Federalism and Separation of Powers

Federalism and the International Criminal Court

*By Ronald J. Rychlak & John M. Czarnetzky**

At a luncheon at the University of Mississippi, the European Union's former ambassador to the United States, Guenter Burghardt, expressed great disappointment that the United States has not embraced the International Criminal Court (ICC). Ambassador Burghardt felt that terms had been defined and issues had been set with sufficient certainty to justify American ratification of the agreement calling for its establishment.[1]

The obvious concern, which has been expressed by many American politicians and commentators, is that American troops travel all over the globe, including areas where Americans are not popular. We do not want to see our men and women put on trial before an international tribunal every time they offend a local group. Most efforts by ICC officials to appease American concerns have addressed this issue.

There is, however, another basic concern about the ICC that is too often overlooked. Part of the American resistance to the ICC stems from the judicially-mandated growth in the size and authority of the U.S. federal government that has come at the expense of state autonomy. The American experience reveals that an active federal judiciary leads to a larger central government. If we now imagine an active *world* court, it is easy to envision a centralization of global power that is unprecedented in history. To many Americans, that is not a welcome development. In short, American opposition to the ICC is based in significant part on courts' failure to adhere to the doctrine of federalism.[2]

I. The International Criminal Court

The idea behind the ICC is not new. At the end of the Second World War, the Allies conducted Nuremberg and the Tokyo Tribunals.[3] More recently, *ad hoc* tribunals were established to deal with abuses in the former Yugoslavia[4] and Rwanda.[5] These tribunals led to the doctrines that shape international criminal law today.

In the summer of 1998, the United Nations (UN) convened the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy. The charge to the conference was to negotiate an agreement relating to a new international court. Despite numerous unresolved issues, the delegates at that conference adopted a draft statute, the "Rome Statute."[6]

This conference did not represent an exercise in multilateral treaty-making of a contractual nature. Rather, the delegates engaged in what was a quasi-legislative effort. More than a treaty, the Rome Statute was designed to modify customary international law and apply even to non-signatories.[7]

As set forth in the Rome Statute, the ICC has the authority to prosecute and sentence individuals, and to impose obligations of cooperation upon states, regardless of whether they are parties to relevant treaties or have accepted the Court's jurisdiction with respect to the crimes in question. The Rome Statute asserts jurisdiction for the ICC over defendants so long as either the "State on the territory of which" a crime was committed or "the State of which the person accused of the crime is a national" has ratified the statute. The result is a serious blow to the concept of national sovereignty.

An international court with the express authorization to modify customary international law has extraordinary power. Consider the Constitution of the United States. Judges have used that document to create new rights that do not appear in the text of that document. What is to stop ICC judges from inventing new crimes, new rights, or otherwise trampling on national sovereignty?

With 18 judges (balanced in terms of gender, geography, and legal systems) and a potentially slow docket, there is every reason to think that ICC judges will be pressured to add new crimes. Following the attack of September 11, 2001 representatives from the nation of Turkey proposed adding the crime of terrorism to the ICC's jurisdiction. There have also been proposals to add international drug transactions to the list of ICC crimes. Suppose ICC judges conclude that denial of the right to euthanasia constitutes a violation of human rights? Or what if they find that a society must recognize the right to same-sex marriage or outlaw the death penalty? Regardless of how members of a society feel about such issues, does anyone really want international judges to decide these issues for all nations?

Officially, the ICC has jurisdiction over only four crimes: Genocide, War Crimes, Crimes against Humanity, and the yet undefined crime of Aggression. This oft-cited list of four crimes is a bit deceptive. Each of these crimes is further defined so that the ICC also has jurisdiction over crimes such as: serious injury to mental health, outrages upon personal dignity, and forced pregnancy. Article 31 of the Rome Statute also codifies grounds for excluding criminal responsibility, including mental disease, intoxication, defensive force (self-defense), and duress or necessity. Article 32 codifies mistake of fact and mistake of law, and Article 33 codifies a limited defense of superior orders. These defenses suggest that the ICC may ultimately be used to prosecute a broad spectrum of crimes.[8]

If the ICC were to create an international right to universal health care or limit certain forms of pollution, it would likely trample on the sovereignty of many nations. Such judicial over-reaching would be bad enough, but without co-equal branches of government (the ICC is a stand-alone court) how would those nations voice their objections? Of course, even without an expansion of jurisdiction, the ICC will have a dramatic impact on domestic laws.

** Ronald J. Rychlak is MDLA Professor of Law and Associate Dean for Academic Affairs and John M. Czarnetzky is Associate Professor at the University of Mississippi School of Law. They both serve as advisors to the Holy See's delegation to the International Criminal Court. The opinions expressed herein, however, are solely their own.*

II. Complimentarity

The typical answer to concerns about an overly-aggressive ICC is that the new court's jurisdiction is "complementary" to national criminal jurisdiction.[9] In other words, national courts have the first right and obligation to prosecute perpetrators of international crimes, and ICC jurisdiction can only be invoked if the national court is unwilling or unable to prosecute.[10] 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 state authority. The complementarity doctrine, however, may instead operate like an international Supremacy Clause.

ICC judges will not simply accept the nation's assurance that it can handle the case. They will have to consider whether the nation is acting in good faith. They are required to examine whether, despite the nation's assertion to the contrary, it can successfully carry out the proceedings. The ICC does not have a mechanism to defer to national policy determinations that might confer amnesty to wrongdoers, and that is a very serious problem. The principle of complementarity cannot avoid this problem, despite assurances to the contrary.[11]

There are cases where punishment of even a clearly guilty person might not promote societal cohesion. At these times, prosecutorial discretion, executive clemency, amnesty, and even jury nullification can do more to serve the common good than would punishment of the guilty. Even statutes of limitation are based on putting other considerations above retributive justice.

At the end of the Civil War, to give one example, President Lincoln forgave many crimes that might legitimately have been prosecuted. He did this in order to preserve social cohesion. In a different example, Sammie "Athe Bull" Gravano was freed (briefly, as it turns out) after a light sentence, despite admitting to participation in numerous murders. Convicting (the late) John Gotti was so important that the government made a deal with a multiple murderer. In cases like this, law-abiding members of society are willing to trade the utilitarian "benefit" that they might receive from punishment in exchange for a larger benefit to the common good.

Consider the example of Chile under Augusto Pinochet. The Pinochet regime regularly violated human rights. When a free vote revealed a high level of hostility toward that regime, Pinochet agreed to leave office, but only after securing a lifetime appointment and the promise of amnesty from prosecution. As it turned out, he was later stripped of much of his immunity, but while it was in place, could it be said that Chile was unwilling or unable to prosecute Pinochet? If the ICC had been in existence, its judges may well have so determined. Of course, if that threat were known to Pinochet, he might never have left office. Would that have been better for the people of Chile?

As with the situation in Chile, South Africa's transition from apartheid to democracy was accomplished through negotiation. The Truth and Reconciliation Commission (ATRC) process must receive credit for South Africa's bloodless transition, even though *it certainly permitted notorious wrongdoers to escape criminal punishment.* Archbishop Desmond Tutu has often spoken of the need to forgo retributive justice in order to balance truth, justice, and reconciliation. Sometimes those values compete with one another:

> [R]etributive justice B in which an impersonal state hands down punishment with little consideration for victims and hardly any for the perpetrator B is not the only form of justice. I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment but, in the spirit of *ubuntu*, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured.[12]

Unfortunately, the ICC structure elevates retributive justice over other concerns, such as restoraive justice.

Consider the current situation in Uganda. Jan Egeland, the UN Under-Secretary-General for Humanitarian Affairs, has described Northern Uganda as "the world's terrorism epicenter." One of the main terror groups, The Lord's Resistance Army (LRA), has killed more people than Al Qaeda, Hamas, and Hezbollah combined. In July, 2006, however, the prospects for peace brightened when LRA leader Joseph Kony accepted an amnesty offer from the Ugandan government. That offer required the LRA to commit to peace talks and to renounce violence.

Unfortunately, Kony had already been indicted by the ICC, and the ICC will not accept Uganda's promise of amnesty. According to a news account from Africa, "Athe government and the ICC are knocking heads over the amnesty matter. The ICC, which has indicted and issued arrest warrants for the LRA leadership, says Kony and his men should be arrested, not granted amnesty. The Ugandan government thinks otherwise, for the sake of peace."[13] In other words, hostility to political compromise (which, of course, is central to the ICC's *raison d'être*) means that people have continued to die.

While there is obviously a place for criminal prosecutions in meting out justice to tyrants who violate international criminal law, trials are only one tool among several in the search for justice. The problem with the ICC is that it favors criminal prosecution in *every* situation. At Nuremberg, this model made sense. When the bad guys have been defeated by an outside force, there is no threat of civil war, and the defendants have already been captured, trials are very logical. In other cases, however, they may only prolong the suffering.

Tyrants know what fate awaits them if they are overthrown. History extending back at least to the French Revolution shows them that they will be called to justice if they fall out of favor. The ICC adds nothing to that threat. *Those who proceed to violate human rights simply do not expect to be overthrown*.[14] In fact, it is entirely possible that the ICC will have the opposite of its intended impact when it comes to deterrence.

Students of social science explain that deterrence is a matter of certainty, or likelihood, of punishment and severity of punishment. Certainty of punishment is hard to establish, particularly when the wrongdoer is a national leader supported by military power. By offering a form of due process and legal counsel to the defendant, however, the ICC may well decrease even the likelihood of punishment. In addition, since judges

of the ICC do not have authority to impose the death penalty, tyrants need not fear the fate that befell Mussolini and others. As such, the ICC probably *decreases* both the certainty *and* the severity of punishment.

III. Federalism's Role in Shaping American Attitudes

Americans have seen a federal court system of supposed limited jurisdiction grow dramatically over the past forty years. There is every reason to think that the ICC will receive similar pressure to expand. Already several scholars have advocated expanding the ICC's jurisdiction to cover international gun running and drug trafficking. In fact, one of the reasons cited by the US for its initial refusal to sign the Rome Statute was its potential to conflict with policing matters. In particular the US was concerned that the ICC might conflict with existing American efforts to combat terrorism and drug crimes.[15]

The ICC will almost certainly force nations to change their domestic substantive criminal laws.[16] A manual for the ratification and implementation of the Rome Statute explains that "the ICC is no ordinary international regulatory or institutional body."[17] In order to comply with the dictates of "complementarity," the manual asserts that "modifications" must be made to a state's "code of criminal law… and human rights legislation."[18] These changes are needed if national law diverges in any important detail from the law established by the ICC. As the manual states, "should there be a conflict between the ICC legislation and existing legislation," international law established under the ICC "takes precedence."[19] Accordingly, the manual declares that "[i]t would be prudent" for states "to incorporate all acts defined as crimes" into their own "national laws."[20]

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."[21] The booklet states that implementation of the ICC Statute will provide an opportunity for groups "[a]ll over the world to initiate and consolidate law reforms...."[22] Indeed, the 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.[23] According to the caucus, "State 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."[24]

At the time that the Rome Statute was being negotiated, the Lawyers Committee for Human Rights predicted that rules established by the ICC "will have a significant impact on domestic criminal procedure... because it will be legally and politically difficult to justify a two-tiered system of rights, one for the ICC and another for purely domestic purposes."[25] According to ICC supporters, nations may need to introduce new criminal laws, proscribing genocide, crimes against humanity, and war crimes, if they do not have such laws already. The simplest approach would be to adopt the definitions of the crimes within the jurisdiction of the ICC. Nations may, however, wish to go beyond these definitions and give their courts jurisdiction over other international crimes as well.[26] Moreover, as the ICC decides these cases and begins to develop a common law of what constitutes effective and acceptable national trials, nations will be forced to follow those precedents or risk having their defendants re-tried before the ICC.

Perhaps the greatest threat to national sovereignty does not relate to potential changes in substantive law, but to changes that might be necessary to a nation's procedural laws. Article 88 of the Rome Statute requires that State Parties "ensure that there are procedures available under their national laws for all of the forms of cooperation that are specified [elsewhere in the statute]."[27] This may require adoption of certain procedures, and may also require deletion of certain features of a nation's procedural laws, particularly constitutional protections for criminal defendants.

Presumably no state, regardless of the Rome Statute, tries to provide undesirable loopholes for criminal defendants. The question becomes whether a nation's "Bill of Rights" might be viewed by the ICC as a loophole.[28] As it is currently structured, the ICC conflicts with many American constitutional rights, including the right to be tried by a jury of peers, the prohibition against double jeopardy, the right to a speedy trial, the Supremacy Clause, the presidential pardon power, the right to be free from unreasonable searches and seizures, and more.[29] If the United States is to participate fully in the ICC, it would seem that constitutional amendments will be required. Of course, at the end of the day the Constitution might be deemed more important than the ICC.[30]

CONCLUSION

If the United States were to join the ICC, it would have significant ramifications on domestic criminal laws and procedures. Concerns about national sovereignty, Constitutional amendments, and other modifications to domestic criminal laws that will be necessary in order to come into conformity with an international standard are quite legitimate. In reality, these concerns are mere extensions of traditional federalist concerns. Efforts to appease them by writing in limits on the court's authority are not successful because Americans have seen courts ignore limits, stretch their authority, and grow in power beyond all expectation.

Supporters of the ICC may see value in the idea of uniformity of national laws. Some may even see value in a "one-world" government.[31] It is good to remember, however, the words of Jacques Maritain:

> The quest of… a Superstate capping the nations is nothing else, in fact, than the quest of the old utopia of a universal Empire. This utopia was pursued in past ages in the form of the Empire of one single nation over all others. The pursuit, in the modern age, of an absolute World Superstate would be the pursuit of a democratic multinational Empire, which would be no better than the others.[32]

The threat of such a quest being imposed by the ICC is particularly worrisome, because there is no legislative or executive branch to hold the court in line.

No one wants to see wrongdoers escape justice, particularly those tyrants who commit crimes like those that fall under the jurisdiction of the ICC. Americans, however, are correct to be cautious about the ICC. Unless and until we see our own courts once again respect federalism, there is little reason to think that a world court, like the ICC, would do so.

A comprehensive strategy to combat serious violations of international criminal law would incorporate amnesties (including a UN Security Council pardon power, not just the ability to temporarily delay prosecution),[33] truth commissions, exile for entrenched leaders, lustration for mid-level officials, and civil compensation. It would prioritize domestic processes—and have the courage not to insist on trials in countries that are not ready. It would also recognize that "[t]he energy expended on tribunals might be better invested in building consensus on robust, timely intervention when crimes are being committed rather than seeking punishment afterward."[34] Some military actions are just.[35]

Defining the crimes of genocide, aggression, war crimes, and crimes against humanity will certainly help overcome future objections based on the claim of "victor's justice." It is also wise to develop basic standard procedures that will help assure that future trials run smoothly. The idea of a standing court, with incentive to grow and a "one size fits all" approach to diverse international problems, however, is extraordinarily unwise.

Endnotes

1 President Clinton signed the agreement in question (the Rome Statute) on December 31, 2000, but he noted serious flaws and said: "I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied." John. B. Bellinger, *The United States and the International Criminal Court: Where We've Been and Where We're Going*, Remarks to the DePaul University College of Law, April 25, 2008 <<http://www.state.gov/s/l/rls/104053.htm >>. In 2002 President Bush announced that he was "un-signing" the Rome Statute. *Id.* See Michael Knigge, *Don't Expect Obama Or McCain To Reverse Washington's Stance Toward The International Criminal Court*, dw-world.de, Oct. 14, 2008 << http://blogs.dw-world.de/acrossthepond/michael/1.7227.html>>.

2 *See* Brian Darling, *U.S. Shouldn't Be Supporting ICC,* Human Events, Oct. 20, 2008 <<http://www.humanevents.com/article.php?id=29091&page=1>>.

3 *See, e.g.,* Quincy Wright, *The Law of the Nuremberg Trial*, 41 Am. J. Int. L. 38 (1947), *reprinted in* 2 International Criminal Law (Gerhard O.W. Mueller & Edward M. Wise, eds., 1965). Even before World War II had ended, people started talking about putting war criminals, like Adolf Hitler and his close associates, on trial for war crimes. *See* Michael Young, The Trial of Adolf Hitler (1944).

4 The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY"), S.C. Res. 808, U.N. SCOR, 48th Sess., 3175 mtg., U.N. Doc. S/RES/808 (1993).

5 The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda ("ICTR"), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

6 *Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF. 183/9 (1998).

7 *See generally* Timothy L. Dickinson, *Joint Report with Recommendations to the House of Delegates: Establishment of an International Criminal Court*, 1998 A.B.A. Sec. Int'l. L. & Prac. 118B (tracing procedural history of the International Criminal Court).

8 The ICC is supposed to exercise its jurisdiction only in cases involving "the most serious crimes of concern to the international community as a whole." Rome Statute, art.5(1).

9 The Tenth Preambular Paragraph of the Rome Statute proclaims that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Rome Statute, pmbl.

10 Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court,* 14 Emory Int'l L. Rev. 1, 67-68 (2000). The International Criminal Tribunals for both the Former Yugoslavia and Rwanda proceeded on the contrary assumption, namely that their jurisdiction enjoys precedence over that of national courts. Statute of the Tribunal for the Former Yugoslavia, art. 9(2), 32 I.L.M.1192, 1194 (1993); Statute of the Tribunal for Rwanda, art. 8(2), 33 I.L.M. 1602, 1605 (1994). Of course, in as much as these tribunals were specially established and not standing courts, that only makes sense.

11 "The principle of complementarity says that if a nation is worried about having its people called before the International Criminal Court, it need only investigate them conscientiously itself and if appropriate, prosecute them. That is an absolute defense to any prosecution by the ICC." 14 Emory Int'l L. Rev. at 171 (comments of Kenneth Roth, Executive Director of Human Rights Watch).

12 Desmond Tutu, No Future Without Forgiveness 52 (1999).

13 Emma Mutaizibwa, *Govt Happy Kony is for Amnesty*, The Monitor (Kampala), July 9, 2006. A similar issue arose in 2003 when Liberian leader Charles Taylor refused to leave office until he was granted exile in Nigeria.

14 Every year, *Parade* magazine ranks the world's worst dictators. A recent check showed that five of the twelve worst had signed the Rome Statute.

15 These concerns were outlined before the Senate Foreign Relations Committee by David Scheffer, the head of the U.S. delegation to the Rome Conference. Kristafer Ailslieger, *Why the United States Should Be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 Washburn L.J. 80 (1999). *See also* Darling, *supra* note 2.

16 Hans-Peter Kaul of the German Foreign Ministry and head of the German delegation to the Preparatory Commission noted that the ICC might serve to harmonize national criminal laws among the States. Jennifer Schense, *Trends Emerging in Implementation of the ICC Statute*, The Monitor, November 2000, at 18.

17 See *Manual for the Ratification and Implementation of the Rome Statute* (2nd ed. 2003), published by the *International Centre for Human Rights and Democratic Development* and *The International Centre for Criminal Law Reform and Criminal Justice Policy* (downloadable from http://www.international.gc.ca/court-cour/guide-manuel.aspx?lang=eng&menu_id=73&menu=R).

18 *Id.*

19 *Id.*

20 *Id.*

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

22 *Id.*

23 *Id.*

24 *Id.*

25 Lawyers Committee for Human Rights, *Pre-Trial Rights in the Rules of Procedure and Evidence*, Vol. 2, No. 3, International Criminal Briefing Series (Feb. 1999) (expressing concern that the ICC Statute does not protect persons suspected but not yet charged, and calling for additional procedural protections, particularly during interrogation and arrest.)

26 Joanne Lee, *Ratifying and Implementing the Rome Statute*, The Monitor, Nov. 2000, at 3.

27 Rome Statute, at art. 88.

28 Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, Policy Analysis, July 16, 1998, in the Internet at www.cato.org/pubs/pas/pa-311.html (noting that many rights taken for granted by Americans would not be available in trials before the ICC). Cathie Adams, *The United Nations*, The Heritage Foundation, November 1998, *available at* <<www.fni.com/heritage/nov98/AdamsCathie.html>>.

29 Kristafer Ailslieger, *Why the United Should Be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 Washburn L.J. 80 (1999). *See* Brian Concannon, Jr., *Beyond Complementarity: the International Criminal Court and National Prosecutions*, 32 Colum. Human

Rights L. Rev. 201 (2000); Lara A. Ballard, *The Impact of an ICC Treaty on U.S. Double Jeopardy Law*, 29 Colum. Human Rights L. Rev. 142 (1997).

30 As early as 1990, the U.S. Congress passed legislation stating that the United States should "explore the need for the establishment of an International Criminal Court." The Congress emphasized, however, that such a Court "should not derogate from established standards of due process, the rights of the accused to a fair trial and the sovereignty of individual nations." *See* Foreign Operations Appropriations Act, 599E, P.L. 101-513, 104 Stat. 2066-2067 (1990).

31 Benjamin B. Ferencz, a former Nuremberg prosecutor, has been a leading voice in support of the ICC for well over a decade. He described himself to these authors as a "one-worlder."

32 Jacques Maritain, Man and the State 204 (1998).

33 The Security Council has authority to delay prosecution for up to 12 months at a time. Such power, however, provides little in the way of a bargaining chip during negotiations to end a reign of terror. Among the other weaknesses is the risk that the delay would be vetoed. *See* Darling, *supra* note 2 (discussing the possibility that the United States would veto a proposed delay in prosecutions related to Darfur).

34 Timothy Waters, *What Now for War Trials after Milosevic?*, Christian Science Monitor, March 2006.

35 *See generally* Ronald J. Rychlak, *Just-War Theory, International Law, and the War in Iraq*, 2 Ave Maria L. Rev. 1 (2004).