Ramifications of The International Criminal Court for War, Peace And Social Change

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INTRODUCTION

The Rome Statute of the International Criminal Court (or "Rome Statute") was adopted at a high-level diplomatic conference in Rome, Italy, on July 17, 1998. As of February 5, 2002, the statute has been ratified by 52 nations, and will go into force once 60 nations have affirmed it. This event culminated a decades-long effort to establish a permanent judicial body to prosecute international crimes, and represents a dynamic shift in international politics.[2] The Rome 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. Furthermore, the Rome Statute is 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 Rome Statute's creation of the International Criminal Court (or "the Court") should be lauded or deplored is certainly debatable. It is quite easy to support the general notion of an international criminal court. After all, the Rome Statute ostensibly deals only with deplorable offenses: genocide, war crimes, and crimes against humanity and aggression. International Criminal Court 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. I wish I could report that the Rome Statute, as drafted, will end war or greatly reduce its probability. That is undoubtedly the primary goal of the Court's supporters. But, wanting to do the right thing is not enough. One must also do the right thing the right way. The Rome Statute, I fear, does not. Instead of reducing the likelihood of war, the Rome Statute may make future conflict more, rather than less, likely.

This Article addresses what I perceive to be the primary problems and dangers posed by the Court as currently structured. Despite the best intentions of the Court founders, the Rome Statute transfers a vast amount of decision making authority from previously sovereign nations to an international court that will be remote (and unable to be controlled by or accountable) to the diverse peoples and cultures of the world. It does so by means of vague statutory language, capable of expansion to include 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 also permits pressure groups to obtain ready influence over prosecutorial functions. The net result of this foundation is that the Court has potential to lose its stated primary focus upon the worst crimes of international concern and instead, as current international events demonstrate, may only make it more difficult to negotiate a peaceful end to

certain crises and existing social problems without reducing the necessity for the occasional use of force. Finally, under the Court's universal and complementary jurisdiction, the Court can and probably will attempt to change social norms in sometimes troublesome areas not admitting of a single, world-wide solution. Should the Court's judges attempt to impose values contrary to or insensitive to the various cultures of the world - a very real possibility - the Court may well make future conflicts inevitable.

I. GENESIS OF THE INTERNATIONAL CRIMINAL COURT

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.[4] 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 on individual state sovereignty.[5] 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 February 1991, 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.[6]

Public pressure for the creation of a permanent court increased in the early 1990's as the world reacted to reported atrocities in Rwanda and the former Yugoslavia. Informal meetings on the issue, commenced early in 1990, ultimately resulted in a draft statute for the proposed International Criminal Court. As that draft statute emerged, however, the mandate for the proposed International Criminal Court 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 Court.[7] This complex and convoluted draft statute was presented to U.N. delegates in 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 (or "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.[8] The adopted Rome Statute, however, went well beyond this (by comparison) modest proposal. The Rome 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.

II. THE INTERNATIONAL CRIMINAL COURT'S INTRUSION UPON DOMESTIC LAW

The jurisdiction claimed by the Court 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 Rome Statute, however, does just that.

A. Universal Jurisdiction

As adopted, the Rome Statute asserts jurisdiction over defendants so long as either "[t]he State on the territory of which" a crime was committed or "[t]he State of which the person accused of the crime is a national" has ratified the statute.[9] Since the "commission" of a crime is generally perceived as having the same location as its harmful effect, a decision in one state to engage in conduct that has an impact in a second, ratifying state, will subject that conduct to prosecution – even though the first state has not ratified the Rome Statute. This notion is often referred to as "inherent" or "universal" jurisdiction.

This concept of "inherent" or "universal" jurisdiction is very broad indeed. Such jurisdiction supposedly confers power upon a nation to prosecute an alleged criminal for an act regardless of where that 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.[10] This assertion, however, is unfounded.

Prior to 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, slave trade, genocide and war crimes.[11] Any use of the term "universal" 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 was[12] – there is virtually *no* evidence that states possess such broad jurisdictional power with regard to *any* other offense.[13]

This notion of "universal" jurisdiction as adopted in the Rome 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 Court can claim jurisdiction over a non-signatory state and its citizens, the Rome Statute makes an unabashed claim of international supremacy over the actions of domestic policymakers. Inherent in this claim is the alarming conclusion that the 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 "[t]reaties cannot create obligations for states who are not parties."[14] By declaring the contrary, the Rome Statute (in the words of the Government of India on the final night of the International Criminal Ccourt diplomatic conference) has "claimed a victim of its own – the Vienna Convention on the Law of Treaties."[15]

Reason and prudence dictate against disregarding the established boundaries of international law. The 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.

B. Complementarity

The Rome Statute, according to its terms, is designed to be "complementary to national criminal jurisdictions."[16] As such, the Court is designed to take jurisdiction only when a nation is "unwilling or unable" to act.[17] 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.[18] 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. In essence, it is a back-hand way of saying "the Court's laws govern" because any time a nation departs from the Court's laws, that nation could be found "unwilling" or "unable" to follow the Court's laws, thereby triggering complementary jurisdiction. The Court's law and national law are "complementary" only as long as national law does not conflict with the Court. Under the Rome Statute, if a conflict exists national law must recede.

The recently issued *Manual for the Ratification and Implementation of the Rome Statute* explains that "the ICC is no ordinary international regulatory or institutional body."[19] 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 procedure, mutual legal assistance legislation, extradition laws, and human rights legislation."[20] Why? Because, if national law diverges in any important detail from the law established by the Rome Statute, that nation will invite the 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 Rome Statute "takes precedence."[21] Accordingly, the manual declares that "[i]t would be prudent" for states "to incorporate all acts defined as crimes" into their own "national laws."[22]

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."[23] The caucus states that implementation of the Rome Statute will provide an opportunity for groups "all over the world to initiate and consolidate law reforms . . . ."[24] 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."[25] 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."[26]

The Court's complementary jurisdiction also invades a nation's domestic affairs by making it more difficult to negotiate a peaceful end to certain crises and existing social problems. In the past several decades, a pattern emerges when looking at nations' peaceful transitions to democracy. Most of those peaceful transitions involved non-prosecutorial approaches where oppressive government leaders relinquished their power only in exchange for some sort of amnesty, power-sharing agreement, or safety-in-exile arrangement.[27] In short, often "the ability to give dictators a face-saving way out is an essential component of democratic change."[28] In many situations, the Rome Statute's complementarity effectively diminishes a nation's ability to use non-prosecutorial approaches to effectuate a peaceful change in power. The Court may view a nation using non-prosecutorial approaches as being "unwilling" or "unable" to act. Because of this triggering of the Court's jurisdiction, dictators such as Pinochet or the former leaders of Apartheid in South Africa would likely have been unwilling to give up high levels of control and protection if unrestrained international prosecution awaited them.

General Agosto Pinochet came to power in Chile following a 1973 governmental coup. His human rights abuses while in power are notorious and well documented. He ruled over Chile for more than 16 years, finally giving up power after allowing, and losing, a free election in 1990. But Pinochet did not peacefully leave office without some important chips in place. He only left power after having secured for himself the position of "senator for life" and enjoying parliamentary immunity from domestic prosecution .[29] Only recently did that immunity fall apart after Pinochet was prosecuted under international law by a Spanish judge who prosecuted him for committing "crimes against humanity" under a premise of universal jurisdiction. Nevertheless, it is clear that Pinochet would not have left power peacefully without some form of protection and immunity. The Rome Statute's complementarity would severely restrict a nation's ability to negotiate peaceful ends to certain crisis situations.

South Africa's Truth and Reconciliation Commission ("TRC") is another example of a country being able to choose for itself how to accomplish a peaceful transition of power. The TRC was formed to peacefully end apartheid in South Africa and was the result of a difficult political compromise between "the broad amnesty that apartheid leaders sought and the prosecutions proposed by the African National Congress, which would have antagonized any hope of a peaceful transition."[30] The TRC kept prosecution as an option but offered amnesty to those apartheid leaders who came forward and told the truth about their human rights abuses. South Africa's past would undoubtedly be much bloodier today without the ability to offer a limited form of amnesty to its former apartheid leaders.

By mentioning Pinochet and apartheid, I am not saying that turning our backs and not prosecuting violators of human rights is good policy. I am saying that countries should have the flexibility to handle their own crises in their own way, including the ability to negotiate peaceful transitions to power by offering amnesty and other face-saving options. The Rome Statute's complementarity strips countries of this ability because those countries would be found "unwilling" or "unable" to enforce the Rome Statute's provisions.

In other words, national law *must* mirror the terms and conditions of the Rome Statute, and ultimately the judicial decisions of the Court 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," instead of a shield, becomes a sword.

III. PROSECUTORIAL ABUSE

One of the most important characteristics of a sound judicial structure is judicial impartiality.[31] The prosecutorial structure established by the Rome Statute raises serious concerns in this area. As adopted, the Rome Statute grants the prosecutor "proprio motu" powers;[32] that is, the prosecutor has the power (subject only to review by a panel of the Court's judges) to initiate an investigation and prosecution completely on his/her own authority and without oversight or control by any national or international power, with the exception of limited review by the Pre-Trial Chamber.[33] 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 prosecute effectively Executive Branch wrongdoers, the U.S. Congress passed the Ethics in Government Act of 1978, which authorized the appointment of "independent prosecutors."[34] 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.[35] 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 Court's prosecutor should be permitted to proceed *only* upon referral of a case by a nation/state or an appropriate United Nations body.[36] That proposal was rejected and the Rome 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 the offer of "gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations. . . ."[37] "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."[38] 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.[39] 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.

IV. SOCIAL POLICY AND "CRIMINAL" ACTS

One might argue, "So what?" Even if the Rome 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."[40] 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 and vague language of the Rome 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 Rome Statute is sweeping. Although the Statute purports to reach only serious crimes, the potential breadth of the crimes set out in articles 6, 7 and 8 of the Statute is limited largely by the imaginations of international lawyers and the judicial restraint (or lack of it) that will be exhibited by the judges on the Court. The crime of genocide, for example, includes not only killing members of a "national, ethnical, racial or religious group,"[41] but also "causing serious . . . mental harm to members of the group."[42] As such, the Rome Statute's machinery conceivably could be called into play to prosecute the racially and religiously charged rhetoric often employed by both sides of the on-going 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."[43]

Of much greater concern are the potentially far-reaching "crimes against humanity" set out in Article 7. The Statute condemns as "crimes against humanity" such acts as murder, extermination, enslavement, forcible transfer of population, torture, sexual slavery, persecution and "other inhumane acts."[44] These crimes certainly *sound* terrible, but the Rome Statute gives very little guidance as to what these words *actually prohibit*. The practical effect of this ambiguous language could conceivably result in a nation's soldiers being hesitant to follow the commands of their superiors because they fear potential prosecution under the vaguely defined crimes in the Rome Statute.

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."[45] 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."[46] 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 Rome Statute might suggest.

For example, the crime of "inhumane acts" is committed by the imposition of "great suffering, or serious injury to body or to mental or physical health." Rome Statute, Article 7(1)(k). The crime of "persecution" consists simply of "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." Rome Statute, Article 7(1)(h); 7(2)(g). At present, no international lawyer or jurist can predict with any certainty how far this language might sweep. Recent discussions at international meetings, however, suggest that such language could be used to completely refashion social policy on a world-wide scale.

At the Special session of the General Assembly on HIV/AIDS held in June 2001, for example, the Executive Director of the Joint United Nations Programme on HIV/AIDS, Peter Piot, and the UN's High Commissioner for Human Rights, Mrs. Mary Robinson, issued a document entitled "HIV/AIDS and Human Rights International Guidelines" that, among other things, called for (1) repeal of all laws condemning homosexual sodomy, (2) legalization of same-sex marriage, (3) mandatory and graphic sexual training of children, and (4) creation of "legal penalties" for anyone who "vilifies" homosexual behavior.[47] The Guidelines claim that these developments were mandated by established international "human rights and fundamental freedoms."[48] As a result, it is hardly far-fetched to assume that the broad language of Article 7 of the Rome Statute will be used to achieve the goals set out by Mrs. Robinson. Indeed, special interest groups are already holding workshops, seminars and publishing materials detailing how the Rome Statute can be used to enforce international "soft law" norms like those contained in the UNAIDS Guidelines and the Beijing Platform for Action.

I could go on. The broad language of the crimes of "persecution" and "inhumane treatment" could be used to dictate marital policies, social welfare policies, educational policies, strictures and rules for religious practices, and on and on. While these (and related) arguments unquestionably press the outer boundaries of the Rome Statute's plain language, they cannot be dismissed; due to the vagueness of the Rome Statute's language, these issues might easily fall within its reach. Pressure groups in Europe, the United States and elsewhere are already meeting routinely to consider how to use the Court to further their social agenda. In my opinion, the International Criminal Court could well become the leading wedge by which failed Marxist ideals are once-again enforced upon the peoples of the world. If so, the Court will hardly lessen tensions in the world. On the contrary, it will vastly increase the potential for cultural conflict.

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' publications explain, "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 Rome Statute, in short, could transform previously unenforceable (and often broadly worded) norms into indictable criminal conduct. In the Caucus' view, the Court is not merely (or even primarily) a court to deal with the "most serious crimes of international concern."[50] Rather, the

Court 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 Rome Statute can (and will) be used to re-engineer social policies throughout the world. I have been a lawyer (and a law professor) long enough to know that vague language can be used to achieve almost any goal 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 Rome Statute 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. Of all revolutions through the centuries, this is the quietest. Of all the attempts made over the years to foist one group's will on everyone else, this is the most subtle and simultaneously the most far-reaching - the world-wide constitutional convention no one knew about.

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 United Nations 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,[52] 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 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 United Nations 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.

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. 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 United Nations was not designed to possess, let alone exercise, sovereign powers. The United Nations Charter does not give it 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." 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."

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2 The International Criminal Court, as conceived, is not formally a part of the United Nations System, although it will have a close financial relationship with the United Nations. *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 1.

3 *Id.* at vii.

4 Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremburg,* 10 PACE INT'L L. REV. 203, 218-219 (1998).

5 *Id.*

6 *Report of the International Law Commission on the Work of its Forty-fourth Session*, U.N. GAOR, 47th Sess., 73rd plenary mtg., U.N. Doc. A/RES/47/33 (1992).

7 Marcus R. Mumford, *Building Upon A Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 MSU-DCL J. INT'L. L. 151, 166-170 (1999).

8 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 Rome Statute was adopted, *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987) (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").

9 *Rome Statute of the International Criminal Court (as corrected by the procés-verbaux of 10 Nov. 1998 and 12 July 1999)* [hereinafter *Rome Statute*] art. 12 para. 2, U.N. Doc. A/CONF.183/9.

10 *See, e.g.,* Mumford, *supra,* note 7, at 181-182.

11 *See, e.g.,* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

12 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").

13 *Id.* at 28.

14 *See*, *Vienna Convention on the Law of Treaties*, art. 34, U.N. Doc. A/CONF.39/27 (1969). *See also*, Mumford, *supra*, note 7, at 183 (*quoting* the U.S. Delegation's Final Intervention at the International Criminal Court Conference, July 17, 1998).

15 Mumford, *supra* note 7, at 183 (*quoting* Statement of Dilip Lahiri of India).

16 *Rome Statute, supra* note 9, art. 1.

17 *Id*. art. 17 para. 1(a).

18 U.N. CHARTER art. 2, para. 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").

19 MANUAL FOR THE RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE *supra* note 18, at 9.

20 *Id.* at 12. *See also* 87, 89, 91, 95, 97, 99, 100 (noting numerous changes required in domestic law in order to follow the doctrine of "complementarity.")

21 *Id.* at 12.

22 *Id.* at 91.

23 THE INTERNATIONAL CRIMINAL COURT: THE BEIJING PLATFORM IN ACTION (PUTTING THE ICC ON THE BEIJING +5 AGENDA) 8 (Pam Spees ed., The Women's Caucus for Gender Justice 2000).

24 *Id.* at 9.

25 *Id.* at 22.
26 *Id.* at 25.

27 Marc. A. Thiessen, *How Not To Get Rid of Dictators; No Tyrant Will Be Willing To Give Up Power If He Ends Up on Trial*, WKLY STNDRD, July 17, 2000, at 16. Examples of peaceful transitions of power without subsequent prosecutions include democracies emerging in Argentina, Nicaragua, the Philippines, and those emerging from the fall of the Soviet Union.

28 *Id.*

29 Susan Waltz, *Prosecuting Dictators: International Law and the Pinochet Case*, WORLD POL'Y J., Spring 2001, at 101, 102.

30 Reed Brody, *Justice: The First Casualty of Truth? The Global Movement to End Impunity for Human Rights Abuses Faces a Daunting Question*, NATION, Apr. 30, 2001, at 25, 27.

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

32 "Of his own volition."

33 *Rome Statute, supra* note 9, art. 15.

34 *See, e.g.,* Morrison v. Olson, 487 U.S. 654 (1988).

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

36 Mumford, *supra*, note 7 at 179.

37 *Rome Statute, supra* note 9, art. 44 para. 4.

38 *Id.*

39 *See generally* Richard G. Wilkins, *Bias, Error and Duplicity: The UN and Domestic Law*, THE WORLD & I, Dec. 1996, at 287-305.

40 *Rome Statute, supra* note 9, art. 1.

41 *Rome Statute, supra* note 9, art. 6.

42 *Rome Statute, supra* note 9, art. 6 para. b.

43 *Rome Statute, supra* note 9, art. 1.

44 *Rome Statute, supra* note 9, art. 7 para. 1.

45 *Report of the Preparatory Commission for the International Criminal Court, Addendum Part II, Finalized draft text of the Elements of Crimes*, art. 7 (1)(h) (setting forth the elements for Crimes against humanity of persecution), U.N. Doc. PCNICC/2000/1/Add.2 (2000); *compare Rome Statute, supra* note 9, art. 7 para. 1(h) and art. 7 para. 2(g).

46 *Id.* at art. 7 (1)(k) (setting forth the elements for Crime against humanity of other inhumane acts); *compare Rome Statute, supra* note 9, art. 7 para. 1(k).

47 *See* Memorandum of Professor Richard G. Wilkins detailing the provisions of the Guidelines.

48 AIDS Guidelines at 8, par. 8.

49 *Supra* note 23, at 6.

50 *Rome Statute, supra* note 9, art. 1.

51 *Supra* note 23, at 8 (emphasis added).

52 *See generally* Symposium Issue: The International Criminal Court, 8 MSU-DCL J. INT'L L. & PRAC. 1 (1999).