the interpretation of such crimes less autonomous and perhaps

¹² Articles 73 and 93, in fact, allow member states to withhold compliance for national security reasons.

more rigid since the Court will have less leeway to change laws (previous agreements make for stricter interpretations). With the latter crimes however, the fewer agreements create greater possibilities in forming and reforming law. Hence the potential for the development of law is skewed in favor of the latter categories of crime: aggression and crimes against humanity.¹³

The jurisdictional structure sets up an initiation mechanism that conforms well to the anarchic structure that underlies the current practice of international criminal law. Parties with principal interests in any given case must be on board (i.e., accept the jurisdiction of the Court) for the ICC to initiate a procedure. It would be difficult for the Court to function very effectively, under the current statute (given its dependence on political will), without the permission of involved states. Void of a case referred by the Security Council, either the territorial state (where the crime was committed) or the state of the suspect's nationality (i.e., the state of nationality, or nationality state) has to be a party to the statute for the ICC to have jurisdiction. In a case where neither state is a party to the statute, and the Security Council does not refer a case, one of them must consent to the Court's jurisdiction. Cases of great power involvement through referral by the Security Council have no consent requirements since initiatives backed by such powerful states would be politically difficult to resist. Outside of Council referrals, while only one state need accept the jurisdiction of the Court, the complementary role of the Court effectively guarantees that all involved states (i.e., that have a legitimate claim to jurisdiction) be on board before a case goes to the ICC. Because of a clear deference to national systems, contesting jurisdiction will be difficult for the ICC (even though it bears the burden of deciding jurisdiction). Such challenges by the ICC would have to be marshaled either on accusations (nations are not sincere in adjudicating suspects), which would prove a daunting diplomatic task, or founded on extraordinary conditions which rarely occur (national institutions are lacking). In the latter case, what government would admit that it lacked the means to administer its laws?

The main exception to the law of power politics in the initiation process appears to be the *sua sponte* power of the Prosecutor to undertake investigations. But even such investigations need be approved (through membership or consent) by the territorial or nationality state, and such investigations are no more robust in the face of competing jurisdictional claims by involved states.

After much controversy in negotiations over what crimes would fall under the jurisdiction of the Court, treaty based crimes such as hijacking, drug trafficking, and terrorism were excluded from the statute. The exclusion of treaty-based crimes solved some difficult problems among negotiators. Most of these non-core crimes are widely addressed by national systems of law, thus making international adjudication redundant. Their frequency would require abundant time and resources which would certainly tax even a well-financed court. Furthermore, problems of interpretation and enforceability would have emerged because of the lack of consensus upon the definitions of these crimes. Delineating what constitutes terrorism for example would be a difficult and contentious task at best (i.e., distinguishing terrorism from rebellious acts of self-

¹³ This issue is discussed in Report of the ILC (1994, p. 77).

determination would be difficult). With so many differing expectations about the nature and significance of treaty-based crimes, any administration of such law would be problematic. The issue of sovereignty also arises in the context of treaty-based crimes. Just as states have prioritized and subsequently addressed these crimes according to their own particular interests and goals, any multilateral scheme which is proposed as a substitute would likely conflict with a variety of national standards. This is most evident in the U.S.'s historic opposition to the inclusion of treaty-based crimes, an opposition which emanates from a fear of losing some autonomy over crimes which especially afflict Americans. Finally, the treaties define a wide range of conduct, much of which does not constitute broad international concerns when taken in isolation. In fact, many of the treaty crimes would not constitute "serious acts" as conceived by norms regarding international crimes.¹⁴

Potential for Politicization

Legal purists have strongly voiced a desire for an ICC that functions in an a-political manner. The Court should, according to their arguments, pursue justice based on recognized standards of international law and avoid as much as possible situations that allow political considerations to intermingle in the functions of the Court. In other words, the Court can only function effectively if it carries out blind justice. Unfortunately for such purists, the statute opens up a plethora of avenues through which the functions of the Court can be politicized either by individuals, states, or the Security Council of the U.N.

The Security Council has various points of entry which would allow it either to block cases by requesting a deferral, or initiate cases by referring a situation. As an initiator, a Security Council referral carries no jurisdictional acceptance requirements under Article 12, unlike referrals from states or prosecutorial initiations which are limited by such requirements. Moreover, the authority which the Council enjoys over matters of peace and war under the U.N. Charter provides it a great deal of latitude in involving itself in cases. States too have numerous points of entry from which politically-motivated initiatives can be marshaled. Member states can make specific complaints against individuals, or refer situations to the Court. If states are involved parties in a situation (based on nationality, territoriality, or custody of a suspect), they could claim jurisdiction over the case themselves. Non-members could withhold consent, thus keeping a matter out of the Court. States may also employ less direct means in attempting to bring politics to bear on a situation (e.g., convince involved parties to withhold jurisdiction or compliance, influence Security Council members to request deferrals).

¹⁴ One of the U.S.'s main reservations over placing drug trafficking on the list of ICC crimes emanated from a concern over potential forfeiture. On the problem of treaty-based crimes, see especially PrepComm V. I (1996, pp. 25-27), Report of the ILC (1994, p. 68), International Law Association (1997, p. 165), U.S. Mission to the U.N. (1995 and 1996), and Committee on International Law (1997, pp. 105,106).

The present statute grants the Prosecutor much leeway in conducting investigations (the statute is not highly specific about the conduct of investigations).¹⁵ Similarly, the Pre-Trial Chamber has much latitude in overseeing indictments. Although some internal safeguards against politicized investigations and indictments have been constructed, the leeway enjoyed by both Prosecutor and the Pre-Trial Chamber at this stage of a procedure open up various such possibilities. The President has substantial power both at the trial and appeal levels, given that the he/she appoints judges to the Trial Chamber and sits on the Appeals Chamber.

While the statute gives much leeway for political abuse of justice, the standards of justice which it contemplates are fairly unassailable.¹⁶ Guidelines governing investigation and indictment provide very careful and thorough consideration of each case. There is an elaborate screening process for indictments in the Pre-Trial Chamber. This Chamber carefully oversees investigation, arrest, and detention and has broad powers to act under its own accord if it disapproves of the way in which the Prosecutor is conducting the case. It appears the statute has been effective in creating separation between the prosecutorial and trial functions of the Court. Provisions for the trial process feature a great many commendable properties in terms of creating institutions which can fairly and competently deal with international criminal cases. Judges will be experienced in international and criminal law, they will be independent of national governments (i.e., can't hold posts in national government), and will be selected under full respect for geographic and gender representation. Guidelines for trial procedure appear to fundamentally (with some important exceptions) respect the rights of the accused in a manner that accords with American due process: defendants will have ample opportunity to present their cases under procedures and laws which are fair and not arbitrary.¹⁷ Penalties are to be commensurate with crimes, and they will be imposed with ongoing sensitivity to the national standards of the parties involved. Extensive venues are available for appeal.

Notwithstanding the statute's grounding in American due process, it does feature what some might consider significant deviations. The accused can be re-tried under an appeal from the Prosecutor, a suspect can be re-tried by the Court even though he/she was acquitted by a national Court (if the ICC determines that the national trial was not genuine), and testimony against the accused can in some instances be conveyed electronically without the witnesses present in court.¹⁸ Notwithstanding the latter rule, the

¹⁵ While Rules of Procedure and Evidence would delineate such conduct, it is not clear how specific they will be when drafted.

¹⁶ In hammering out trial and pre-trial procedures the negotiators worked hard to meld common and civil law traditions while remaining consistent with international instruments delineating due process. Although this was an impressive task, it was made far less onerous by the fact that international standards of due process are strongly grounded in those same customary and civil law traditions (i.e., western law).

¹⁷ The present statute is most directly based on the International Covenant on Civil and Political Rights, which itself is grounded in American due process.

¹⁸ The double-jeopardy implications of such provisions are problematic. Many would deny that double-jeopardy can exist when suspects are acquitted by sham trials.

statute lacks specific guidelines for a witness protection plan, which would be essential for prosecutions to be effectively carried out.¹⁹ Lack of forceful provisions also render the arrest and extradition functions of the Court rather flimsy at best. There are no specific penalties (aside from reporting noncompliance to the state parties or the Security Council) which would pressure in-compliant states to extradite or arrest suspects.

A Substitute for the Nation-State and Tribunals

Advocates of a permanent court have traditionally desired an institution that provides a substitute *for* rather than a continuation *of* the prevailing regime for addressing international crime (i.e., a substitute for the nation-state and *ad hoc* tribunals). The prosecution and adjudication of international crimes has traditionally been conducted through the sovereign nation-state. Hence an effective ICC, under this criterion, would provide some alternative to the state as a world policeman and court. States have had difficulty in effectively administering international law through the present extradite-or-prosecute system that prevails for a variety of reasons: states are reluctant to extradite, domestic laws do not cover relevant extraterritorial crimes, institutions for prosecuting or adjudicating crimes are lacking, civil war or unrest makes it difficult to prosecute specific individuals, the accused are former heads of state, and custodial states are either biased in favor of or against the accused. In such situations the only alternative to the nation-state has been *ad hoc* tribunals which have been created under the jurisdiction of the U. N. Security Council, or created by powerful states in the aftermath of World War II. These tribunals have been few and fraught with a variety of institutional limitations relative to a permanent court.

A permanent court has several advantages over such tribunals. First, it would provide an ongoing deterrent against crimes which might not otherwise exist under temporary tribunals. Since tribunals have tended to be manifestations of fairly high-level disturbances in international politics (i.e., international wars or civil wars), those acting in environments in which the disturbances are at a lower level of salience might act with greater impunity. Given that crimes have been extremely pervasive at lower levels of salience, a permanent court should have a greater deterrence effect than *ad hoc* tribunals.²⁰ Second, a permanent court, unlike a tribunal, would allow a continuous development and application of international criminal law. Such development of law

Furthermore, some national systems of law do allow acquittals to be re-tried in different jurisdictions (e.g., federal versus state jurisdiction in the U.S.).

¹⁹ The Yugoslavia and Rwanda Tribunals have demonstrated the difficulty of prosecuting suspects on the most serious charges because witnesses have feared retribution. See Scharf (1997). Article 43 establishes a Witnesses Protection Unit, but is not highly specific about instruments which would be used to protect witnesses.

²⁰ In this respect one can cite all of the human rights abuses that have not generated tribunals: Angola, Burundi, Cambodia, Uganda, Haiti, Yemen, Sudan, Ethiopia, East Timor, Iraq, El Salvador, Honduras, Tadjikistan. Scharf (1997) notes how Hitler was emboldened in his genocidal rampage by the fact that no one was held accountable for the Armenian genocide in the early 1900s. See also Podgers (1996, p. 54).

across *ad hoc* tribunals is lumpy at best. Third, unlike a tribunal, a permanent court would not be subject to the criticism of *post-hoc* justice (*nullum crimen and poena sine lege*, or, no crime and punishment without law).²¹ Fourth, the start-up process is very costly and time-consuming for *ad hoc* tribunals relative to the maintenance costs for a permanent court. Some argue that the costs and difficulties of maintaining the Rwanda and Yugoslavia Tribunals have discouraged the Security Council from undertaking further such activities in the near future (i.e., “tribunal fatigue”).²² Finally, while an ICC might lack legitimacy for some countries on occasion because of specific rulings, it might enjoy greater systematic legitimacy than tribunals which have tended to be targets of criticism because they have originated directly from great-power police actions (by either members of the Security Council in Yugoslavia and Rwanda, or winners of World War II with Tokyo and Nuremberg). This consideration was important in moving negotiators to establish the Court through a multilateral treaty rather than in the framework of the Security Council, thus making a sharp institutional distinction between an ICC and a tribunal (i.e., the Court would thus be more difficult to use as a pawn in the game of power politics).

While the ICC has several advantages over tribunals such as those in Rwanda and Yugoslavia, it is considerably weaker in one respect. The tribunals have enjoyed “concurrent jurisdiction” *vis-à-vis* national courts (i.e., had the right to contest the jurisdiction of national courts), while the complementary role of the ICC denies it such power. Furthermore, the complementary role which is envisioned for the Court also promises to make serious inroads into the autonomy of the Court over international crimes. While complementarity renders the Court’s principal mission an ancillary or auxiliary one, it is nonetheless necessary because it solves several extremely thorny problems which if not addressed could jeopardize the very existence of a permanent court. First, it keeps the burden of prosecuting many common transgressions in national courts, thus preserving the Court’s resources. Second, it diffuses problems of cooperation owing to differing standards of justice across party states. Since the principal burden of prosecuting international crimes will remain with national systems, states need not insist that international standards of justice exactly conform to their own. Third, it preserves national sovereignty over crimes (other than core crimes) to which states are especially sensitized. That states will have the right to prosecute crimes first is extremely important because states are especially affected by specific crimes, hence they would not want to relinquish the prerogative to deter and punish such crimes. This, for example, accounts for America’s historic reluctance to include treaty-based crimes in the statute: the U.S. would not want any impediments in dealing unilaterally with drug trafficking and terrorism, two important targets of U.S. foreign policy.²³

²¹ During the Yugoslavia Tribunal proceedings, it was reported that the judges were creating laws and procedures in hallway chats. See Jamison (1995, pp. 437,438) and Perera (1994, p. 300).

²² Tribunal fatigue is discussed in Lawyers Committee for Human Rights (1998).

²³ On the complementary role of the ICC, see PrepComm V. I (1996, pp. 36,37) and Politi (1997, pp. 141-47).

The actual way in which the complementarity norm will be operationalized appears bounded by two extremes. A loosely specified corollary role with more limited overview of national courts would create opportunities for sham trials, as well as place the Court at a great disadvantage in competition for jurisdiction with national courts. A more prominent role with elaborate overview would be difficult to operationalize. As it presently stands, the statute predicates the complementary role of the Court on vague guidelines: Article 17 states that the Court will defer to national systems that are either investigating or prosecuting cases, unless their national courts are “unable” or “unwilling” to investigate and/or prosecute. While the term “unwilling” is specifically associated with attempts to shield the suspect from justice, specific language which would provide clear and uncontested guidelines for declaring a state unwilling is missing from the statute. Similarly, specific guidelines for determining “inability” are also lacking. According to Article 19, the responsibility for establishing the Court’s jurisdiction falls onto the Court itself. While this appears to place the burden of determining jurisdiction on the Court, its complementary role renders that power much more circumscribed since that role underscores the primacy of national systems.

International Support

International support will be crucial to the Court for several reasons. First, the Court depends largely on nation-states for the operationalization of its mandates. In essence, states are essentially administrators of justice for the ICC. This is largely due to the fact that the statute makes the Court rely on the compliance of states at every stage of a legal procedure: the provision of evidence, arrest, identification of witnesses and suspects, transfer, extradition, enforcement of judgements, and rules of speciality. The present statute grants states much leeway with respect to compliance.²⁴ The precise requirements dictating how states will carry out the Court’s mandates are not highly specific. In fact, Article 93 (3) provides that where national laws prevent a state from complying with a request from the Court, the Court shall change the request. Member states may even refuse to cooperate with the Court if they feel it will compromise their national security (Articles 73 and 93). Aside from provisions establishing the admissibility of cases (Articles 17-19), neither is the statute highly specific about how the complementary role of the ICC will be administered. Hence, states will enjoy great leeway in how they interpret claims of jurisdiction. With respect to provisions enforcing compliance, the statute contemplates no specific penalties for non-compliance: provisions merely hold that states reluctant to comply with the Court’s mandates will be reported to the “Assembly of States Parties,” or to the Security Council if the Council originally referred the matter (Article 87). As for non-members, there are no specific provisions in the statute for facilitating compliance from such parties, Article 87 merely states that such parties “may be invited to cooperate” with the Court.

²⁴ Crossette (1997), Meron (1997, p. 3), Bucyana (1996), Scheffer (1996, p. 45), and Warrick (1997, p. 41) all underscore the degree to which the Yugoslavia and Rwanda Tribunals were hampered by lack of cooperation among involved states.

Second, as an independently financed institution it will rely on states for financial and logistical support. *Ad hoc* tribunals, from Nuremberg to Rwanda, would have been impossible without the support of powerful states. Third, much is still left to negotiate in order for the ICC to become operational. The Preparatory Commission will begin deliberations in 1999 for the purpose of constructing “Rules of Procedure and Evidence” which will be necessary for the Court to carry out its judicial functions. Moreover, a number of amendments will have to be undertaken in order to make the statute effective. The statute, in fact, mandates such amendments. The amendment process through which the statute will be refined and operationalized appears cumbersome and unable to deliver timely changes without the emergence of a strong critical mass of diplomatic support from powerful states. Adoption of amendments requires approval from at least two-thirds of the state parties. The language in Article 121 (3), however, suggests that a consensus will be preferred. Diplomatic norms would suggest consensus will be sought vigorously because institutions which rely on the cooperation of sovereign states function poorly in the face of a disgruntled minority of state parties. Amendments will enter into force for all state parties one year after seven-eighths of the parties have ratified them. No amendment can be proposed until seven years after the treaty comes into force. Even speedy ratification still leaves the first amendments a long way from activation. Hence, the process of operationalizing the statute and the need for cooperation in enforcing the mandates of the Court will rely heavily on the amount of diplomatic pressure which supporters are willing to bring to bear on the community of nation-states. Will such support be forthcoming?

The negotiations in Rome showed strong and widespread support for a permanent court among the community of states, with only seven states voting against the treaty (120 in favor and 21 abstentions). Unfortunately for advocates of the Court, the one state most crucial to the success of the Court (the U.S.) did not support the statute.²⁵ The track records in both the Yugoslavia and Rwanda proceedings have demonstrated just how crucial the logistical and financial support of the U.S. has been to the administration of international law through international tribunals. The ICC would be no exception, especially given that contributions to support the Court will be collected according to the U.N. formula, which would place the U.S. in the role of principal donor.

The U.S. position at the Rome Conference was in stark contrast to its traditional position on the ICC throughout the 1990s. It had been a leading, if not *the* leading, supporter of the Court. Congress had consistently funded the tribunals in Rwanda and Yugoslavia. In 1993 a joint resolution adopted by the Committee on Foreign Relations placed Congress on record as supporting the idea of a permanent court. Furthermore, American negotiators had been at the forefront of preparatory initiatives to construct a workable statute for the Court throughout the mid-1990s. Even Clinton, before being beset by the Starr investigation, was a strong advocate of a permanent Court.²⁶ All such support had essentially withered by the summer of 1998. The position

²⁵ Aside from the U.S., however, diplomatic support for the Court has been strong in the G-7.

²⁶ While Bush was rather cool on the idea of a permanent court, Clinton spoke out strongly for an institution that prosecuted “serious violations of international law.”

of the U.S. at the Rome Conference essentially embodied the major reservations held by opponents of the Court in American politics: losing jurisdiction over crimes involving Americans. In this respect, the U.S. had reservations both as a member and as a non-member of such an institution. A specific concern, which strongly reflected the input of the Pentagon and Republican Congressmen, was with the possibility that Americans involved in peacekeeping operations overseas would be subject to investigation and prosecution under laws and procedures which lacked the full U.S. constitutional guarantees.²⁷

While support for the ICC is presently at a low in American politics, there are a number of reasons to be enthusiastic about future U.S. support. First, much of the current decline in support is the function of situational circumstances in American politics. Support in both the Executive branch and in Congress that would have been forthcoming to counter reservations by the Pentagon and Republican Congressmen has been diminished by the Starr investigation. Hence, the President and Democrats in Congress who might have fought for the Court have been sidetracked. Second, while U.S. diplomacy is marked by a tendency of not signing or ratifying international human rights conventions, the U.S. has nonetheless been the greatest advocate in the promotion of the respect for human rights in the 1990s. Secretary of State Albright (1996), in fact, has placed the pursuit of international human rights along side of peace and democratic reform as one of the three major foreign policy goals of the U.S., and there has been a strongly shared sentiment in both the State Department and the Executive branch that promoting human rights is an important means of achieving the other two goals. Hence, human rights promotion presents itself as an important tool of foreign policy to many elite policymakers in American government.²⁸ But even if human rights promotion proved to be a less useful tool of foreign policy, it would be hard to square the rhetoric of supporting international human rights with a policy that cuts in the opposite direction in a democratic state such as the U.S. Such pockets of hypocrisy are visible to the American masses, who tend to support international human rights.

Finally, it appears that U.S. concerns about the dangers of the ICC for Americans are exaggerated. Either as a member or a non-member of the Court, the U.S. would have no less jurisdiction over crimes involving Americans (committed by Americans or committed on American territory) than it already enjoys under the present extradite-or-prosecute regime. The complementarity provision would give the U.S. clear jurisdiction over crimes committed either by Americans or on American soil. The U.S., of course, has the same jurisdictional claim under the present system of international criminal law. Furthermore, since the statute appears to honor prevailing norms regarding

Quoted in Committee on International Law (1997, p. 115). On Bush's position, see U.S. Senate (1993, pp. 8,9).

²⁷ On the U.S. position, see U.S. Senate (1993, pp. 18-29, 77-87), Scheffer (1998), and Helms (1998).

²⁸ The U.S. has indeed made use of the international law/human rights "card" in pursuing its geo-strategic goals around the world. China, Iraq, and Panama are glaring examples of attempts to gain political leverage through the promotion of international law and human rights. See Shattuck (1995 and 1996).

jurisdiction over international crimes, the existence of the ICC would not affect U.S. jurisdiction over situations in which it was not an involved party (extra-territorial crimes committed by non-Americans), which in this case would be almost none. Still, under the statute, the possibility exists for states to refer cases involving Americans or for the Prosecutor to undertake investigations involving Americans *proprio motu*. As an involved party, the U.S. would have jurisdiction over such a situation, but would have to satisfy the admissibility provisions of the statute (Articles 17-19) and investigate or prosecute the case. This would give politically-motivated enemies of the U.S. the means of forcing the U.S. into some kind of legal action it would not otherwise have undertaken. But repeated use of the ICC for such political annoyance over cases without substance is self-defeating because the Court would quickly lose legitimacy and consequently support. If the cases actually do involve serious human rights abuses on the part of Americans, then the argument that the U.S. would not want to investigate or prosecute appears indefensible. Moreover, the present concerns on the part of conservative Congressmen regarding the lack of Constitutional guarantees facing American nationals under an ICC also appear somewhat overblown. Since the ICC is not an instrument of the U.S. government, it would not be subject to the expectations under U.S. law. The preponderance of legal precedent in the U.S. makes foreign and international tribunals independent of the U.S. Constitution. Since the U.S. does not demand that foreign courts honor U.S. Constitutional guarantees when trying Americans, neither can it demand that the ICC honor such guarantees.²⁹ But given that the ICC statute is strongly grounded in American law (i.e., honors principles of due process), because existing instruments are founded on western law, Americans would enjoy virtually all such guarantees anyway.

IV. The ICC: Weak but not Flawed

In terms of the five criteria discussed above, it appears that the statute has created what could be considered a “weak” institution, i.e., an organization that lacks the institutional autonomy necessary to impose its will on sovereign nation-states. Moreover, the statute allows significant possibilities for states and individuals to politicize justice. In this respect, the ICC is typical of most international organizations: the limits it places on national sovereignty are modest, the leeway states enjoy under the statute is pronounced, penalties for non-compliance are vague and mild, mandates can be politicized, and reform is cumbersome.

While the ICC may be weak and open to the vagaries of politics however, it would be incorrect to call it overly flawed. Referring to the ICC as flawed, because of such characteristics, suggests three limitations in judging the Court: 1) exaggerated fears about the consequences of allowing politics into the international judicial process, 2) unrealistic expectations about what diplomacy can presently achieve in the area of

²⁹ Helms and Williamson marshal the Constitutional critique in U.S. Senate (1993, pp. 18-25). The interpretations of Henkin (1972) and Marquardt (1995) strongly rebut such a critique.

international criminal law, and 3) an under-appreciation of the virtues which a weak and politicized ICC can carry.

Legal purists, who have desired a permanent court which functions according to principles of blind justice, have been outspoken about the dangers of a statute which allows significant room for politics. The voices from the purist camp have called for a court which departs “from the summary judgements of power politics,” hence avoiding the mistake of “co-mingling” politics and justice.³⁰ Given that such possibilities for politicizing justice exist under the present statute carved out in Rome, it would appear all too tempting to view the ICC as seriously flawed. However, careful consideration of just how politics could co-mingle with justice under the statute suggests that politics need not become a serious impediment to the administration of justice, in fact it could even become a positive force with respect to the spirit of justice.

To expect the first iteration of a permanent court to be significantly divorced from politics is unrealistic. Given the impact which international crimes have on national interests, creating a fundamentally depoliticized court would be asking states to give up far more sovereignty over crucial issues than they would be willing to lose at the present time. The fight over the inclusion of treaty-based crimes represented such a dynamic in microcosm. States are especially affected by certain crimes, hence would not want to cede jurisdiction entirely to an international organization.³¹ The crimes over which the ICC does enjoy automatic jurisdiction often involve large-scale violence and international conflict. Seriously limiting national involvement in such situations would mean that states are also limiting their ability to manage their national security. But even if states were to agree in principle on a statute that effectively blocked the intrusion of politics into considerations of justice, such a statute would be difficult to construct, and if constructed, difficult to operationalize. Irrespective of the provisions of any statute, it would be impossible to guarantee that the legal actions of individuals and states were not influenced by political considerations. Ironically, David Scheffer (1996, pp. 38, 39), whose reservations (as head of the U.S. delegation at Rome) about the ICC were strongly founded on the potential for enemies of the U.S. using the Court as a political tool, himself averred that “international judicial intervention can never be completely isolated from politics.”

It is not clear, however, that because justice *can* be politicized, it *will in fact be* politicized. It is one thing for the statute to open up windows for politicizing justice, and quite another thing for states to take advantage of those windows in ways that obstruct justice. Ultimately, the political use of the Court is self-defeating for the perpetrators. As individuals (e.g., President and Prosecutor), the perpetrators will lose the confidence of states. Consequently, their effectiveness will be compromised, and their positions

³⁰ Quotes are from Ramtane Lamamra and Mohamed Marti. See U.N. Press Releases GA/L/2880 (November 2, 1995, p. 3) and GA/L/2879 (November 2, 1995, p. 8). On legal-purist arguments, see also International Law Association (1997) and Committee on International Law (1997).

³¹ The U.S., for example, would not want to rely on an international court to protect its citizens against crimes of terrorism and drug trafficking.

ultimately forfeited. Similarly, states that use the Court as a diplomatic weapon will also find that such actions, especially if repeated, will place them in an inferior position with respect to making use of the instruments of the Court. For such states, this abuse will lead to their marginalization as members. Should such abuse become rampant among a larger group of states, then surely the ICC would lose legitimacy among the greater world community. In all such cases of political abuse of the Court, the actions would be self-defeating because reliance on the Court as a diplomatic weapon would create a backlash which would cause such a weapon to be taken away.

Aside from exaggerated fears about the impact of such “bad” politics on the ICC, critics who decry the co-mingling of justice and politics also tend to both espouse an unrealistic vision of the law as well as discount the virtues of co-mingling politics and justice. Opinions on what constitutes justice tend to be quite varied across individuals and states. Invariably, systems of national law are founded on principles which are both legal and political. In fact, legal principles are always embedded in greater political and social goals (minimize serious crimes, preserve an orderly society, etc).³² Hence, the idea that principles of justice are autonomous and independent of other considerations conflicts sharply with reality.

Given that principles of justice could be founded on greater political and social goals, it is clear that not all political acts which might bear on the operation of the ICC need be dysfunctional, i.e., some political considerations can actually be considered “good” in that they facilitate the spirit of justice. War crimes, genocide, aggression, and crimes against humanity all take place in highly political environments. As a court of justice, therefore, the ICC would be intervening in cases with major geo-strategic implications. While the execution of blind justice could certainly serve greater political goals in those cases, it could also lead to situations which result in greater political instability (prolong disputes, intensify conflict).³³ In such cases, the spirit of justice (i.e., protect individuals from harm, promote peaceful relations, facilitate retribution) could actually be compromised if criminal cases were handled in a way that was insensitive to the political exigencies of the specific geo-political situations. In such situations, the practice of international justice could be promoting cures which are worse than the diseases.³⁴

³² For example, the American practices of trading immunity to lesser offenders for testimony and placing the burden of proof on the prosecution in criminal cases would, by the standards of legal purists, tolerate a great number of injustices since under such practices many offenders would be escaping punishment for their transgressions.

³³ Just as courts exist as substitutes for private acts of vengeance, in environments fraught with conflict, they can also provoke acts of vengeance.

³⁴ While the Yugoslavia Tribunal received much criticism for conducting justice according to principles of political expediency, it is clear that its conduct was quite consistent with building a peace settlement which ended an extremely bloody war. Moreover, while the pattern of indictments did not conflict with the diplomatic requirements needed to forge a settlement to the conflict during the period of the Dayton negotiations (i.e., leaders most important to the settlement were spared indictments), it is still possible to bring such individuals to justice. In fact, the pattern of indictments

Just as it is unreasonable to think that the statute forged in Rome could contemplate a court which offered few venues for the expression of politics, it is similarly unrealistic to think that such a court could be fully autonomous in the administration of international criminal law. While redistribution of power from nation-states to the Court is possible over time, it is too much to expect major intrusions into national sovereignty in the initial treaty. For the same reasons that states want to preserve windows of opportunity for bringing politics to bear on the exercise of justice, they also want to maintain influence over situations which affect their national interests. Anarchy (i.e., no international institutions as yet challenge the autonomy of the nation-state) is still very much the rule in international relations, which essentially means that all international organizations work within a prevailing power structure which is dominated by the nation-state rather than existing above the nation-state. Given that such a reality should make advocates of a permanent court more modest in their expectations, it is possible that even the most extreme among their ranks would settle on a less critical vision of the present ICC.

Such modest expectations would in fact fully appreciate the virtues which even a weak institution possessed. First, for the ICC, as with all international organizations, weakness has been essential to its birth. In an uncertain environment, states will be reluctant to agree to supranational institutions which make major inroads into their sovereignty. States would be more likely to bring such organizations into being if they perceive challenges to their sovereignty over crucial issues as mild. Hence, a weak statute for the ICC is in fact one which would maximize votes and ratifications. Pushing too hard for an autonomous court might have endangered the ICC's very existence. Second, while weakness in the statute may limit the potential for actually administering criminal law (i.e., investigations, indictments, trials), a weak statute may nonetheless suffice to effectively deter many crimes. The birth of the ICC, weak or strong, represents a statement to would-be offenders that the global community will no longer tolerate significant havens from justice. In essence, the message to potential perpetrators would be that criminal accountability has been extended to encompass the entire world. As a precedent for the extension of international criminal liability, the ICC should have a significant impact on the calculations of would-be criminals. Even though the statute generates much uncertainty about the autonomy and jurisdiction of the Court, such uncertainty works in favor rather than against deterrence.

Third, although the ICC may be fragile at birth, it is likely that it will take on greater strength with the passage of time. While it is common for international

suggests that efforts to prosecute suspected criminals have increased as the Dayton peace has been consolidated. Hence, the model apparently pursued in Yugoslavia has not been so much a case of relinquishing principles of justice for the sake of peace, but rather one of pursuing peace before justice. Quite fittingly, as President Clinton himself noted, "There must be peace for justice to prevail, but there must be justice when peace prevails". On the Yugoslavia Tribunal and the peace settlement, see Scheffer (1996), Guttman (1995), Brock (1996), Meron (1997), and Gallarotti and Preis (1998). Clinton is quoted in Scheffer (1996, p. 42).

organizations to be conceived as weak institutions, it is also common for them to increase their jurisdiction and autonomy over time. Only in exceptional cases do such organizations weaken or disappear. Finally, even a weak ICC represents a progressive step in the evolution of international criminal law, a step that is important in its own right. The ICC embodies a movement away from an environment in which retribution is tempered by the sword, and toward a universal system of justice that holds transgressors accountable under principles that respect the human rights of all individuals.

V. Conclusion

The Rome treaty has created an institution which might be considered weak and open to the vagaries of politics. The ICC does not make major inroads into the sovereignty of nation-states over the administration of international criminal law, and states enjoy a number of institutional venues through which they can use the Court as a diplomatic weapon. Yet, even in the face of such limitations the ICC appears to be a significant achievement in the evolution of international criminal law. Although the present statute contemplates a court which is neither autonomous nor insulated from political considerations, it is clear that such characteristics need not manifest themselves as serious flaws. Politics and limited autonomy are inescapable for such a fledgling institution, but they need not be detrimental to the functioning of the ICC. In fact, the statute embraces such characteristics in ways that assure the survival and facilitate the effectiveness of an international judicial body.

The road ahead promises to be difficult because both advocates and detractors find much to criticize in the current statute. Advocates decry the co-mingling of politics and justice, while detractors lament the challenges to national jurisdiction over crimes. The road can be made easier to travel if the U.S. renews its support for the ICC. There appears to be every indication that such support will be forthcoming because the Court is consistent with the U.S.' official position on international human rights and it also facilitates important foreign policy goals. But even so, American politics does not necessarily deliver outcomes that accord with the national interest. In any event, the creation of a permanent international criminal court after so many years of failure stands as a testament to the resilience of principles in the community of states. The compelling principles in this case emanate from a belief that national boundaries should not determine the scope and practice of justice, but that such things must be defined for the world at large. As such, the ICC represents a progressive step toward universal human rights and the rule of law.