

Why we need the International Criminal Court

by [Douglas Cassel](#) in the [May 12, 1999](#) issue

This has been a good century for tyrants. Stalin killed millions but was never even charged with a crime. Pol Pot slaughtered well over 1 million but never saw the inside of a prison cell. Idi Amin and Raoul Cedras are comfortably retired. Despite recent legal complications, Chile's General Augusto Pinochet, too, will probably escape trial. Ditto for Slobodan Milosevic, who has chosen to close out the century by brutalizing Kosovo.

There have been few exceptions to this pattern of impunity. The most notable exceptions are the Nazis who faced judgment at Nuremberg. Joining the short list of adjudged are the Greek colonels, the Argentine junta, the genocidal regime in Rwanda and some leaders in the former Yugoslavia. But the odds have overwhelmingly favored those who commit atrocities.

Will the 21st century be any better?

The answer may well depend in large part on the success--or failure--of the world's first permanent court with global jurisdiction over the most serious international crimes. Last summer in Rome, by a vote of 120 nations in favor, seven opposed and 21 abstentions, a United Nations diplomatic conference adopted a treaty to establish an International Criminal Court (ICC) in The Hague in the Netherlands. It will hear cases of genocide, war crimes and crimes against humanity that national governments are unable or unwilling to prosecute.

The ICC will differ from the existing World Court, officially called the International Court of Justice, also located in The Hague. The World Court hears only lawsuits between governments and cannot prosecute individuals. As a permanent global court, the ICC will likewise differ from the special International Criminal Tribunals created by the UN Security Council to address atrocities in the former Yugoslavia and Rwanda.

Nearly all the world's democracies--Europe plus such countries as Argentina, Australia, Canada, Costa Rica, South Africa and South Korea--supported the Rome treaty. Seventy-eight nations have now signed the treaty, indicating their intention to join it. Once 60 countries complete the ratification process (to date only Senegal has done so), the treaty will go into effect and the ICC will be created.

Late blooming 20th-century tyrants have little to fear; the ICC will have power to try only crimes committed after it is established. The current carnage in Colombia, Congo and Sierra Leone, for example, will either go unpunished or be addressed in some other way.

Only two democracies--Israel and the United States--opposed the ICC, thereby joining a rogue's gallery of regimes like China, Iran, Iraq, Libya and Sudan. Israel's opposition is regrettable but understandable: the Jewish state has lost so many lopsided UN votes that it fears giving power to an international prosecutor.

The U.S., too, professes to fear frivolous or politically motivated prosecutions of American soldiers and officials. However, the ICC has so many built-in safeguards against unwarranted prosecutions that the odds of abuse are minimal. Otherwise, the ICC would hardly have garnered support from Britain, France and other countries with extensive military and peacekeeping forces overseas.

Washington's real grievance is that it cannot control the court. In 1995, on the 50th anniversary of the Nuremberg trials, President Clinton became the first U.S. president to announce support for an ICC. But the U.S. insisted on an ICC that would be an arm of the UN Security Council, which would make prosecutions subject to a U.S. veto and insulate Washington from unwanted trials.

The rest of the world found this vision uninspiring. Still, in a fruitless effort to induce U.S. participation, backers of the ICC at Rome offered numerous concessions, including a significant role for the Security Council. The council will be empowered to refer cases to the ICC. Indeed, at least in the early years, council referral is likely to be the primary route by which cases reach the court. While cases can also be referred by states that are party to the treaty or by the prosecutor, the obstacles to doing so will initially be so high that the ICC will depend heavily on the council. The council can also block investigations by voting to defer them for one year, renewable indefinitely.

But these and other concessions were not enough to dispel Washington's fears that if American troops commit war crimes in another country, that country could have those troops tried in The Hague (unless the U.S. would agree to investigate the case itself). Also, other nations with veto power on the Security Council could block a resolution to defer a case. In short, U.S. control is less than fully assured under the ICC, which pleased neither the Pentagon nor Senate Foreign Relations Committee Chair Jesse Helms, who declared that any treaty to create a court that could conceivably prosecute Americans would be "dead on arrival" on Capitol Hill.

U.S. opposition to the ICC is of a piece with its vote a year earlier against the treaty to ban antipersonnel land-mines, its refusal to pay UN dues, its economic sanctions on allies that do business in Cuba, and its implicit foreign policy of demanding a "superpower exemption" from international rules. It lends further support to the views held by "elites of countries comprising at least two-thirds of the world's people," according to Harvard scholar Samuel Huntington, writing in *Foreign Affairs*, that Uncle Sam is "intrusive, interventionist, exploitative, unilateralist, hegemonic, hypocritical, and applying double standards." Small wonder that following the 120-7 humiliation of the U.S. in Rome, delegates applauded for 15 minutes.

U.S. opposition to the ICC not only undermines American credibility and diplomacy but also strains the human rights banner Washington purports to carry. The rest of the world cannot fail to notice that the U.S. supports the prosecution of Yugoslavs and Rwandans for human rights crimes but not the prosecution of Americans. If human rights is no more than a flag of convenience, its rallying power diminishes.

But American participation, while important, is not indispensable. The world's democracies are likely to go ahead without us. Americans who care more for the dignity of humanity than for the color of their passports should support the ICC, despite its shortcomings, as a first step toward international justice for crimes against humanity.

But does "justice" for atrocities require a court, let alone a criminal court, much less an international criminal court? Volumes have been devoted to defining justice. For ICC purposes, however, we can focus on an operational definition. Justice calls for identification, exposure, condemnation and proportionate punishment of individuals who violate fundamental norms recognized internationally as crimes, and it calls for reparations to victims, by means of fair investigations and fair trials by an authorized judicial body. Thus defined, justice requires criminal courts, including--as experience

has shown--at least the possibility of prosecution before international courts.

Like other efforts to capture "justice" in words, this account covers both too little and too much. As Martha Minow has observed, some crimes are so horrific or massive that no amount of punishment can be proportional. And no form of court-ordered reparation can truly repair the loss of even a single loved one, much less of an entire people. At best, successful prosecutions can deliver only a measure of justice.

On the other hand, criminal punishment may not always contribute to a just society. As argued eloquently by Donald Shriver in these pages (August 26, 1998), "living with others sometimes means that we must value the renewal of community more highly than punishing, or seeking communal vengeance for, crimes." And while "some forms of justice sow the seeds of justice, some do not. Without peaceful public acceptance of their decisions, courts risk irrelevance at best and social chaos at worst."

The case for an ICC must acknowledge the wisdom of such insights. Yet these comments do not so much counsel against the existence of the ICC as remind us of its inherent limitations. Criminal justice is not, by itself, sufficient to heal either victims or societies.

Still, without at least the credible prospect of criminal punishment, victims and societies are unlikely to wield the leverage necessary to pry out the truth, which is an essential prerequisite to genuine repentance, forgiveness and reconciliation. Pervasive impunity is therefore the enemy of justice in all its dimensions.

How might the ICC contribute to justice?

First, in particular cases, it may identify, expose, condemn and punish perpetrators and provide reparations to victims. It may do so either by its own prosecutions or by stimulating prosecutions in national courts, brought by governments reluctant to see their officials and soldiers hauled off to The Hague for trial. Either way, an effective ICC could lift the blanket of impunity that now covers atrocities almost everywhere. By so doing, it could provide a measure of justice to some victims. That by itself would justify creation of the ICC.

But such a court would have even broader impact. It would serve to reinforce moral norms. There is no more powerful social condemnation of evil than to label it as a serious crime, for which serious punishment may be imposed. The preamble

adopted in Rome elevates ICC crimes to the status of the "most serious crimes of concern to the international community as a whole." The ICC's every indictment, arrest, conviction and sentence may serve to remind governments, the media and the public that there is "zero tolerance" for crimes against humanity.

The pedagogical and practical import of such moral messages is illustrated by the current case of General Pinochet. In strictly legal terms, he has suffered no more than deprivation of liberty and freedom of movement for some months. He may never actually be prosecuted. But his hopes of becoming a respected senior statesman and to go down in history as his country's savior have been dashed. He will now be remembered, above all, as a torturer who got nabbed. Not only has he suffered loss of honor and reputation, but Chile will now understand its history differently. In Chile and elsewhere, a generation of youth has been taught that his alleged crimes, most of which took place before they were born, are so unconscionable that he is pursued for them even today.

Such messages sensitize global consciousness. This, in turn, has practical consequences. Governments may find it more difficult to grant visas, confer political asylum or otherwise treat alleged torturers as if their crimes could be forgotten. Voices of conscience may be empowered; their demands to treat future Pinochets as pariahs will be legitimized.

Of course, to the extent the ICC proves to be ineffective, its moral message will be undermined. An impotent ICC may serve merely to stoke the fires of cynicism. This is one reason why the extensive compromises made at Rome are troubling.

To succeed, however, the court need not be perfect. Consider the case of former Bosnian Serb leader Radovan Karadzic. In 1995 he was indicted for genocide by the International Criminal Tribunal for the Former Yugoslavia. Yet he remains at large, because NATO troops in Bosnia to date have not dared to arrest him. Does his case show that genocide is tolerated in practice?

Prior to the Dayton peace agreements, that may indeed have been the message. Until then, few of the suspects indicted by the International Tribunal had been arrested. Karadzic still strutted the world stage as head of the Bosnian Serb "government." But he was barred from Dayton, because he had been indicted and would have to be arrested if he left Yugoslavia. The agreements reached at Dayton also excluded him from any future position in government because, again, he had

been indicted. Since then he has lost his official position, and remains hunkered down in Serb territory, unable to travel. Dozens of other suspects have now been arrested or have surrendered.

A similar point may be made on the question of the court's deterrent value. The prospect of prosecution will not deter a Pol Pot or a Slobodan Milosevic. But not all dictators are fanatics like Pol Pot. And at times, calculating manipulators like Milosevic may be restrained by the threat of indictment. How often this happens may depend on how credible the threat is. That, in turn, depends on how the compromises made at Rome play out in practice.

Two of the Rome compromises are especially troublesome. The first imposes a "state consent" requirement on the ICC's jurisdiction (except in cases referred by the Security Council). In cases referred by states or by the prosecutor on his or her own motion, the ICC will not be free to prosecute crimes regardless of where they are committed. It will have jurisdiction only by consent of either the state where the crime was committed or the state in which the accused is a citizen. States that ratify the Rome treaty are parties to the court and automatically consent to its jurisdiction. Other states may consent on a case-by-case basis.

The treaty negotiations suggest the significance of this limitation. Germany proposed that the ICC have "universal" jurisdiction, that is, be able to prosecute crimes wherever they are committed. This made legal sense. For centuries individual states have had the right to prosecute piracy, regardless of where it takes place. Treaties now allow states to prosecute genocide, torture and serious war crimes--all within ICC jurisdiction--wherever they are committed. If individual states have universal jurisdiction over such heinous international crimes, why can they not agree to delegate it to an international court?

This legally sensible proposal did not, however, attract much diplomatic support. Most states were unwilling to give the court a worldwide license to prosecute.

South Korea proposed a compromise: Let the ICC hear any case that has the consent of any one of four states: the state where the crime took place, the state of nationality of the defendant, the state of nationality of the victim, or the state having custody of the suspect. While far short of universality, this proposal would have given the ICC jurisdiction in most cases. But the U.S. strenuously objected. Allowing so many states to invoke ICC jurisdiction would allow the court to bypass

the Security Council.

In a last-ditch effort to bring the U.S. on board without gutting the court's jurisdiction, the Canadian chair of the Rome conference whittled the four states in South Korea's proposal down to two: the territorial state and the state of nationality of the accused. Over U.S. objections, this proposal became part of the final text of the treaty.

To understand the effect of this provision, consider a hypothetical case involving Saddam Hussein. If he commits atrocities in Kuwait, either of two states could consent to ICC jurisdiction: Kuwait, where the crimes were committed, or Iraq, the state of Saddam's nationality. Since Kuwait would be likely to consent, in such cases--international wars--state consent is not a major obstacle.

But suppose Saddam commits atrocities against Kurds or political dissidents inside Iraq. Then the territorial state and the state of his nationality are one and the same: Iraq, which he controls. In such cases--regimes that repress ethnic minorities or others within their own borders--the ICC may be unable to act.

This kind of situation poses a serious threat to the effectiveness of the court. Except on referral by the Security Council, the ICC could not, for example, prosecute Milosevic for atrocities committed in Kosovo, nor Pol Pot for killing Cambodians, nor Pinochet for "disappearing" Chileans.

Another potentially crippling compromise allows the ICC to hear cases (again, except for those referred by the Security Council) only when the states involved are unable or unwilling to do so. The U.S. likes this provision; it can avoid ICC jurisdiction simply by conducting its own good-faith investigation--even if the result is a decision not to prosecute, or an acquittal.

But what if, say, a Milosevic promises to investigate alleged war crimes by his troops in Kosovo? Unlike the International Criminal Tribunal for Yugoslavia, which has primary jurisdiction, the ICC would have to defer to a Yugoslav national investigation unless the ICC prosecutor can prove that it is a sham. But how can the prosecutor impeach a national investigation before it starts? In most cases, the ICC will have to wait until the individual nation has a chance to show its true colors. In the meantime, what may happen to fingerprints, blood samples, autopsies and witnesses? ICC prosecutor and judges will have to keep careful watch lest national prosecutors merely go through the motions, stall and possibly ruin the ICC's case.

Despite such weaknesses and uncertainties, the agreement on the ICC reached in Rome is the best we are likely to get for the foreseeable future. It deserves support as an essential first step. Once created, it will have a chance to prove itself. If it fails, the need to strengthen it will be demonstrated.

Neither the Clinton administration nor the U.S. Senate is likely to accept the ICC. This is no reason, however, for American supporters to sit on their hands.

It should be stressed that ICC has significant safeguards against abuse. For example, its judges must have expertise in criminal or international law, and can be elected only by a two-thirds majority of states which are parties to the treaty, most of which will be democracies. Its prosecutor cannot begin an investigation of an American without first notifying the U.S. and allowing it to take over the investigation and any prosecution. Even if the U.S. consents, the ICC prosecutor still cannot begin an investigation without reasonable grounds and the prior approval of a three-judge panel, which may be appealed to a five-judge panel. Once the investigation is complete, no trial can be held without another prior approval by the three-judge panel. Even then there are extensive fair-trial safeguards. No judicial system is airtight, but this one comes close.

Supporters can also dispel Pentagon claims that because American troops undertake so many overseas missions they are uniquely exposed to ICC prosecution. In Bosnia as of mid-1998, for example, our troops represented less than 20 percent of NATO forces and only 10 percent of the International Police Task Force.

Bringing international criminals to justice is no easy task. But the ICC gives humanity in the coming century a chance to administer justice that wasn't available in the 20th century. Let us not miss the opportunity.