The International Criminal Court and the Limits of Global Judicialization

STEVEN R. RATNER†

I. INTRODUCTION

The increased resort to international courts to deal with human rights violations has become a key fact of life in two regions of the world. In Europe and in Latin America, which have well-established and well-functioning regional human rights courts, indeed the ability of individuals to seek a remedy against their government has advanced very rapidly at the international level. It has also increased rapidly at the domestic level, though perhaps even faster at the international level than at the domestic level in the case of Latin America. It may well be easier to bring a claim against one's government in the Inter-American Court of Human Rights than it is in one's own domestic courts.

In light of these two precedents, one might think a fortiori that criminal law would be ripe for international judicialization. After all, criminal law is by its very nature applied by courts, more so than human rights law, which is applied by all sorts of components of governments, in all sorts of non-judicial ways. Thus, moving criminal law from the domestic level to the international level would seem an inevitable product of the internationalization of the judiciary.

My purpose today is to show that, in fact, the process is not inevitable and that the most notable accomplishment in this area, the International Criminal Court (ICC), is likely to have far less impact than both its supporters and its detractors would envisage. I will begin with a caveat: Like Professor Alvarez, I am not a judicial romantic. I think that international law is applied mostly outside of courts and will continue to be so applied. I believe that judicialization is fine, unless it diverts resources from equally important methods of enforcing the law, such as diplomacy, negotiation, and sanctions. Like Alvarez, I am also a product of the State Department Legal Adviser's Office, and I am ready to admit that that experience has affected my view about these things, because we were the evil diplomats who tried to negotiate side deals and keep things out of courts. I have also experienced firsthand the power of non-judicial methods when I worked for the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE), who, in a very political setting, using soft law, has managed to make a big difference in addressing minority disputes in Central and Eastern Europe.

II. THE ICC AS AN ACCOMPLISHMENT

Like Professor Alvarez, I agree that certain positive developments must be seen before one starts to critique them and evaluate them. There have undoubtedly been major developments in the field of international criminalization.

† Albert Sidney Burleson Professor in Law, The University of Texas School of Law.

The current International Criminal Court is not the first idea for an international criminal tribunal. In fact, in 1937, the League of Nations organized and concluded a Convention for the Creation of an International Criminal Court, but the Convention was ratified by only one state. The court never came into existence. The Nuremberg and Tokyo Tribunals were the product of a historically contingent flashpoint. They were, basically, the story of a relatively small number of states agreeing to prosecute the senior Axis leaders. There was no significant follow-up by the states involved with the creation of those courts to create a permanent international criminal court. The Geneva Conventions were drafted in the late 1940s to set the parameters of modern international humanitarian law, including by defining a set of war crimes. However, they did not discuss or contemplate an international criminal court. Rather, they required states to extradite or prosecute war criminals and prosecute them domestically.[1] The 1948 Genocide Convention does contemplate an international criminal court, but it does not itself create one.[2] In fact, there have been relatively few prosecutions for genocide at the domestic level. And the process of creating an international criminal court was moribund during the Cold War because neither side trusted the other to set up a court fair to its officials. The idea of a court was simply regarded as too dangerous.

In 1989, Trinidad and Tobago restarted discussions on an International Criminal Court,[3] proposing it for, strangely enough as we might think today, narcotics and terrorism, rather than war crimes, genocide, or crimes against humanity. Their proposal did not get very far. Legal experts did some preliminary work in the International Law Commission of the United Nations, but it was not until the outbreaks of the conflicts in former Yugoslavia and Rwanda that the idea of international criminal justice in the contemporary era ever really took hold. The resultant UN tribunals were obviously the key breakthroughs, although they are limited in time and in geographical scope to the former Yugoslavia and Rwanda. With respect to time, the International Criminal Tribunal for Rwanda (ICTR)[4] actually covers the events of only part of one year—1994. The International Criminal Tribunal for the Former Yugoslavia (ICTY)[5] has a specific starting date for its jurisdiction, but no termination date, which perturbed the United States when the ICTY prosecutor considered investigating NATO actions in the Kosovo War in 1999, as they were formally under her jurisdiction. In the end, she decided that there was not enough evidence to justify an investigation.

The International Law Commission then made proposals, and there followed a diplomatic process that began in 1996, culminating in the Rome conference of 1998. The Statute is very long and complex, with 128 articles.[6] It entered into force in July 2002. As of April 2003, it had eighty-nine parties.

---

1. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62.

2. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. III, 78 U.N.T.S. 277, 280.

3. M. Cherif Bassiouni, *Historical Survey: 1919–1998*, *in* ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION 1, 21 (M. Cherif Bassiouni ed., 1999).

4. Statute 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 of Neighboring States, between 1 January 1994 and 31 December 1994, Nov. 8, 1994, 33 I.L.M. 1598 (1994).

5. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, May 25, 1993, 32 I.L.M. 1159 (1993).

6. 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].

What is the significance of this? For one thing, the ICC has jurisdiction over a broad range of serious human rights abuses that take place in war time and peacetime: war crimes—a very long list of war crimes—in both international and civil conflicts; crimes against humanity, namely, mass or systematic violations of human rights often outside of wartime; and genocide, a narrow but severe set of human rights violations.[7] The Statute sets up an independent prosecutor, although that prosecutor is beholden to a three-judge pre-trial chamber.[8] The ICC provides a full range of protections for defendants.[9] It obligates state parties to cooperate in handing over suspects and evidence.[10] And, perhaps, most significantly, it has entered into force relatively quickly. Eighty-nine ratifications in five years for a major treaty is impressive.[11] A lot of the progress has been due to very, very, effective work by both transnational and domestic NGOs that have convinced governments to ratify quickly enough for this Statute to enter into force.

III. OBSTACLES TO THE ICC'S EFFECTIVENESS

What are the obstacles to the effectiveness of this court? Before answering this question, I need to share what I think an effective court would be, which is probably consistent with what the drafters of this Statute thought it would be. An effective International Criminal Court will be one that encourages individual criminal accountability by providing a back-up mechanism in case states do not prosecute human rights abuses. As Professor Alvarez indicated, the key notion of the ICC is complementarity. The Court is not able to hear a case unless a domestic tribunal is unable or unwilling, for some reason, to hear the case or unless the Security Council specifically sends the case to the ICC. The goal is to encourage domestic processes and, in the end, to create a deterrent to the underlying human rights abuses. The ICC is, in effect, a way of signaling to domestic courts that they should prosecute—which is a way of signaling to those who might commit human rights abuses that they ought to be afraid of the possibility of prosecution.[12]

What is the key obstacle to effectiveness? In my view, it is the very nature of individual accountability. The fundamental constraint on the effectiveness of the ICC, and indeed on the effectiveness of the ad hoc UN tribunals, is the very *personal* nature of the accountability. It is one thing for states to sign on to international regimes that allow for the creation of political organs, courts, or quasi-judicial bodies that can impose damages upon states. These might be damages as imposed by the European Court of Human Rights (ECHR) or the Inter-American Court or the sanctioning of reciprocal tariffs by the WTO Dispute Settlement Body. That is, however, a far cry from seeing one's own leaders in the dock or in jail—even if it is in a nice jail in Norway, where the ICC might have its jail.

One example is a clear precedent about the difference between interstate accountability and individual accountability in terms of the willingness of states to accept

---

7. *See id.* arts. 5–8.

8. *Id.* art. 15.

9. *See, e.g.*, *id.* arts. 31, 61, 66–67.

10. *See id.* arts. 86–102.

11. Ratification Status of the Rome Statute of the International Criminal Court, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last visited May 1, 2003) [hereinafter Ratification Status].

12. *See* Statement of ICC Prosecutor Luis Moreno Ocampo to the Assembly of States Parties, Apr. 22, 2003, *available at* http://www.iccnow.org (last visited May 8, 2003) ("That is the first task of the Prosecutor's office: make its best effort to help national jurisdictions fulfill their mission.").

it. It concerns the Rainbow Warrior Affair,[13] the 1985 incident when the French government arranged for the sinking of a Greenpeace boat in a New Zealand harbor because the government was concerned about the publicity this boat was giving to French nuclear testing in the South Pacific. The result was the death of one of the crew members and the destruction of the boat. It was a very, very embarrassing episode for France. The issue was ultimately resolved, at first glance, by a binding opinion of the UN Secretary-General who served as a mediator in this conflict. He ordered France, in a sense—although France assented to this before he even worked it out—to apologize and opened up the possibility of damages to be paid to Greenpeace. Greenpeace ultimately sued France in a New Zealand court and, in the end, France both apologized and paid $6.2 million to Greenpeace.

However, one other part of the Secretary-General's opinion was that the two French officers involved be sent to an isolated prison on the South Pacific island of Hao, where they would serve out a relatively short sentence for their crime.[14] Within two years, France managed to find a way to pull out of this agreement.[15] One of the officer's relatives became sick, and the officer was sent to France. The other became pregnant and was also sent back to France. In the end, France managed to get around this imprisonment issue. Once it violated this aspect of the Secretary-General's opinion, a new arbitral tribunal was set up; it found France in violation and recommended that it pay $2 million into a sort of fraternal cooperation fund between New Zealand and France.[16] France did not have any trouble paying that $2 million but it did not return the officers to the island where they were supposed to serve. Interstate accountability, apologies, fines, and damages were tolerable to France. But seeing its officials, whether a leader or an underling, in a jail, whether a New Zealand jail or a jail under the supervision of other states, was not acceptable.

We see the same phenomenon in states in the process of transition from autocracy to democracy that have opted for truth commissions and amnesty over trials. The very personal nature of individual accountability, of individual criminal accountability and the vested interests involved, means that states have little trouble accepting truth commissions. But the resistance to trials is very strong. Consider two obvious examples. Guatemala accepted a truth commission as part of a UN-mediated peace settlement. However, now that victims' groups in Guatemala are attempting to see some of the former leaders put on trial, these groups face intimidation and threats. In Cambodia, I was part of a UN-appointed group of experts four years ago to devise a method of individual accountability for the Khmer Rouge for their atrocities in the 1970s.[17] The government, for many complicated reasons, was not interested in seeing any people put in the dock, mostly because it was afraid that some of its allies within Cambodia might be tried. But it had no trouble with truth commissions and was thus willing to see some form of governmental or state accountability but not individual accountability.[18]

Indeed, this very difference, this very personal nature, explains the complementarity regime itself. In a sense, it serves to make sure that domestic regimes remain paramount. Those who designed this court saw that an effective court would not, in fact, have a large

---

13. United Nations Secretary General, Ruling on the Rainbow Warrior Affair Between France and New Zealand, July 6, 1986, 26 I.L.M. 1346 (1987).

14. *Id.*

15. JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 15–21 (2002).

16. *Id.* at 21.

17. Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. Doc. A/53/850 (1999).

18. *See generally* Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT'L L. 948 (1999).

case load—even though NGOs might like to see a court with a large case load because that is their measure of effectiveness. I think the designers of this court saw an effective court as one that pushed cases into the domestic arena. And, at the risk of sounding cynical, the domestic arena is one where governments have a lot of sway to influence judges, and that is the way that many of the participants in the ICC process wanted it.

There are some other interesting ramifications about personal versus interstate accountability that create obstacles to the former's effectiveness. First, if we want individuals in the docket and not states, we have to worry about things that we do not have to worry about with states. We have to be concerned with age, with illness, and with getting custody of people, whereas states can still be the subject of adverse judgments if their representatives do not show up in a court. In the ICC, as with the existing UN tribunals, there will be no trials in absentia, and so issues of age, illness, and lack of appearance very much can hamper effectiveness. Second, different due process questions arise regarding evidence against individuals versus states. A court can make a decision much more easily when dealing with state accountability—essentially a civil matter—because the rules of evidence are more lenient. With respect to individual accountability, the possibility of extremely long trials is ever present. One only has to look at the case log of the ICTY and especially the ICTR to see how long these trials last and how such duration becomes a barrier to effectiveness. Indeed, the U.S. government has threatened to terminate its funding of the ICTY because it thinks the trials are lasting too long.

IV. TROUBLES ON THE HORIZON

If the personal nature of criminal accountability is the key obstacle to the effectiveness of the ICC, where has this obstacle been manifesting itself? The first manifestation is in the general lack of ratification of the ICC Statute by states with poor human rights records. Again, the ICC can hear a case only if the state of nationality of the offender or the state where the crime is committed is a party to the Statute or in the unusual circumstance where the Security Council refers a case directly to the Court.[19] As long as states with poor human rights records do not ratify, the ICC becomes something relevant in extremely rare cases. Most states that have ratified are likely to prosecute domestically anyway. These states, with relatively strong human rights records, will prosecute, and if they prosecute fairly, the ICC cannot take the case under the principle of complementarity. As for a state that has not ratified, whether Iraq, Iran, China, India, or the United States, if human rights abuses are committed on its territory by domestic actors—and those tend to be the typical cases of human rights abuses—the Court cannot assume jurisdiction absent Security Council referral. In that case, the state of nationality of the offender and the state of territoriality are the same state, and as long as that state is not a party to the Statute, the ICC cannot hear any cases involving those sorts of crimes.

There are a handful of exceptions to this general premise. The Democratic Republic of Congo is a party to the ICC Statute, Algeria is a party, and Sudan is a party.[20] One can envision situations where human rights abuses in those states are not prosecuted, giving the ICC prosecutor the ability to investigate those atrocities. One could also imagine a situation where a national of a state that is not a party commits a crime on the territory of a state party. But if, for example, in the unlikely event that a Chinese national commits genocide or crimes against humanity on the territory of England or France, which are

19. Rome Statute, *supra* note 6, arts. 12–13.
20. Ratification Status, *supra* note 11.

parties, how likely is it that the states that are parties themselves are not going to prosecute? During a war situation, one could imagine combat conducted by soldiers of state A (a non-state party) in the territory of state B (a state party); in those sort of situations, if the war crime takes place in state B, even though the person who committed it was from a non-state party, the Court could nevertheless prosecute.

Some people will make the valid point that this pattern of ratification, where the "good states" ratify first and the "bad states" either do not ratify at all or they ratify long into the future, is the fate of all human rights agreements—that we always need to put pressure on the states that most need to ratify. They would note that the key strategy of human rights NGOs is always to get states to ratify and later to embarrass them by pointing out that they are violating their own commitments. But the resources for this sort of pressure are finite. Is the ICC Statute the treaty that we really want China to ratify, or is it the International Covenant on Civil and Political Rights, the Torture Convention, or some of the other key conventions that some of the states with less-than-stellar human rights records are ratifying? Given that governments and NGOs have limited resources, is the ICC the right priority in convincing states with problematic human rights records to improve their conduct?

The second phenomenon is the lack of ratification by the United States. Indeed, the scenario mentioned above about foreign nationals committing crimes in the territory of a state party is the one that opponents of the treaty in the United States fear. The scenario might be that the U.S. Army, either acting on its own or pursuant to a resolution of the Security Council, is somehow investigated because its targeting or bombing involved civilian casualties, and there is a question about whether the deaths of civilians were intentional—a war crime. The opponents of the ICC in the United States point out that the United States is unique in its capacity to project force overseas—unique in that the international community will be calling on it to use force on its behalf. To expose American soldiers to situations where, if they use force against a state party to the treaty, they might be subjected to war crimes investigations, will in fact undermine peace and security by deterring the United States from using force.

The United States is especially susceptible to such fears not simply because of the personal nature of the accountability, but because of a mistrust of international institutions. This mistrust appears principally in the Congress, but also in this particular Administration. Those judicial bodies whose authority the United States clearly accepts are those where a U.S. domestic constituency favors such acceptance. In terms of binding or semi-binding decisions, the WTO Dispute Settlement Body and the NAFTA panels are fairly unique. In these instances, multinational companies very much wanted to have this dispute resolution process because they felt that it would protect them from discrimination against American business and that this process would be used far less against the United States than it would be used against other countries. The ICC, however, lacks any domestic constituency, with the possible exception of some human rights NGOs.

Equally problematic for supporters of the ICC is that the strongest possible domestic constituency opposes the ICC—the U.S. military. As a State Department lawyer, I worked very closely with Department of Defense lawyers on negotiations of Status of Forces Agreements, which govern how the United States stations forces with allies. The Department of Defense is extraordinarily concerned about exposing American servicemen to foreign trials relating to official acts. Careful agreements are worked out whereby the foreign state cedes jurisdiction over official acts to the United States and is limited to prosecuting unofficial acts, such as assaults off base. The United States agrees to even this limited retention of jurisdiction by foreign courts for nonofficial acts because it is in the clear interest of the United States to have forces stationed in that country. And even then,

in those cases of nonofficial acts that will be judged by domestic courts, judges hail from an American ally, and in my view, the United States can sometimes make it clear what it would like the outcome to be. With respect to an international court, none of this applies. Most importantly, the acts for which servicemen could be prosecuted would include official acts and not be limited to unofficial acts.

The fears of the United States, and of the political right in particular, result in a dialogue of the deaf between those favoring ratification by the United States and those opposing it. On the one hand, NGOs point to provisions in the long Statute of the ICC about the definition of crimes (that it would be hard to imagine U.S. service members committing these crimes because the definitions are so carefully defined) or about complementarity (that the ICC cannot hear a case because domestic courts have the first take on it) or about the power of a pre-trial chamber (that judges can second-guess the prosecutor before he actually begins an investigation). They point out these protections for American service members, many of which were in fact inserted into the ICC Statute during the negotiations at the behest of the United States. The opponents also look at the text and make legal arguments. They note that, in the end, the discretion on all of these questions rests with the judges of the Court. But if the ICC's judges do not make these determinations and the states are left to do a sort of auto-interpretation, the Court would be fairly useless. Any functioning court has to leave to the judges the key interpretive decisions as to what its constitutive document means and as to what the crimes mean.

Thus, each side relies upon the text to make competing legal arguments. One says that the Court can be trusted and the Statute is very carefully worded; the other says that, in the end, these are foreign judges about whom we do not know much. They point to the International Court of Justice when it ruled against the United States in the *Nicaragua* case[21] and say that the United States cannot trust this court. It is my sense that at least some of the NGOs do not really appreciate the real basis for the disagreements. No textual argument in the Statute will convince the other side.

On the other hand, the opponents of the ICC Statute in the United States completely misunderstand how international organizations work and how international courts work. International courts are not out to entrap the United States, but instead will want to work with it and gain its trust. The United States' exposure at the ICC is fundamentally not a legal question about the language of the Statute or about the powers of the judges; it is a political question about the ways that international organizations function. Secretary-General Kofi Annan captured this idea in the summer of 2002 when he wrote Secretary of State Colin Powell, trying to convince the United States to compromise on its insistence that UN peacekeeping operations would not continue unless U.S. troops in those operations were given a blanket waiver from the jurisdiction of the ICC. Annan wrote: "I think I can state confidently that in the history of the United Nations and certainly in the period that I have worked for the Organization, no peacekeeper or any other mission personnel have been anywhere near the crimes that fall under the jurisdiction of the ICC."[22] That is not a legal argument; it is an argument about the reality of how this Court is going to work. It says essentially that the United States needs to trust this Court. In this end, the peacekeeping impasse was resolved through a compromise worked out in the Security Council.[23]

---

21. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

22. Letter from U.N. Secretary General Kofi Annan to the U.S. Secretary of State Colin Powell (July 3, 2002), *available at* http://www.iccnow.org/documents/otherissues/1422/SGlettertoSC3July2002.pdf (last visited Apr. 12, 2003).

23. S.C. Res. 1422, U.N. SCOR, 4572d Sess., U.N. Doc. S/RES/1422 (2002).

V. PROSPECTS AND PREDICTIONS

What are the prospects for the ICC in light of these barriers to its efficiency and the manifestations of these barriers so far? I will make four predictions, some of which are not particularly controversial.

First, the United States will not ratify this treaty for a very long time. The United States took forty years to ratify the Genocide Convention, which is a far less controversial convention.[24]

Second, states with poor human rights records will not ratify the Statute for a very long time. We may see a handful more exceptions where NGOs are persuasive or where some sort of bilateral pressure is put on the state to ratify, but that will be far more the exception.

Third, those states that have ratified will be extremely reluctant to hand over their nationals to the ICC even when they are required to do so. Under the complementarity rule, if the ICC judges determine that the state has not entered into a bona fide investigation or has whitewashed a defendant at trial and if the Court has jurisdiction, parties would be obligated to hand over their nationals. I do not think that they will readily do so. State parties will hand over foreigners but not their own nationals. In the rare case where, for instance, the Congolese official makes the mistake of deciding that he and his spouse have to take a shopping trip to Paris or Brussels and they are caught there while the ICC is investigating, we can expect France or Belgium to turn them over to the Court. That is far more likely than the Congo turning over that official to the Court. And, of course, under the Statute's jurisdiction provisions, if those visiting Paris or Brussels were Syrian families, Iraqi families, or Chinese families, the ICC cannot act because those states have not ratified.

Fourth, and this is my answer to the American opponents of the ICC, the Court is clearly going to tread very gently as an international institution. It will act as other international courts have, by assuring member states that it understands its mandate. This story, as Professor Alvarez indicated, is not unique to international courts; even domestic courts have to do this during their infancies as we know from *Marbury*.[25] It means that the ICC will be very deferential to states on the issues of complementarity. It will go out of its way to say that a state has tried to prosecute fairly, rather than grabbing up defendants. The judges will be concerned that the ICC will not be able to get an offender if states suddenly say, "We disagree with you as to whether we conducted a fair trial," and will fear being exposed as a paper tiger. This strategy is backed up by the history of the European Court of Human Rights on the issue of the margin of appreciation—namely, when it defers to member states in the Council of Europe about whether they can limit freedoms in the European Convention of Human Rights based on public order, national security, public health, or morals.[26] As a result, we saw a very, very different court in the 1970s and early 1980s on these issues from what we saw in the 1990s. This is the way international institutions work, and it is why the opponents of the ICC are missing the big picture.

This analysis suggests that it is quite hard to see what a big difference the ICC will make to human rights protection. It will collect suspects far more slowly than did the ICTY and the ICTR, which were backed up by Security Council mandates that required states to turn over suspects and, more importantly, by diplomatic pressure by states to get them to

---

24. Ratification Status of the Convention on the Prevention and Punishment of the Crime of Genocide, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp (last visited Apr. 12, 2003).

25. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169–76 (1803).

26. *See generally* FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (3d ed. 2002).

hand people over. Eventually, some observers will be very upset when the ICC cannot gain custody of suspects; some may see it as, in fact, turning into a paper tiger.

In the long term, the ICC may well cause some human rights abusers to stay at home—at home in states that do not ratify and where they will continue to enjoy impunity. Although there may indeed be pressures on states to start complying, the question is where we want to put those resources. As a result, there are many steps between the status quo and achieving the overall goal of the ICC, which is to deter crimes against humanity, war crimes, and genocide—so many steps that it would be a mistake to put all of our proverbial eggs in this basket. A number of NGOs and, as Professor Alvarez has pointed out, a number of scholars have placed undue emphasis on the Court as a mechanism for promoting human rights. The United States opponents have fed into this dynamic by insisting that the Court is such a danger, when in fact, it is likely to make very little difference and have every incentive not to indict U.S. service members.

My final observation is to emphasize the alternatives to the ICC to bring about individual accountability, even individual criminal accountability. Those alternatives are to keep the trials close to those affected by them. The ICC is one method to put pressure on states to prosecute domestically, but it is not the only method and is not at all clear that it is the best method. Indonesia reluctantly put on trial some of the people responsible for human rights violations in East Timor.[27] It did so not because NGOs were knocking at their doors saying, "Sign the ICC Statute because that will force you to either try or send them to the ICC," but because the United States and a handful of other countries, especially before September 11, 2001, said that such trials were important to showing that Indonesia really believed in human rights and would respond to the catastrophe that occurred in East Timor in 1999. That sort of traditional diplomacy to encourage domestic trials seems far more important and effective than working through the route of the ICC.

My fear is that the advocates of the ICC believe that this Court is, in fact, a better way of dealing with human rights abuses than domestic trials—that, although they had to accept complementarity because the negotiating states insist on it, they really do not believe in complementarity. The ICC's strongest supporters seem to like the idea that the worst abusers, such as Slobodan Milosevic, are tried in front of a grand international court sitting in The Hague, rather than in some rundown Serbian court in front of Serbian judges. This idea of the globalization of justice is what they think is the most important. I think that the states preparing the ICC Statute were right to insist on complementarity, not simply as a political matter, but because complementarity is the more effective way of deterring human rights abuses.

And so, in the end, we see a clear difference between the interstate procedures, whose goal is to get elites in the state to pay damages or change behavior, and the individual procedures, whose goal is to influence societies as a whole. When the goal is the latter, then justice should be close to the atrocities. When the goal is simply to get a government to pay damages, it does not matter as much; elites dealing with each other at a court in Strasbourg or Luxembourg can resolve these disputes. With the crimes at issue in the International Criminal Court, that sort of elite dialogue does not suffice. Domestic courts are the better place to try them, compared to the ICC. To the extent that some of the ICC's supporters believe otherwise, they seem misguided and are ultimately doing a disservice to the cause of international justice.

---

27. *See Landmark Human Rights Trial Opens: Indonesian Officers Charged in East Timor Massacre*, N.Y. TIMES, Mar. 20, 2002, at A5; Jane Perlez, *Indonesia Acquits 6 in Rights Case, Upsetting the U.S.*, N.Y. TIMES, Aug. 16, 2002, at A10.