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No Badges, No Bars: A Conspicuous Oversight in the Development of an International Criminal Court

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SUMMARY

Article I
The Court

An International Criminal Court (the Court) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdiction. The jurisdiction and functioning of the Court shall be governed by the provisions of this statute.[1]

I. INTRODUCTION

In the summer months of 1998, the world community stood witness to an amazing and still unbelievable event: the creation—at least theoretically—of an international

† Associate Professor of Law, University of Oklahoma College of Law. I would like to thank Jennifer Wylie, Marcy Fassio and John Kmetz for their tireless and patient research efforts. These young lawyers have the potential to proffer workable solutions to all the problems that international criminal law poses and, eventually, to make the system both workable and effective. Their respective thirsts for justice inspire me. I would also like to thank the students in my Accountability for Gross Violations of Human Rights course 2003 for prompting my thoughts, furthering the dialogue, and convincing me that the solutions to the issues discussed in this paper are forthcoming—and, indeed, may be closer than we imagine. These students' commitment to providing peace and justice to all encourages me. Finally, I would like to thank my colleague Peter Krug for his careful proofreading and gentle suggestions. His presence at OU comforts and sustains my intellectual efforts. Although I had numerous individuals contribute to this effort, any shortcomings are mine alone.

1. Rome Statute of the International Criminal Court, July 17, 1998, art. 1, U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999 [hereinafter Rome Statute].

criminal court (ICC).[2] The drafting and adoption of the Rome Statute,[3] the principal instrument creating the forthcoming ICC, has already yielded unexpected fruits.[4] Since its passage, there have been several international attempts to bring former dictators and war criminals to account for their past acts of indiscretion.[5] The two most prominent attempts have included the arrest and attempted trial of the former Chilean General, Augusto Pinochet,[6] and the long-awaited arrest, extradition, and ongoing trial of former Yugoslavian President, Slobodan Milosevic,[7] at the International Criminal Tribunal for the Former Yugoslavia (ICTY) at The Hague.[8]

The Pinochet and Milosevic trials stand as a testament to the growing momentum for establishing an international system of criminal justice. Passage of the Rome Statute revived the belief, emanating forcefully following World War I, that humankind need not be subjected to the torturous and lasting scars of war.[9] Wars, both domestic and

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2. Jimmy Gurulé, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1, 2 (2001) (noting that "[m]ost commentators believe that a permanent International Criminal Court is necessary to ensure that acts of mass murder, rape and torture are not committed with impunity, and individuals responsible for such heinous acts and serious violations of international humanitarian law are brought to justice and severely punished for their crimes").

3. Rome Statute, *supra* note 1.

4. The Honorable Richard Goldstone, Justice of the Constitutional Court of South Africa, *The Role of the United Nations in the Prosecution of International War Criminals*, 5 WASH. U. J.L. & POL'Y 119, 125 (2001) (noting that there is no longer impunity for war criminals).

5. Mary Margaret Penrose, *It's Good to Be the King: Prosecuting Heads of State and Former Heads of State Under International Law*, 39 COLUM. J. TRANSNAT'L L. 193, 206–07 (2000) (describing the attempted domestic prosecution of former Indonesian dictator, Suharto, and Senegal's failed attempt to prosecute Hissene Habre). *See also* Adam Isaac Hasson, *Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet and Milosevic: Trends in Political Activity and Transnational Criminal Law*, 25 B.C. INT'L & COMP. L. REV. 125 (2002).

6. *In re* Augusto Pinochet Ugarte, (Q.B. Div'l Ct. 1998) (Pinochet I), *reprinted in* 36 I.L.M. 68, *rev'd in part*, R. v. Bow St. Metro. Stipendiary Magistrate, *Ex Parte* Pinochet, [1998] 3 W.L.R. 1456 (H.L.) (Nov. 25, 1998) (Pinochet II), *reprinted in* 37 I.L.M. 1302, *vacated*, R. v. Bow St. Metro. Stipendiary Magistrate, *Ex Parte* Pinochet, [1999] 2 W.L.R. 272 (H.L.) (Jan. 15, 1999) (Pinochet III), *reprinted in* 38 I.L.M. 430 (vacating Pinochet II on grounds of potential conflict of interest); R. v. Bow St. Metro. Stipendiary Magistrate, *Ex Parte* Pinochet, [1999] 2 W.L.R. 827 (H.L.) (Mar. 24, 1999) (Pinochet IV), *reprinted in* 38 I.L.M. 581, *aff'g* and *rev'g in part* Pinochet II. For a thorough description of the Pinochet precedent, see Ruth Wedgewood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT'L L. 829 (2000). For a nice compilation of materials relating to the Pinochet arrest and decisions, see Kathleen Johnson, *The Case of General Augusto Pinochet: A Legal Research Guide*, 27 BROOKLYN J. INT'L L. 519 (2002).

7. Prosecutor v. Milosevic, Initial Indictment, Case No. IT-99-37 (I.C.T.Y., May 24, 1999), http://www.un.org/icty/indictment/english/mil-ii990524e.htm (last visited Mar. 3, 2003) (ongoing).

8. 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, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/827 (May 25, 1993), *reprinted in* 32 I.L.M. 1159 (1993), *available at* http://www.un.org/icty/legaldoc/index.htm (last visited Mar. 3, 2003) [hereinafter ICTY Statute]. The ICTY Statute is attached as an addendum to UN Security Resolution 827.

9. Finally, after many years and many attempts, there is a concerted effort to limit the methods and methodology of warfare via criminal prosecution for individuals violating the "laws of war." Even though the Kellogg-Briand Pact of 1928 renounced war as "an instrument of national policy," we remain a world crippled by wars—both international and internal. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. Article I of the Kellogg-Briand Pact asserts: "The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." *Id.* art. 1. Since the first codified laws of war, "there have been few and scattered attempts to prosecute the violators of the laws of war." Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War, General Order No. 100 (Apr. 24, 1863), *in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiří Toman eds., 1981). This is true despite clear authority in nearly every code, covenant, and treaty dealing with war crimes. The Leiber Code was adopted by President Lincoln to

international, could be deterred through the erection of a world criminal court capable of delivering justice to the worst enemies of humankind. And, with 139 signature countries lending support for the idea[10] and the necessary sixty ratifications[11] required to transform the Rome Statute into a fully operational court, there is restored hope that such justice may eventually eradicate the horrors of war and state-sanctioned crimes against humanity.[12]

It is difficult to calculate the effect that the surreal events of September 11, 2001, had on ratification of the Rome Statute. The Statute laid dormant for nearly four full years awaiting the requisite ratifications. This dogged pace, I believe, is primarily attributable to the fact that the United States has never fully embraced the idea of a permanent "world" criminal court.[13] The United States was slow in signing the Statute,[14] yet quick and

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apply to American servicemen following the horrors observed during the U.S. Civil War. *See also* The Laws of War on Land, Sept. 9, 1880, *available at* http://www.lib.byu.edu/~rdh/wwi/1914m/land1880.html (last visited Mar. 3, 2002).

10. *See* Rome Statute Signature and Ratifications Chart, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last visited Jan. 31, 2003). Although the United States initially signed the Rome Statute and is currently reported as a signatory since December 31, 2000, the United States has recanted its signature and made clear its intention *not* to be a party to either the Rome Statute or its forthcoming criminal court. The Rome Statute was open for signature for nearly two and one half years. *See* Rome Statute, *supra* note 1, art. 125 (explaining that the Statute "shall be open for signature by all States in Rome . . . on 17 July 1998. Thereafter, it shall remain open for signature in Rome . . . until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.").

11. Portugal and Ecuador helped bring the ICC into existence with their respective ratifications on February 5, 2002. Rome Statute Signature and Ratifications Chart, *supra* note 10. The United States is conspicuously absent from this otherwise traditional list of international governments. For example, Italy, France, Canada, Spain, South Africa, Germany, Austria, Argentina, Denmark, Sweden, the Netherlands, the United Kingdom, Switzerland, Peru, and Poland have all ratified the Rome Statute. *Id.* (listing countries in order of ratification). *See also* Rome Statute, *supra* note 1, art. 126 ("This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.").

12. Goldstone, *supra* note 4, at 119.

13. John B. Anderson, *Global Governments and Democratization*, 5 WASH. U. J.L. & POL'Y 27, 29 (2001) (observing that the United States is one of only seven countries that failed or refused to sign the Rome Statute on July 18, 1998). Anderson comments: "The Treaty of Rome . . . found [the United States] in some very strange company with nations [with] whom we do not ordinarily associate our foreign policy." *Id. See also* Joseph Lelyveld, *The Defendant*, THE NEW YORKER, May 27, 2002, at 82. ("The total of sixty-six ratifying nations included America's closest allies, and also Yugoslavia, which seized the chance to present itself as a bigger supporter of international justice than the United States. Other holdouts include Russia, China, and the 'axis of evil': Iran, Iraq, and North Korea."). *Id.* at 87.

14. David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 55–68 (2001). Former Ambassador Scheffer records that:

> President Clinton arrived at his decision to sign the treaty while at Camp David on December 30–31, 2000. His statement, which was released on December 31st, is a precisely worded articulation of why the United States would sign the Treaty and what remained to be done in order to advance the prospect of serious consideration of ratification of the Treaty in the future. There were three main points in the statement. First, President Clinton reaffirmed "our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes and crimes against humanity." Signing the treaty would sustain the "tradition of moral leadership" of the United States in advancing the principle of accountability from Nuremberg to the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.
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> Second, President Clinton emphasized the importance of the complementarity principle in the Treaty and that the U.S. delegation had worked hard to achieve the limitations on the ICC Prosecutor that are part of the complementarity regime, which the United States believes "are essential to the international credibility and success of the ICC."
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> Third, President Clinton stated that:

decisive in pulling out.[15] Further, although the crimes of the al Qaeda network may qualify conceptually for prosecution under the Rome Statute,[16] the court remains a structural blueprint only, and crimes predating the sixtieth ratification on February 5, 2002, do not fall within its jurisdiction.[17] Thus, this article will not attempt to tackle the unimaginable task of bringing those responsible for the September 11th violence to justice. Such task is far too monumental for this effort. Rather, this article will focus more narrowly on the ongoing need to establish a permanent and functional international system for prosecuting and punishing crimes against humanity. The events of September 11th merely underscore the need for an efficient and effective response to crimes committed at the international level.

Conceptually, the ICC is the venue reserved for future versions of Hitler, Mussolini, Pol Pot, Pinochet, and Milosevic. Individuals who resort to campaigns of terror and genocide will have a court waiting eagerly to catalogue and judge their offenses. An international court, it is believed, will serve as a deterrent to such horrific crimes and a constant reminder that there will be tangible consequences for war crimes, crimes against humanity, and genocidal campaigns.[18] This shifting attitude, as evidenced by the passage

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> We are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes into existence, it will not only exercise authority over personnel of states that have ratified the Treaty, but also claim jurisdiction over personnel of States that have not. With signature, however, we will be in a position to influence the evolution of the Court. Without signature, we will not.

Id. at 63–64.

15. Lelyveld, *supra* note 13, at 86–87. Mr. Lelyveld observes:

> The Clinton Administration voted against the treaty and thereafter remained permanently divided on the issue of what to do about the new court. It was never able to satisfy the Pentagon that a wayward or politically motivated international prosecutor would not be able to indict, say, an American pilot whose bombs had missed a target and killed civilians. Finally, President Clinton, with his term expiring, managed to have it both ways: he approved the signing of the treaty by a sub-Cabinet officer but denounced it as being unworthy of ratification by the Senate. The Bush Administration was less tortured. It said from the start it would have nothing to do with the International Criminal Court, which [was] inaugurated on [July 1, 2002]. [In May], the Administration served formal notice on the United Nations that the United States considered itself to have no obligations to the new court.

Id. *See also* Gurulé, *supra* note 2, at 43–45. Professor Gurulé notes that:

> The United States has voiced its concerns of the International Criminal Court through its outcome-based argument in which the ICC could subject U.S. military personnel to prosecution for inadvertent casualties and property damage during a military operation. The United States has reason to fear this outcome . . . . The Rome Statute creates a super-international appellate court with unchecked de novo review over national jurisdiction. In its current form, the Statute threatens national sovereignty, and, without additional jurisdictional guarantees that defer to good-faith national prosecutions and doctrinal guarantees that protect soldiers and their civilian and military commanders from serious humanitarian violations based on simple negligence, the Statute should not be ratified by the United States.

16. Scheffer, *supra* note 14, at 49 (characterizing the "terrorist assaults" of September 11, 2001, as crimes against humanity). *See also* Rome Statute, *supra* note 1, arts. 7, 8 (defining both crimes against humanity and war crimes).

17. Rome Statute, *supra* note 1, art. 11 ("The Court has jurisdiction only with respect to crimes committed after entry into force of this Statute."). *See also id.* art. 24 ("No person shall be criminally responsible under this Statute for conduct prior to the entry into force of this Statute.").

18. This author remains somewhat skeptical of this projection due in large part to the limited success and deterrent effect that the Nuremberg Tribunal, the Military Tribunal for the Far East, and the ICTY and ICTR have had on international acts of violence during war. *See* Scheffer, *supra* note 14, at 50–53.

and ratification of the Rome Statute, and its attendant overt actions are a success worth celebrating. But there remain two obvious and unresolved oversights that must be addressed if the concept of an ICC is truly to succeed: enforcement and imprisonment.

II. THE PROBLEMS

Article 4
Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and fulfillment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.[19]

A court, standing alone, does not have the capability to effectuate justice. A court, without coercive enforcement mechanisms, is merely one piece of a criminal justice system and is incapable of successfully combating or punishing criminal activity. The ICC, as currently structured, has no police force to assist it with finding, arresting, and securing potential suspects.[20] Rather, the Rome Statute preserves, with limited exception, the deficient approach currently utilized by both the ICTY and the International Criminal Tribunal for Rwanda (ICTR),[21] whereby arrests are made by "cooperating states"[22] or

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> There are many different mechanisms that the international community is exploring and using to respond to genocide, crimes against humanity, and war crimes. The mechanisms include international courts, national courts, truth and reconciliation commissions, historical commissions, and other means of transitional justice. No one mechanism is adequate to the task; all of them will be used in the years ahead depending on the circumstances surrounding the particular atrocity crimes and the desires of victims and governments about how to address them.

Id. at 51–52.

19. Rome Statute, *supra* note 1, art. 4.

20. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 415 (2000) (observing that "[t]o begin with the most obvious point, the ICC has no police force").

21. International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994), *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute] (attaching the Statute of the Tribunal as an Addendum to this Resolution).

22. *Id.* art. 28; ICTY Statute, *supra* note 8, art. 29. Both provisions mandate an identical obligation, namely, that "[s]tates shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law." Paragraph 2 of each Article much more unambiguously requires that "[s]tates shall comply without undue delay with any requests for assistance or an order issued by a Trial Chamber, including, but not limited to: . . . (d) the arrest or detention of persons." These provisions should be compared and contrasted with the ICC approach embodied in the Rome Statute. *See* Rome Statute, *supra* note 1, arts. 89–93. Article 89 specifically mandates as follows:

> The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

NATO forces.[23] A second major deficiency in the ICC's current formulation is the lack of any international or regional system for incarceration purposes.[24] The Rome Statute clearly indicates, and indeed limits, the possible penalties of conviction to terms of imprisonment.[25] Yet, oddly enough, the Rome Statute does not provide for a permanent facility where ICC convicts will be housed. Instead, the Rome Statute maintains the status quo used unsuccessfully by both the ICTY[26] and ICTR,[27] which relies upon "willing states" to provide prison facilities on an "as needed" or "as desired" basis.[28]

This article argues that these two oversights—lack of an international police force and lack of a permanent international or regional prison system—will ultimately undermine the potential for success heralded by ICC supporters. The current structure of the ICC provides merely a court, not a fully functional criminal justice system. Moreover, while the presence of a court filled with international judges and lawyers capable of addressing international crimes and participating in criminal trials sounds impressive, the reality is that our current approach to international criminal law is destined for limited success.[29] What exists under the Rome Statute is merely a court—nothing more. What is necessary, however, and quite possible, is the construction of an entire international criminal justice system.

Id. art. 89. No penalty for failure to comply with such requests for "arrest and surrender" is listed in Article 89 or those following it.

23. *See* Anne L. Quintal, *Rule 61: The Voice of the Victims Screams Out for Justice*, 36 COLUM. J. TRANSNAT'L L. 723, 759 (1998) (suggesting the need for greater use of SFOR for purposes of arrest).

24. *See id.* at 734.

25. Rome Statute, *supra* note 1, art. 77. While the Rome Statute and Article 77, in particular permit the imposition of monetary fines and/or the forfeiture of property and proceeds improperly obtained through the commission of the crime being punished, such fines may only be imposed "[i]n addition to imprisonment." *Id.* art. 77. The two primary options under the ICC structure as presented in the Rome Statute include the following:

> (a) Imprisonment for a specified number of years, which may not exceed the maximum of 30 years; or
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> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

Id.

26. ICTY Statute, *supra* note 8, art. 27 (indicating that prison sentences "shall be served in a State designated by the International Tribunal from a list of States which have indicated their willingness to accept convicted persons").

27. ICTR Statute, *supra* note 21, art. 26 (stating that "[i]mprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Criminal Tribunal for Rwanda."). Thus, Article 26 is distinct from both the ICTY Statute and Rome Statute in that the ICTR Statute actually permits imprisonment within the country wherein the violence and crimes were committed.

28. *See* Rome Statute, *supra* note 1, art. 103. Article 103 enshrines what has thus far been a consistent shortcoming both at the ICTY and ICTR—the utilization of "willing states" to imprison convicted individuals. Article 103 states, in pertinent part, that "[a] sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons." *Id.* art. 103. Article 103 further permits States to "attach conditions to its acceptance [of a particular prisoner] as agreed by the Court." *Id.* Such formula places far too much power in the hands of receiving states and submits the Court to a subservient role in the issue of imprisonment.

29. *See* M. Cherif Bassiouni, *The International Criminal Court in Historical Context*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 55, 66 (1999). Professor Bassiouni reminds:

> How the new International Criminal Court will work in practice will largely depend on the political will of the States, and their ability to provide the resources and personnel. Another key to success is the extent to which the Court will be free from cumbersome United Nations bureaucratic and financial procedures. However, the ultimate key will be the States' willingness to cooperate with the Court in the course of its decision-making processes.

Id.

III. THE FIRST SOLUTION: THE NEED FOR BADGES

Article 59
Arrest Proceedings in the Custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its law and the Provisions of Part 9 [of the Rome Statute]. . . .

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.[30]

A fundamental principle of criminal justice is that some arm of the state must be empowered to exert control—physically, if necessary—over the accused. Quite literally, there must be some body or agency capable of bringing recalcitrant individuals to justice. Ours is not a world where criminal suspects readily surrender themselves. Only in rare cases have individual suspects walked voluntarily into a prosecuting facility asking that justice be rendered against them.[31]

Rather, it is usually necessary to secure the physical presence of criminal defendants in court by utilizing some measure of force or authority over the suspect.[32] This was certainly true in the cases of the dual World War II tribunals, the International Military Tribunal at Nuremberg[33] (the Nuremberg Tribunal), and the International Military Tribunal in the Far East[34] (the Tokyo Trials). A similar phenomenon is occurring in Afghanistan where U.S. military forces have successfully seized hundreds of individuals for transport to a makeshift temporary prison facility at Guantanamo Bay Military Base in Cuba.[35] In each of these instances the vanquished population was placed under the control of the victorious forces. In World War II, police, in the form of military police or the armed forces, stood watch over the criminal proceedings, beginning with initiating the arrest or seizure and then carrying their authority through the entire trial as guards over the temporary cells in

30. Rome Statute, *supra* note 1, art. 59.

31. The main exception or instance where voluntary surrenders occur are cases where an individual is trying to gain protection from the prosecuting State. For example, consider the case of James Charles Kopp, a man accused of shooting and killing Dr. Bernard Slepian, a New York abortion provider, who fled to Paris ultimately turned himself in to Parisian officials. Mr. Kopp's extradition back to the United States has been conditioned upon assurances that Mr. Kopp would not be subjected to the death penalty. *See Kopp's Extradition vs. Execution* (CBS News television broadcast, June 8, 2001). Under circumstances such as these, where the suspect sees a favorable result from turning him or herself in, voluntary surrender is possible. In the more extreme cases of war crimes, however, voluntary surrender is less likely and should not be relied upon by proponents of international criminal justice.

32. A good example is the case of former Chilean dictator, Augusto Pinochet. Pinochet was physically taken into custody by the British police forces on a provisional Spanish arrest warrant following surgery to repair his injured back.

33. M. Cherif Bassouni, *From Versailles to Rwanda in Seventy-Five Years*, 10 HARV. HUM. RTS. J. 11, 28 (1997) ("At the time, over one million Allied troops occupied Germany, with complete access to prisoners of war, civilian witnesses and government documents."). *See also* Quintal, *supra* note 23, at 734 ("At Nuremberg, the victors were responsible for conducting the trials and had complete control over the vanquished.").

34. JOHN L. GINN, SUGAMO PRISON 2 (1992) ("The occupation forces began rounding up suspected Japanese war criminals early in September.").

35. *See generally* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002). *See also* Erin Chlopak, *Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions*, HUM. RTS. BRIEF, Spring 2002, at 6.

Nuremberg and Tokyo.[36] The two modern UN tribunals, in contrast, have struggled to obtain physical control over their suspects,[37] due largely to the practical limitations and impediments of international arrests.[38]

Arrests, under the ICTY and ICTR, can be considered voluntary due to the practical limitations of international law.[39] While the statutory mandate regarding arrest and extradition is written in mandatory terms, there in no apparent penalty—beyond shame—that may be imposed for failure to comply with the provisions of either the ICTY or ICTR.[40] Like much of international law, compliance is largely consensual, and countries

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36. GINN, *supra* note 34, at 3–5. "While Army troops were readying Sugamo Prison, other troops from the Thirty-fifth AAA group . . . were guarding war criminal suspects at Omori Prison." *Id.* at 2. *See also* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 615 (1992) (explaining that "[w]ith the arrival of the prisoners [at Spandau] it became an international penitentiary, ultimately under the Control Council, but administered in monthly sequence by Russian, American, British and French military officers").

37. *See generally* ICTY Website, *at* http://www.un.org/icty/glance/detainees-e.htm (last visited Jan. 21, 2003) (cataloguing the number of individuals arrested by national police forces, or "willing states," as opposed to the number of individuals arrested by international forces). Of the forty-two current detainees, nine individuals were arrested by national police forces, while seventeen were apprehended by international forces. *Id.* Although there have been approximately fifteen voluntary surrenders to the Tribunal, this system does not appear to have been – or provide the prospect of being – an effective method of obtaining judicial authority over international war criminals. *Id.*

38. Kenneth J. Harris & Robert Kushen, *Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution*, 7 CRIM. L.F. 561, 562 (1996) (contrasting that "[u]nlike the Nuremberg Tribunal, where defendants were surrendered by the victorious Allies, [the ICTR], as well as its counterpart to deal with the conflict in the former Yugoslavia . . . is entirely dependent on states' fulfilling their obligations under the Tribunals' Statute to arrest and surrender accused"). *See also* The Honorable Patricia M. Wald, International Criminal Tribunal for the Former Yugoslavia, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 114 (2001).

39. Although the statutory provisions mandating cooperation are stated in requisite terms, "shall co-operate," students of international law will surely note that there are no practical enforcement mechanisms in international law. International law, by its very nature, remains in large part a voluntary system not subject to legal enforcement. Two prominent mandates for cooperation with the ad hoc tribunals include Article 29 of the ICTY Statute and Article 28 of the ICTR Statute. Article 29, entitled "Co-operation and Judicial Assistance," provides as follows:

> 1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
> 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
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> a) the identification and location of persons;
> b) the taking of testimony and the production of evidence;
> c) the service of documents;
> d) the arrest or detention of persons;
> e) the surrender or the transfer of the accused to the International Tribunal.

ICTY Statute, *supra* note 8, art. 29. *See also* ICTR Statute, *supra* note 21, art. 28 (presenting a nearly identical version of requirements).

40. Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 136–38 (2002). Mr. Cogan points out that:

> In the case of the ad hoc tribunals, the cooperation regime's weakness does not result from the absence of tribunal authority or an authoritative enforcement mechanism. Both the ICTY and ICTR were created by the Security Council pursuant to its Chapter VII authority. States are thus under an obligation to cooperate with the tribunals, and the Security Council could conceivably decide to take measures against states that failed to comply with the tribunals' orders. Despite occasional pleas by the ICTY, however, the Security Council has failed to take such action. Individual states and regional organizations, though, have used various forms of persuasion to encourage states, in particular Yugoslavia and Croatia, to cooperate, and this has worked in limited fashion. But, even backed by the

may fail to meet their "international obligations" without suffering recourse in a legal setting. One prominent example of the inertia hampering the success of the ICTY and ICTR efforts was the reluctance of a member of the U.S. federal judiciary to surrender Elizaphan Ntakirutimana, an ICTR suspect to the ICTR,[41] despite a clear and unequivocal mandate that ICTR prisoners and request for prisoners take precedence over any domestic proceedings.[42] The case of Mr. Ntakirutimana languished in the federal court system in Texas for several years before the U.S. courts agreed that the ICTR primacy clause read in conjunction with the requirement of cooperation meant that ICTR proceedings take precedence over domestic cases. Such reluctance to surrender international criminal suspects gives limited authority to the idea of international criminal justice.[43]

If courts within the United States are unwilling to transfer indicted individuals to an international criminal tribunal in a timely fashion, what are we to expect from other countries? Not surprisingly, the ICTY has suffered from the dilatory tactics of various

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enforcement authority of the Security Council and certain powerful states, the tribunals, as demonstrated, have not always been able to provide for defendants. In fact, the very reliance on such states may itself create fair trial problems.

If the experience of the ad hoc tribunals should make proponents of international justice wary of possibilities of fair trials, it is, therefore, worthwhile to ask if the future permanent International Criminal Court is an improvement on its predecessors. The answer is "no." In contrast to the ad hoc tribunals, the ICC is backed by the Rome Statute, not the U.N. Charter, and, thus, only those states that ratify the Rome Statute will be bound by the ICC's orders.

Id. at 137. Although Mr. Cogan is speaking more directly about the essence of fair trial procedures, these same comments ring true for the issue of state cooperation generally and the lack of enforcement mechanisms against recalcitrant states.

41. *See infra* note 54 and accompanying text.

42. ICTR Statute, *supra* note 21, art. 8 (mislabeled concurrent jurisdiction). Paragraph 2 of Article 8 proclaims: "The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute." *See also* ICTY Statute, *supra* note 8, art. 9 (containing identical language). The right of primacy, or the right to have the first choice of defendants for trial, enshrined in both the ICTY and ICTR statutes, is not a component of the ICC. Rather, the Rome Statute and the ICC only become operational if the domestic courts are unwilling or unable to hold trial. The Rome Statute approach is referred to as "complementarity." *See* Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT'L L. 5, 18–19 (2001) (discussing the principle of complementarity under the ICC). Ms. Duffy observes:

> The complementarity provisions at Articles 17 to 19 of the [Rome] Statute are central to any debate on the implications of the ICC. The discussion on constitutional compatibility of the Court is no exception. Defining the relationship between national authorities and the ICC, Article 17 limits ICC investigation to those situations where there is no state willing or able to investigate or prosecute. If a state carries out a genuine investigation on a national level, the ICC will not have jurisdiction, thereby avoiding many of the potential constitutional difficulties.

Id. at 18. Ms. Duffy continues:

> The complementarity provisions of the Statute accordingly enshrine a very high degree of deference to national proceedings and thereby provided considerable comfort to state actors currently considering possible scenarios of constitutional conflict. The Court cannot, for example, "overrule" a national investigation it deems unsatisfactory, unless the ICC Prosecutor can satisfy the Court that the national authorities can not [sic] or will not do justice in the particular situation or case. Multiple opportunities exist for challenge and review to safeguard the primacy of national courts.

Id. at 18–19. *See also* Gurulé, *supra* note 2, at 10–19.

43. Wald, *supra* note 38, at 114 (criticizing the realpolitik that limits the Tribunal's ability to gain cooperation in effectuating arrests).

Balkan countries in trying to secure compliance with arrest and extradition.[44] Various members of the Yugoslavian Tribunal and the ICTY Office of the Prosecutor have chastised former Yugoslavian countries for their respective failures to recognize the primacy of the ICTY over domestic Balkan proceedings and their reticence to cooperate in arresting and extraditing known suspects.[45] For nearly six years, two highly publicized defendants, Karadzic and Mladic, have flouted the impotency of the ICTY in securing arrests by walking the streets of their hometowns without fear or trepidation.[46] On at least one occasion, NATO troops had zeroed in on the exact location of the defendant, but chose not to effectuate the arrest.[47]

Recently, however, the domestic arrest of Slobodon Milosevic, the ICTY's prized defendant, in his home country of Yugoslavia, resulted in the hastened transfer of this deposed dictator to The Hague.[48] The domestic arrest of Milosevic was itself remarkable.

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44. United Nations Press Release, Countries Urged To Cooperate in Delivering Indicted War Criminals to Tribunal on Former Yugoslavia, GA/9345 (Nov. 4, 1997) (explaining that "[a]n additional stumbling block is the lack of cooperation by the States and entities of the former Yugoslavia"). Further, "certain States and entities in the former Yugoslavia, namely, the Federal Republic of Yugoslavia, Republic Srpska and the Bosnian Croat authorities, continue stubbornly to refuse to arrest indictees." *Id. See also* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 22 (2001) (noting that "over 78 percent of Croatian citizens [surveyed] think that Croatia must not extradite its citizens if The Hague Tribunal requests it").

45. Former ICTY Judge Patricia M. Wald catalogues some of the Tribunal's shortcomings. *See* Wald, *supra* note 38, at 114. Specifically, she notes:

> While the ICTY is truly revolutionary in its authority to transcend national boundaries and try war criminals wherever found, it is in fact highly dependent on other institutions' cooperation. It needs state cooperation or the UN peacekeeping force to physically arrest indicted individuals. Cooperation is required to implement any provisional release of defendants awaiting trial or to take depositions or obtain formal statements from witnesses who cannot come to The Hague. States can hinder the work of the Tribunal by discouraging witnesses from coming forward or passively failing to enforce ICTY summons, subpoenas, or requests for information.

Id.

46. Radovan Karadzic and Ratko Mladic were indicted nearly six years ago for their respective roles in the siege of Sarajevo and the 1995 massacre of up to 8000 Muslims in the town of Srebrenica. *See infra* note 48 and accompanying text. However, with the arrest of former President Milosevic, General Mladic's happy life in a suburb outside of Belgrade has begun to lose its luster.

47. Goldstone, *supra* note 4, at 124. Goldstone observes:

> Indeed, the most serious threat to the credibility, and indeed the very essence, of the Tribunals has come from politically inspired delays in the arrest of indicted war criminals. The most visible and publicized of these failures of the international community to support the Tribunals have been in respect of the arrest of major Serbian leaders who were indicted by the ICTY—Milosevic, Karadzic and Mladic.
>
> The case of Karadzic is the most unfortunate. When he was indicted on charges of genocide and crimes against humanity in July 1995 UN troops in Bosnia could have undoubtedly arrested him. The same is probably the case for Mladic, who was indicted for the same war crimes. The troops in Bosnia did not arrest these suspected war criminals simply because the Pentagon military leaders were not prepared to risk American lives. Yet what were American troops, armed and in uniform, doing in Bosnia if they were not prepared to take risks in the performance of their duties? The great tragedy is that if these wanted war criminals had been arrested in 1995, some of the tragic events which occurred since then, especially in Srebrenica and in Kosovo, may have been avoided.

Id.

48. ICTY Press Release, Statement of the Prosecutor, Carla Del Ponte, F.H./P.I.S./598e (June 29, 2001), *at* http://www.un.org/icty/pressreal/p598-e.htm (last visited Mar. 3, 2003). In her statement, the Prosecutor indicated the importance of this arrest and transfer:

> The arrival of Slobodan Milosevic in the detention unit of this Tribunal marks an important day for international criminal justice. He is here, and I am satisfied about that.

The act of international surrender by Yugoslavia, however, signals a clear break from prior protective acts of the Yugoslavian nation. Is the case of Milosevic truly a sea change such that international criminal tribunals may rely on cooperating states to effectuate arrests, surrenders, and extraditions? Unfortunately, it likely is not. Rather, the case of Milosevic should be characterized, for now, as the anomaly it most likely is. Even a cursory review of the Milosevic case indicates that his arrest and eventual transfer was tied to much-needed monetary relief.[49] Numerous countries threatened to withhold their financial contributions unless and until Milosevic was transferred to the ICTY.[50]

Thus, one must question whether the carrot of aid in either monetary or other form can be replicated with sufficient frequency to lead to future cooperation regarding arrest and transfer. Will such enticements be available in all cases or only those involving "big name" defendants like Milosevic or Osama bin Laden?[51] And, if the receipt of aid is acceptably tied to arrest and surrender, what about the cases of Karadzic and Mladic?[52] These two key players have been living comfortably under indictment since July 1995.[53] Why was receipt of aid not tied to their capture as well? Perhaps the truth remains that even those with international renown or familiarity continue to enjoy immunity from arrest when arrest remains dependent on cooperating states.

The case of Milosevic should also be contrasted with the United States' treatment of Elizaphan Ntakirutimana, an ICTR suspect.[54] The receipt of aid could not be used to encourage the desired behavior or cooperation from an individual federal court in the United States. Even in the face of open scolding from then-ICTY President Gabrielle Kirk McDonald, an American herself, the United States took no deliberate speed in transferring

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> I welcome the decision by the authorities of the Republic of Serbia to transfer him to The Hague .... The transfer of Slobodan Milosevic marks the real beginning of co-operation by Yugoslavia .... The support of all Member States is necessary to ensure that the Tribunal can perform the task that has been entrusted to it, and that justice can be done.
>
> I am also confident that the transfer of Slobodan Milosevic will now lend renewed energy to the task of arresting those fugitives who are still at liberty. Remember that there are still many other accused on other indictments who have not yet been taken into custody. Radovan Karadzic and Ratko Mladic were first indicted almost six years ago. The fact that they have not been arrested when we are preparing the trial of other members of the Bosnia Serb leadership is scandalous. All our accused must be brought to trial. The transfer of Slobodan Milosevic is a turning point that all authorities throughout the former Yugoslavia must now recognise.

49. *See* Misha Savic, *Serbs Ask War Criminals To Surrender*, ASSOCIATED PRESS, Feb. 13, 2002, 2002 WL 13775968 (stating that "Yugoslav authorities extradited Milosevic to The Hague last year after facing threat that the country wouldn't receive international aid").

50. *One Brought to Justice, Many at Large; Balkans War Crimes; The Hague Tribunal and the Balkans*, ECONOMIST (London), Feb. 9, 2002, 2002 WL 7245089. The European Union's executive Commission pledged nearly $450 million. The United States proffered nearly $200 million, and the World Bank agreed to offer another $580 million. *See, e.g., E.U. Pledges Aid, Outlines Expectations for Belgrade*, DEUTSCHE PRESSE-AGENTUR, Feb. 8, 2001; Carol J. Williams, *The Imprisonment of Milosevic*, LOS ANGELES TIMES, June 30, 2001; *World Bank Pledges 580 Million Dollars in Aid to Yugoslavia*, AGENCE FRANCE-PRESSE, June 29, 2001. All of this aid was made contingent on the surrender or arrest of former President Milosevic. Ultimately, as Yugoslavia is in desperate need of financial aid to assist with reconstruction, the carrot of monetary relief overcame any desire to protect nationalistic interests.

51. *See* Kenneth Anderson, *What to do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591 (2002) (discussing the difficulty of trying certain defendants in the international arena).

52. *See supra* notes 47–49 and accompanying text.

53. Goldstone, *supra* note 4, at 124.

54. In the Matter of Surrender of Elizaphan Ntakirutimana, 988 F. Supp. 1038 (S.D. Tex. 1997); In the Matter of Surrender of Elizaphan Ntakirutimana, 1998 WL 655708 (S.D. Tex. 1998); Elizaphan Ntakirutimana v. Reno et al., 184 F.3d 419 (5th Cir. 1999).

Mr. Ntakirutimana to the ICTR in Arusha, Tanzania.[55] Fortunately, other states, such as Cameroon and Mali, have been much more cooperative with the ICTR.

Thus it becomes apparent that a criminal court cannot operate efficiently without the assistance of a police force or alternate authority capable of effectuating arrests. It remains curious that the two UN-sponsored tribunals were structured without the aid of a police or security force despite the fact that both areas were once part of a larger UN peacekeeping mission. Both the ICTY and ICTR, born out of UN Security Council Resolutions, were placed in the unenviable prosecutorial position of being courts without the supporting appendages of either police or prison facilities. Unlike many of the recent peacekeeping missions, where international security forces have been physically present within the conflict,[56] the ICTY and ICTR have been left to assert their presence and demonstrate their force without any international supporting devices. Of course, it is important to note that both tribunals operate *outside* their respective states where the conflicts, massacres, and genocidal campaigns occurred.[57] The decisions to operate a free-floating court in a vacuum has had obvious limitations that even the judges and prosecutors recognize.[58] In fact, the decision to isolate these tribunals free of police and prison structures, in countries outside of the original sites of conflict, has only added to the resentment and distancing from both institutions at home.

Were the tribunal to have the force of law that follows from a more complete criminal justice system—or even the rudimentary criminal justice system evidenced at Nuremberg and Tokyo—it is arguable that the results would be perhaps greater. Greater respect. Greater deterrence. Greater efficiency. Instead, the ICTY and ICTR have combined to produce a mere thirty convictions between them, following eighteen domestic arrests and twenty-three international arrests. This paucity of arrests has resulted despite approximately $174 million in annual funding.[59] These amounts do not even consider the additional $5 billion spent on peacekeeping missions to both the former Yugoslavia and Rwanda.

It is not as though no international police model exists. The International Criminal Police Organization (Interpol) has successfully utilized the cooperative efforts of 179 member states for over seventy-five years.[60] The mission of Interpol is "to be the world's pre-eminent police organization in support of all organizations, authorities and services whose mission is preventing, detecting, and suppressing crime."[61] Interpol is solely an

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55. The Honorable Gabrielle Kirk McDonald, *Conference on War Crimes Tribunals: The International Criminal Tribunal for the Former Yugoslavia*, 13 AM. U. INT'L L. REV. 1422, 1459 (1998) ("Compliance must become the norm. States must execute [ICTY] orders. States must arrest individuals. States must respond to our requests for facilities for convicted persons and vulnerable witnesses.").

56. Information about UN peacekeeping missions can be found on the UN website, http://www.un.org/peace/index.html (last visited Apr. 22, 2003).

57. The ICTY sits in The Hague, the Netherlands, while the ICTR is located in Arusha, Tanzania. In addition, the ICTR has a prosecutorial office in Kigali. At least as far as proximity is concerned, the ICTR has remained closer than its sister institution at The Hague.

58. Former Chief Prosecutor of the ICTY and ICTR, Richard Goldstone, underscores the importance of the power of arrest in international criminal justice in decrying that "the most serious threat to the credibility, and indeed the very essence, of the Tribunals has come from politically inspired delays in the arrest of indicted war criminals." Goldstone, *supra* note 4, at 124.

59. Updated information regarding both tribunals—including information regarding arrests, detentions, convictions, and sentencing—may be found at their respective websites. For the ICTY, see http://www.un.org/icty (last visited Mar. 3, 2003), and for the ICTR, see http://www.ictr.org/wwwroot/default.htm (last visited Mar. 3, 2003).

60. Extensive information regarding Interpol may be found on the organization's website, http://www.interpol.int (last visited Mar. 3, 2003).

61. Interpol, Mission, http://www.interpol.int/Public/Icpo/default.asp (last visited Mar. 15, 2003).

international organization and does not engage itself in domestic crimes.[62] Thus, Interpol appears perfectly situated to step in and fill the void when crises of international magnitude and character invoke the jurisdiction of the ICC.[63] The author recognizes that the current structure of Interpol would not fill the void currently existing in international criminal justice. Interpol merely provides a structure that could be manipulated to assist countries in setting up an international police system. The current clearinghouse design of Interpol proffers only an existing structure. To facilitate the transformation of Interpol in to a functioning international criminal police structure, the mandate of Interpol and, perhaps, the structure of the Rome Statute would need to be modified. Regardless of how the international community arrives at a police solution, this author remains convinced that the lack of a police force constitutes a monumental omission in constructing an international criminal justice system. While other solutions certainly exist and should be continually evaluated, the utilization of an existing organization, such as Interpol, whose structure, character, and format seemed appropriately suited to meet the needs of the ICC should at least be considered for feasibility.

The decision implicitly made by the drafters of the Rome Statute was that a police force is simply not a necessary component of a criminal justice system. This error/oversight may be a sin of omission—that is, the failure in 1998 to fully appreciate the difficulties befalling the ICTY and ICTR without the aid of a police force. Conversely, it could also be a disturbing sin of commission—a decision fully recognizing the limited structure of the court and nevertheless endorsing these limitations as an inevitable consequence of delving into international efforts at criminal justice. But with the ratification of the Rome Statute in 2002, the Court has officially been born. No longer will the world community speak in terms of possibilities and aspirations. Rather, a world court now exists in reality, not just conception. Thus, we must begin focusing on the role this institution will play as we strive for peace among humankind. Whatever political will was lacking in 1998 and whatever omissions have been uncovered since then, should be cured before these deficiencies take precedence over the amazing potential that this new institution holds.

While I steadfastly assert that a court without any accompanying police force to assist with arrests, extradition, and detainment is destined to mediocrity, the political climate of international law may simply not tolerate such large-scale efforts at institutionalizing an international system of criminal justice.[64] For over fifty years, the world community was unable to achieve anything nearing the force or stature of an ICC. Indeed, the United States remains reluctant to ratify, much less sign, the Rome Statute based on fears that "our" servicemen and women may be subjected to targeted prosecutions for political reasons.[65]

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62. *See* Interpol, ICPO-Interpol Constitution and Regulations, *at* http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/constitutionGenReg/constitution.asp#gp (last visited Mar. 15, 2003).

63. *Id.* In fact, the ICTR has already credited Interpol for their cooperative efforts with the Tribunal. *Sixth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory Neighboring States Between 1 January and 31 December 1994*, U.N. GAOR, 56th Sess., Provisional Agenda of Item 62, ¶ 82, U.N. Doc. A/56/351-S/2001/863 (2001) [hereinafter *Sixth Annual Report*]. Paragraph 118 of the Report notes: "The Investigations Division management has endeavored to increase cooperation with Interpol. For its part, Interpol has trained three investigators in criminal intelligence analysis. About 15 red notices regarding the Tribunal's fugitives have been forwarded to Interpol for distribution throughout its wide channels of communication." *Id.* ¶ 118.

64. Ruth Wedgewood, *United Nations Peacekeeping Operations and the Use of Force*, 5 WASH. U. J.L. & POL'Y 69 (2001).

65. *See generally supra* notes 13–17 and accompanying text.

Although the United States has chosen not to obfuscate this concern or disingenuously suggest that ratification might yet occur, other states have been swift in signing while slow in ratifying the Statute.

Perhaps the slowed progress of ratification is attributable to the deliberations required domestically to ensure ratification. Or, as this author believes, perhaps the slow pace can be blamed on the reluctance—not altogether misguided—that becoming a part of an international criminal justice system will undoubtably translate into a potential loss of control over a State's sovereignty. What may be at issue in relinquishing state sovereignty in the international community transcends questions of humanity and assurances of "never again." What may be at issue is the inability or incomprehension of submitting one's nation, one's people and, ultimately, one's sovereignty to partial control by an international tribunal with criminal justice powers.

The risk of the Rome Statute—despite the rhetoric of complementarity—is who will decide when a domestic case has been appropriately handled.[66] Will the ICC ultimately clothe itself with powers beyond those now envisioned so that the idea of criminal justice enforcement includes an international police force capable of overriding domestic proceedings? Will principles of Eastern justice be accepted by the Western-dominated UN tribunals? At this point, the end stage of ratification and true creation, no question should confidently be shrugged away as irrelevant or insignificant. To minimize any such risks would place blind faith in a system that, at least historically, varies with the politics of the moment.[67] Both Pinochet and Milosevic have learned that immunity for life and assurances of safety may be more opaque than originally believed. The risks of ratification and the objections raised by countries like the United States cannot—and should not—be wholly discounted.

Yet the risks most deserving of mention rarely garner any space in popular media. One of the most grave risks is that any ICC without a supporting police force will likely fall short of expectations. Whether it is politically acceptable or not, a standing or permanent police force is a prerequisite to any successful attempt at criminal justice enforcement. Beliefs to the contrary indicate a level of faith or complacency in cooperating states that has not been borne out by either the ICTY or ICTR.

Article 103
Role of States in enforcement of sentences of imprisonment

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66. John Sequin, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85, 94 (2000).

> In a speech to the United Nations General Assembly Sixth Committee, David J. Scheffer noted that the addition of the concept of complementarity could not ensure that Americans would not be brought before the [ICC] because "[t]he court could decide there was no genuine investigation." Therefore, because the Pre-Trial Chamber may decide by a vote that a State has not genuinely carried out an investigation of an accused, the United States remains unsatisfied with [the] level of protection afforded to national sovereignty.

Id.

67. Wedgewood, *supra* note 64, at 79. In her article relating to international peacekeeping, Professor Wedgewood stressed a similar point, implicitly criticizing the lack of structure in peacekeeping missions.

> In practice, the national contingents that take part in peacekeeping do not answer to the UN force commander. If the UN commander wants to move a battalion ten miles down the road in a disputed area, he must wait for the head of the national contingent to get permission. There really is no such thing as an integrated UN military force.

Id.

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. . . .

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.[68]

IV. THE SECOND SOLUTION: THE NEED FOR BARS

As set forth above, a necessary ingredient in any criminal justice effort is the ability to arrest, through involuntary means if necessary, and detain suspects. Equally imperative is the creation and maintenance of a structure capable of housing individuals awaiting trial and those ultimately convicted of offenses. It defies logic to invest resources in constructing a criminal tribunal without considering the still-unanswered question of where these defendants, once convicted, will be placed.

This author has never fancied the idea embodied in the statutes of the ICTY,[69] ICTR,[70] and now the Rome Statute[71] that strictly limit punishment to terms of imprisonment. No lesser penalty or alternative treatment option is made available under any of the most recent international tribunals. Granted, individuals appearing before these bodies will be accused of some of the worst offenses catalogued by any nation-state.[72]

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68. Rome Statute, *supra* note 1, art. 103.

69. ICTY Statute, *supra* note 8, art. 24 ("The penalty imposed by the Trial Chamber shall be limited to imprisonment.").

70. ICTR Statute, *supra* note 21, art. 23 (repeating verbatim the provisions set forth in Article 24 of the ICTY Statute).

71. *See* Rome Statute, *supra* note 1, art. 77.

72. *Id.* art. 5. Article 5 lists the crimes falling within the jurisdiction of the ICC. Paragraph 1 reads as follows:

1) The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

Much like Nuremberg and Tokyo, these modern-day efforts are aimed at crimes against humanity,[73] war crimes,[74] and genocidal campaigns.[75] Implicit in these broad categories are acts of sexual violence, torture, forced expulsion from one's community, and ethnic cleansing.[76] The idea that such offenses continue to permeate civilized society shocks the conscience and breaks the heart.

Nonetheless, not all offenders are best suited nor all victims best vindicated by limiting the penalties to terms of imprisonment. Other approaches to criminal justice enforcement should be reconsidered and evaluated. Restorative justice, particularly in the case of forced expulsions and lesser crimes, should at least be an option. However, considerations of punishment alternatives must be relegated to another effort. The focus of this article is the apparent shortcomings of the current approach to the status quo.

As indicated above, prison appears to be the sole penalty embraced by the Rome Statute.[77] Judicial activism or creative sentencing may escape this conclusion, but the actual text of the Statute is limiting.[78] Accordingly, the international community must begin to evaluate a second major shortcoming in the Rome Statute—lack of a permanent prison facility. The Rome Statute provides for judges,[79] prosecutors,[80] and defendants' rights.[81] But, inexplicably, only the slightest consideration has been given to the issue of incarceration, a natural consequence of criminal prosecution.

Previous experience at The Hague[82] and in Arusha[83] should have exposed the weakness of relying on cooperating states to provide prison facilities. Beyond the clear

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a) The crime of genocide;
b) Crimes against humanity;
c) War crimes;
d) The crime of aggression.

Id. The still undefined "crime of aggression" was one of the more contentious points of the Rome Statute. It is one of the crimes that the Kellogg-Briand Pact of 1928 meant to outlaw—where a nation-state resorts to war as a response. Though listed in Article 5, the crime of aggression has not been fully defined. *Id.* art 5. In contrast, the crimes of genocide, crimes against humanity, and war crimes are all defined immediately following Article 5. *Id.* arts. 6–8.

73. *See id.* art. 7 (providing an exhasutive definition of crimes against humanity).

74. *See id.* art. 8 (presenting definition of war crimes).

75. *See id.* art. 6 (defining genocide).

76. *See generally id.* arts. 6–8.

77. Rome Statute, *supra* note 1, arts. 76, 77, 105, 106. Article 76 provides that "[i]n the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed . . . ." *Id.* art. 76. Article 77 unequivocally limits the applicable penalties to either imprisonment for a term not to exceed thirty years, life imprisonment, or imprisonment *plus* either a fine or forfeiture of proceeds of the crimes. *Id.* art. 77. There is no statutory ability, upon conviction, for a Trial Chamber to avoid sentencing an ICC convict to imprisonment. Accordingly, the need for a prison becomes apparent.

78. *See id.* art. 77. The plain language of Article 77 mandates some measure of imprisonment. Although there is no minimum sentence length set forth in the statute, there is no provision that permits a Trial Chamber to avoid sentencing an ICC convict to a certain term of imprisonment upon conviction. It will be interesting to see if any cases materialize where the Trial Chamber issues an absurdly low prison sentence or a "time-served" sentence where the facts do not warrant imprisonment. Regardless of what the Trial Chambers might like to do in an unusual case, Article 77 gives absolutely no room for restorative approaches to punishment. Each and every defendant convicted under the Rome Statute will, according to Article 77, serve some amount of time in a prison facility. *Id.*

79. *See id.* arts. 36–41.

80. *See id.* arts. 15, 42.

81. *See id.* arts. 55, 60, 63, 66, 67.

82. ICTY Statute, *supra* note 8, art. 27. Article 27 requires that the enforcement of ICTY sentences shall be served in a state designated by the International Tribunal from a list of willing states.

83. ICTR Statute, *supra* note 21, art. 26. Article 26 reads in pertinent part: "Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to

propensity of African countries to proffer space to the ICTR[84] and Western European countries to provide assistance to the ICTY,[85] there is a conspicuous absence of states willing to cooperate with either tribunal.[86] As both tribunals have been in operation for several years, we should take an accounting of the actual number of states that have offered aid. This effort would reveal that most permanent members of the Security Council have not answered the call.[87] Likewise, many members of NATO have avoided their respective responsibilities under the ICTY and ICTR statutes—both UN Security Council resolutions that require cooperation.[88]

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accept convicted persons." Unlike the ICTY, which will not permit domestic placement of prisoners, the ICTR does provide the potential for ICTR convicts to return to Rwanda for service of sentence.

84. Three African countries, Mali, Benin, and Swaziland, have signed the requisite agreements indicating their availability to enforce ICTR sentences. *Sixth Annual Report, supra* note 63, ¶ 82. This UN Report covers the period from July 1, 2000, to June 30, 2001.

85. ICTY Press Release, Stevan Todorovic Transferred to Spain to Serve Prison Sentence, JL/P.I.S./648e (Dec. 11, 2001), *at* http://www.un.org/icty/latest/index.htm (last visited Mar. 3, 2003). This Press Release indicates that only seven states have thus far signed the requisite agreements enabling them to receive ICTY prisoners. In ascending order, the states are:

1. Italy, signed Feb. 6, 1997
2. Finland, signed May 7, 1997
3. Norway, signed Apr. 24, 1998
4. Sweden, signed Feb. 23, 1999
5. Austria, signed July 23, 1999
6. France, signed Feb. 25, 2000
7. Spain, signed Mar. 28, 2000

The 2001 ICTY update concerning Detainees and Former Detainees, at http://www.un.org/icty/glance/index.htm (last visited Mar. 3, 2003), indicates that, of the arrests that have taken place, these countries have actually received the following notable ICTY convicts:

1. Finland, received Zlatko Aleksovski on Sept. 22, 2000 (now released)
2. Norway, received Drazen Erdemovic on Aug. 26, 1998 (now released)
3. Finland, received Anto Furundzija on Sept. 22, 2000
4. Spain, received Stevan Todorovic on Dec. 11, 2001
5. Germany, who has not yet penned an agreement with the ICTY, received Dusko Tadic on Oct. 31, 2000

86. Mary Margaret Penrose, *Spandau Revisited: The Question of Detention for International War Crimes*, 16 N.Y.L. SCH. J. HUM. RTS. 553, 572–76 (2000) (explaining that only Italy, Finland, Norway, and Sweden have agreed to accept ICTY prisoners). Spain was later added as a "willing state," but not before it instituted proceedings against General Pinochet in England. The only two countries willing to accept ICTR prisoners were Mali and Benin. *Id.*

87. With the exception of France, none of the five permanent members of the UN Security Council have proffered space to either ICTY or ICTR convicts. *See supra* notes 84–86 (setting forth the three African and seven European States that have agreed to receive ICTY and ICTR prisoners). Conspicuously missing in this small contingent is the United States, the United Kingdom, Russia, and China. Other notable countries that have not proffered space include Germany (although Germany currently has custody of ICTY convict, Dusko Tadic), Australia, Greece, the Netherlands, and Switzerland.

88. The Honorable Gabrielle Kirk McDonald, The International Criminal Tribunal for the Former Yugoslavia, Address at the Washington College of Law (Mar. 31, 1998), *in International Support for International Criminal Tribunals and an International Criminal Court*, 13 AM. U. INT'L L. REV. 1413, 1432–33 (1998). The former Judge and President of the ICTY expressed her concern regarding lack of cooperation at a conference held at American University in 1998. Judge McDonald noted that, at the time:

> Only six States have commenced negotiations to reach agreements for the enforcement of sentences and of those, only [three] have signed agreements, while a further thirteen States have indicated they are willing to accept convicted persons .... The Tribunal has the right to expect more than this dismal demonstration of support by the vast majority of the international community. The expectation

In much the same manner that a court cannot function in isolation from a police force, neither can such court operate without assistance in housing condemned individuals and providing oversight of criminal sentences. The world should have learned its lesson during World War II when the cessation of international supervision resulted in the large-scale parole and release of both Nuremberg and Tokyo prisoners.[89] Undoubtedly, the court is the corpus or body of the criminal justice system. Meanwhile, a police force provides the legs, or foundational support; access to a prison facility provides the arms, or balance. It is inconceivable that a successful criminal justice effort would intentionally exclude any provision for incarceration facilities. Yet the Rome Statute perpetuates the misguided approach adopted by both the ICTY and ICTR that relies on "willing states" to provide prison facilities on an ad hoc basis.[90] This approach has yielded only marginal support from the international community[91] and cannot be relied on by a more permanent institution. Accordingly, this oversight must be reconsidered and, if possible, remedied.

A natural consequence of criminal trials is convictions. Indeed, this is the very point and purpose of criminal proceedings. Thus, a natural consequence of conducting criminal trials in the international arena is the need to incarcerate these convicted individuals in some permanent facility. Unlike the protections often denied to domestic prisoners, both UN rules and the mandates contained within the Rome Statute should guarantee that international prisoners receive a minimal level of humane treatment.[92] These rights include delineated space for each prisoner, oversight protections, and visitation requirements enshrined in the UN Standard Minimum Rules for the Treatment of Prisoners.[93] Many countries' prisons will simply not be able to meet these minimum standards or would

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that we will be supported and empowered by the international community has practical, legal and moral underpinnings.

As yet, states have not truly heeded the request of the former Judge. Very few of the NATO states have proffered assistance to the Tribunal in the form of available prison space. This reluctance to help a Tribunal already in existence serves as a troubling harbinger for the ICC. One can only question why the drafters of the Rome Statute would model this deficient system conditioned on "willing states" when it has already demonstrated, and continues to demonstrate, its inability to provide the necessary prison support for a successful endeavor.

89. GINN, *supra* note 34, at 242 (describing the release of prisoners prior to complete service of their respective sentences). *See also* MICHAEL R. MARRUS, THE NUREMBERG WAR CRIMES TRIAL 1945–1946: A DOCUMENTARY HISTORY 261 (1997).

90. Rome Statute, *supra* note 1, art. 103. Article 103, Paragraph 1 states: "A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons." *Id.* This language mirrors almost exactly the language that has produced marginal results, at best, at both of the ad hoc UN Tribunals. ICTY Statute, *supra* note 8, art. 24; ICTR Statute, *supra* note 21, art. 23. It is curious that such language would be adopted when ICTY and ICTR had already demonstrated its impotency.

91. *See supra* notes 84–86 (listing seven European states and three African nations that have willingly proffered prison space to the two ad hoc tribunals over the course of nearly eight years).

92. *See* Rome Statute, *supra* note 1, art. 103. Article 103, Paragraph 3 reads as follows:

> 3. In exercising its discretion to make a designation under Paragraph 1, the Court shall take into account the following: . . .
>
> b) The application of widely acceptable international treaty standards governing the treatment of prisoners.

93. United Nations Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/6111 (1957), Annex 1, E.S.C. Res. 663(c), U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *amended by* E.S.C. Res. 2076, U.N. ESCOR, 62nd Sess., Supp. No. 1 at 35, U.N. Doc. E/5988 (1977) (detailing specific requirements for accommodation, personal hygiene, clothing and bedding, food, exercise and sport, medical services, discipline and punishment, instruments of restraint, information to and complaints by prisoners, contact with the outside world, books, religion, treatment, privileges, work, education, and recreation). In addition, the UN General Assembly passed the Basic Principles for the Treatment of Prisoners, UN Doc. A/RES/45/111, in 1990.

discriminate in favor of these international prisoners that have been condemned for committing the most heinous acts catalogued by modern society.[94] Even if it were possible to optimistically project that the inclusion of international prisoners within domestic prisons would raise the level of care and treatment for all incarcerated persons, the problem persists that a single location or regional system needs to be created to accommodate ICC prisoners.

Currently, and only by default, all persons condemned by the ICC are assured that if no willing state proffers space in conformity with the Rome Statute, they will be housed at the seat of the ICC in The Hague.[95] Currently, the ICTY Detention Unit in Scheveningen,[96] the North Sea Port on the outskirts of The Hague holds forty-three individuals either awaiting trial before or awaiting transfer from the ICTY.[97] There has been little commentary on the propriety of this facility or the desire of the Netherlands to consider this site as a permanent house for international prisoners. Likewise, the United Nations Detention facility in Arusha, Tanzania, houses forty-three ICTR suspects/indictees and, currently, three convicted individuals.[98] No movement has been made to streamline the prison facilities for these potential prisoners or to standardize their placement. Rather, the current approach that relies upon state cooperation has ICTY and ICTR prisoners serving their respective sentences in different facilities.

The greatest danger that an ad hoc approach to imprisonment poses is the danger that certain individuals will benefit from detainment in one state's facility versus another.[99] As this author has previously noted, there are obvious advantages—both in contemporaneous treatment options and in possible parole options—that arise from being incarcerated in particular countries. For example, imprisonment in those states with poor human rights records and poor prison facilities—including the United States—would burden certain prisoners with the added penalty of suffering potential human rights violations while being incarcerated.[100] Such risk cannot be tolerated by an international effort.[101] Further,

94. *See* Penrose, *supra* note 86, at 565–87 (discussing the many and varied difficulties of relying on "willing states" to provide prison facilities).

95. Rome Statute, *supra* note 1, arts. 3, 103. Article 103, Paragraph 4 provides: "If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State . . . ." Article 3 defines the seat of the court, as well as the host state by explaining in Paragraph 1 that, "[t]he seat of the Court shall be established at The Hague in the Netherlands ("the host State")." *Id.* art. 3.

96. Wald, *supra* note 38, at 97. Judge Wald suggests that the Schevenigen Detention Unit "is quite upscale, certainly in comparison to some American prisons [she has] viewed. Each accused has his own cell with toilet and shower and an outlet for a computer. The day rooms are clean and equipped with television and games. There is an exercise room, a medical facility with a full-time nurse and visiting doctors, outdoor recreation, and several training and craft classes—even provision for conjugal visits." *Id.*

97. Updated information regarding ICTY detainees and convicts may be obtained directly from the official ICTY at http://www.un.org/icty (last visited Mar. 3, 2003).

98. Relatively detailed information regarding the ICTR detainees and convicts may be obtained at the official website for the Tribunal at http://www.ictr.org/wwwroot/ENGLISH/factsheets/7.htm (last visited Mar. 3, 2003).

99. There have been various writings commenting on the shortcomings in American prisons. The noted deficiencies include overcrowding and violence inside prison walls. For one example discussing the potential for physical violence in American prisons, see Shara Abraham, *Male Rape in U.S. Prisons: Cruel and Unusual Punishment*, HUM. RTS. BRIEF, Fall 2001, at 5 (noting both domestic and international protections afforded prisoners housed in U.S. prisons).

100. Penrose, *supra* note 86, at 567 n.70. Amnesty International keeps annual statistics regarding human rights violations occurring in prison facilities. In the 1999 World Report, there were numerous catalogued violations in Middle Eastern and African countries. Likewise, there was significant criticism levied against the United States. The Scandanavian countries, however, received very little negative commentary. In 1999, there were no entries listed against Iceland or Norway. During this same period, there were only minor complaints raised involving Finland, Denmark, and Sweden.

101. *See* Nancy E. Guffey-Landers, *Establishing an International Criminal Court: Will It Do Justice?*, 20 M. J. INT'L L. & TRADE 199, 233 (1996) (discussing alternatives for securing distinct prison facility for persons convicted as international criminals).

continuing the ad hoc approach to incarceration ensures that some prisoners will receive a more favorable placement than others.[102] One must believe that any disparate treatment in incarceration should be eliminated by sending a case to the international level where the goal of criminal justice should be to place similarly situated individuals in a similar facility and, to the extent possible, to incarcerate them under similar conditions of confinement.[103]

It is beyond question that defendants appearing before the ICC will represent some of the highest security prisoners encountered in any domestic setting. The crimes falling within the jurisdiction of the ICC are murder, torture, sexual violence, or calculated displacements that have been directed against entire societies.[104] In many jurisdictions, these acts would constitute capital crimes making the defendant vulnerable to a sentence of death. Thus, these individuals, having evidenced a prior disregard for human life and perhaps humanity itself, would likely pose a greater security risk than ordinary domestic prisoners. In addition, due to the political nature of many of these crimes (often committed during wars or internal conflicts), each facility that houses ICC convicts would need to have heightened security measures in place to protect prison employees and other prisoners.

Equally important are considerations of culture, language, religion, and societal similarities.[105] Historically, war crimes and crimes against humanity have occurred on a large scale usually during wars or internal conflicts. Thus, a sad truth regarding these offenses is that they generally represent a societal pattern formed within a wider social framework. The numerous crimes committed in the Balkan region involved defendants with similar cultural, linguistic, and religious traditions. Although there were differing factions at war, each faction presented similarities in language, culture, and religion.[106] Likewise, the Rwandan genocidal campaign generated a host of defendants with similar

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102. Favorable treatment may be considered through placement in a more prisoner-friendly country or proximity to one's homeland. With no permanent facility, an ICC prisoner may hit the lottery or receive what, in reality, amounts to a second level of punishment by being sent to a far-away country with a different religion, different language, and different cultural design. *See also* Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 500–01 (2001).

> The Tribunals have no prisons, and individual countries have agreed to house their convicted defendants. As a result, defendants convicted by the Tribunals may serve time in a variety of countries, ranging from Finland to Swaziland. The possibility of a defendant's pardon or commutation of a defendant's sentence will depend, in part, on the laws of the State where the defendant is ultimately imprisoned. As most defendants convicted under international criminal law have not historically served their full sentences, these provisions may have great impact on the ultimate sentence served by defendants convicted by the Tribunals.

Id.

103. William A. Schabas, *Sentencing By International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 494–95 (1997) (pointing out some of the unique considerations that must be evaluated when enforcing international sentences).

104. Rome Statute, *supra* note 1, arts. 5–8 (defining what constitutes genocide, crimes against humanity, and war crimes).

105. Prosecutor v. Erdemovic, Sentencing Judgment, Case No. IT-96-22-T, 108 I.L.R. 180 (I.C.T.Y., Nov. 29, 1996), *available at* http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj961129e.htm (last visited Mar. 3, 2003), *vacated on other grounds*. The Trial Chamber at sentencing recognized the importance of these very issues in sentencing Drazen Erdemovic. The Tribunal noted:

> [B]ecause persons found guilty will be obliged to serve their sentences in institutions which are often far from their places of origin, the Trial Chamber takes note of the inevitable isolation into which [these prisoners] will have been placed. Moreover, cultural and linguistic differences will distinguish them from the other detainees.

Id.

106. *See* Penrose, *supra* note 86, at 569 n.76 (discussing the linguistic similarities between those involved in the Yugoslavian conflict and those involved in the Rwandan genocide).

language, cultural heritage, and religious faith.[107] Thus, it would seem sensible to concentrate these numerous, similarly situated individuals in a single facility where their similar preferences could be properly served.

International or, more feasiblely, regional systems should be considered to handle what may quickly become an internationally created prison population. The advantage to housing ICC prisoners in regional facilities would include the availability of guards and other prison staff who have some understanding of the linguistic, cultural, and religious traditions of the inmates. One of the more important requirements of any prison setting, at least from a human rights perspective, is that inmates retain the opportunity to convey their needs and concerns to prison staff. Prison safety—even if simply due to the ease of communication between prisoners and prison guards—will be furthered by linguistic similarities. Prisoners will feel less isolated if they are able to communicate with other prisoners and prison staff. They would likewise be more easily revealed for having improper communications with others.

Another attractive feature of relying on regional facilities is the ease of access prisoners could maintain with family, friends, and counsel. The ICTR explicity recognized this benefit based on "socio-cultural reasons" and assigns ICTR prisoners only to nation-states within Africa.[108] One would expect that this decision was made for many of the reasons noted above as well as the additional reason that travel remains difficult on the African continent. Without a similarly articulated limitation, the ICTY has in practice only sentenced ICTY prisoners to states within Western Europe.[109] Thus, without statutory design, a regional approach to imprisonment has already begun. But perhaps a more overt attempt at codifying the issue of incarceration should be made. Rather than permitting international prisoners to be spread throughout Africa, Europe, and eventually the Americas, we should focus on the possibility of creating and maintaining permanent prison facilities for international prisoners in deliberately chosen locations. Such foresight is necessary for a successful ICC effort.

Last, where there are prisoners, there are bound to be prisoner complaints. The International Committee of the Red Cross (ICRC) offers an international "watchdog" effort to ensure that minimum standards exist for all detained persons. The ICRC, however, lacks the adjudicatory power to rectify prison maltreatment. While the ICRC can often secure changes simply by monitoring locations, a more structured approach is necessary if the institutionalization of international criminal law is to maintain credibility. The advantage of relying on a regional system of imprisonment is that several regional systems already possess human rights bodies. These bodies are well suited to the oversight of prison conditions and capable of redressing any alleged human rights violations. Each of these institutions is currently equipped with a functioning and often-credible human rights court. The various human rights courts also have mechanisms that permit individuals to submit complaints to the respective court. Regional oversight ensures that higher standards will be maintained through the threat—both implicit and explicit—of resort to a permanent human rights tribunal.

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107. *Id.*

108. *The Slow Fight for Justice in a Country Rent by War*, CANBERRA TIMES (Austl.), Aug. 3, 2002, 2002 WL 23950065 (listing states where ICTR convicts serve sentences).

109. For a list of ICTY detainees, see Detainees and Former Detainees, *at* http://www.un.org/icty/glance/detainees-e.htm (last visited Apr. 1, 2003). Overall, Germany has held two prisoners (Kunarac and Tadic); Finland two (Furundzija and Aleksovksi); Spain three (Todorovic, Santic, and Josipovic); Norway three (Vukovic, Kovac, and Erdemovic); and Austria two (Sikirica and Dosen).

Under the ad hoc approach, it is unlikely that immediate redress would be available on a consistent basis. While domestic courts may be available to render decisions relating to the conditions of confinement within the particular state, the elevation of a prosecution to the ICC transcends domestic standards and places a prisoner in the unique position of being an international criminal—an enemy to all humankind. Such ICC convicts will be distinct and should be treated distinctly. As the jurisprudence of the ICC grows and matures, so too should the treatment standard for international prisoners. A regional approach proffers the surest approach to this conclusion.

V. CONCLUSION

If the ICC is truly to become a world criminal court, then this body should begin to clothe itself with all the traditional components of a criminal justice system. A successful international criminal court cannot be dependent on the political will of so-called cooperating states. Crimes that fall within the jurisdiction of the ICC should be subject to prosecution by the court, which requires that there exist some body or agency capable of enforcing indictments and arresting suspected individuals. A court is but one piece of a greater body of criminal justice. In addition to the need for contemporaneous and coercive police power, it is necessary that a permanent world criminal court be able to send its convicts to a facility for incarceration. The reliance on ad hoc placements has not yielded acceptable results for either the ICTY or ICTR. A permanent criminal court will require a permanent prison facility for placement of its condemned. This author would like to see the utilization of regional facilities to achieve greater access to relatives and counsel, access to similar language, religious and cultural ideals, and reliable access to human rights tribunals to place their complaints.

The Rome Statute provides us with a simple blueprint for prosecuting individuals accused of the most egregrious international crimes. Before international criminal law outgrows this simple design, we should hasten to correct the shortcomings that are both obvious and urgent.