Prosecuting War Crimes in the Twenty-First Century

Towards a Conservative Peace

By:
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Introduction

In the words of Ernest Hemingway we must, "never think that war, no matter how necessary, nor how justified, is not a crime."[1] To wage war was an action that was extended by one state onto another state. War and its progression can best be described through different time periods. There were four distinct periods which were the medieval, modern, cold war, and postmodern. The most notable period was the cold war era, which was the turning point between modern and postmodern warfare because, as General Rupert Smith discusses in his book, *The Utility of Force* [2], there was a shift in how war was traditionally fought has from state to state warfare to "war amongst the people". This new form of warfare according to him requires a new concept on how to plan, execute, and wage war. The enemy is no longer right in front of you, but is blended in with everything else. The change during the cold war has created a 'new paradigm' in warfare. Paradigm shifts are quite significant because it requires a heavy catalyst to make the shift happen. The threat of the use of nuclear weapons on opposing states is what brought about the shift. A paradigm shift is defined as a shift in thought about an idea or topic. Smith explains how the way to "win" wars now is to operate in this new paradigm. Wars like the U.S. Civil War or WWII will probably never happen again. He believes that we need to adopt this new paradigm of warfare to win such wars. It is now the civilians who are becoming the casualties. The ratio of soldiers killed for everyone one civilian used to be 7 to1. This figure has changed drastically in the last two decades to make it 7 civilians for every 1 soldier killed. The goal of maximizing soldier protection was met, but at the cost of the

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[1] Ernest Hemingway 1899-1961

[2] Rupert Smith, *The Utility of Force: The Art of War In The Modern World,* Random House, New York, 2007

innocent lives. Post-modern twenty-first century war is not fought on distant battlefields that are far away. Battles are instead fought in the cities, in the places where people live. This concept is harder to understand for Americans because this generation has not seen a war fought on its own soil. The last domestic war was the Civil War, which was fought mostly on plains and hills away from civilians. This accommodation is no longer afforded to civilians because of guerilla warfare, which focuses fighting the enemy indirectly. Security is harder to keep when you can not see your enemy. The issue is that civilians are dying in record numbers. Entities like the U.N. are created for the protections of people now have to take up the task of doing so.

Kaldor's New War

In attempting to protect all individuals, it becomes clear that a universal ideology is needed to apply the protection. Such an idea does exist, which is called cosmopolitanism. This principle explains that the world should be viewed in a collective outlook of thinking. People are human beings on this earth before they are citizens of a state. Mary Kaldor talks about the application of it in her book*, New and Old Wars*.[3] Her book discusses similarly to Smith that "old war" is now out of the picture, and a new mode of war has emerged. Her discussion talks about how war is no longer between states, but more based on identity. Hence, she introduces her view of identity politics, where people fight for much more than national pride. War, she believes, is now rooted in religion, ethnicity, and most of all politics that are relative to groups of people who have a common identifier. Andrew Latham also agrees in principle with Kaldor that what is seen is, "the simultaneous emergence of both inclusive 'cosmopolitan' forms of collective identity and more

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[3] Mary Kaldor, *New and Old Wars: Organized Violence In A Global Era* 2nd edition, Stanford University Press, Stanford California, 2007

fragmented and particularistic 'imagined communities' based on 'ethnicity', race or religion."[4]. This new idea of identity politics provides opportunities for new crimes that tend to cause harm to selected groups. Genocides like we saw in Rwanda show how malicious actors (more now government sponsored but not government affiliated) can target a single group and execute mass destruction with the intent of extinguishing an entire group of people. What the world now faces is how to limit, and or handle such crimes that now have global links and global effects.

The Need for Cosmopolitan Justice

A recent development that is linked to cosmopolitanism is a new form of justice that is exemplified in the development of the International Criminal Court, which seeks to bring to justice those who commit crimes that violate international law. Some countries where these violations occur do not have the adequate infrastructure to properly handle the prosecution of such crimes. Also, war crimes are becoming much more prevalent, due to an increase in intra fighting. The definition of war crimes in general has to be expanded to allow for the prosecution against combatants that do harm to civilians. States, like the U.S., seek to keep the view that non-nationals cannot try domestic soldiers. The ICC faces a new challenge of providing an effective way to handle crimes that violate international laws. This paper intends to show that the new paradigm shift that facilitates globalized postmodern warfare requires an international legal entity to establish rules and precedents for future war crimes. The other contention is that the ICC is becoming the new institution to judge war crimes. The major issues of jurisdiction, legitimacy, and enforcement will be addressed, along with the best way to solve the major problems discussed above. The most

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[4] Andrew Latham, "Warfare Transformed: A Braudelian Perspective on the `Revolution in Military Affairs', *European Journal of International Relations* ,2002 vol. 8 (2) pp. 231.

important aspect to start with is how this particular court is structured.

Defining ICC Structure

To begin with understanding the ICC, it is best to understand certain elements that make up the court. The ICC is officially established by a doctrine known as the Rome Statue[5]. This document outlines things from what cases fall under the jurisdiction of the court to how prosecutors pick staff members. This doctrine is meant to be the official structure document of the court. This document was promulgated on July 17, 1998 after being signed by 139 states. It officially establishes the court as an instrument to serve justice for international criminal crimes. This court is made up of the presidency, judges, and office of the prosecutor, the registry, along with their staff members. The group that is responsible for staffing the court the Assembly of State Parties (ASP). This was the group that actually drafted the documents for the Rome Statute. They are "empowered, inter alia, to adopt recommendations of the ICC Pre-paratory Commission; 2) provide management oversight for the Court; 3) set the ICC budget; 4) elect the ICCjudges, 5) prosecutor, and deputy prosecutors; 6) and make recommendations for the position of registrar. [6] This group also has oversight power over the court to make sure that everything works like its suppose to, until a registrar is selected.

Parties of the Court

The prosecutors are a separate organ from the ICC, and are elected.

> The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each

[5] Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9* (1998),
[6] Daryl Mundis, "The Assembly of States Parties and the Institutional Framework of the International Criminal Court" *The American Journal of International Law*, 2003 vol. 97 (1) pp. 132-147, Jan 01, 2003.

> position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.[7]

There are eighteen judges. These judges are divided into divisions so that judges can be assigned to the cases that are close to or near to their geographic region. Judicial divisions ensure that a judge will have some type of background in the region to have the best understanding of the case. Divisions also help to bring a better sense of the universal principle of having a trial of ones peers. The judges are elected in a similar fashion, except the judges terms are divided in threes. This means a third of the judges are elected for three years, another third for six years, and the remaining for nine years. These terms are to ensure that there is stability to the court, but not to have the same people on the court all the time. The registry deals with all matters that do not pertain legally to the court. Responsibilities of the registry fall being the main communication organ between the court and the UN. Communication in this aspect is very important because situations like confirming that an accused party has legal defense council, or whether or not the Security Council wants the court to continue with a case. The registrar, who is the chief administrative officer of the court, heads the registry.[8] The registrar does what the ASP used to do at the beginning of the courts inception. Power was officially transferred to the registry when a registrar was selected. Legitimacy is the most important thing in he international community. Most people still perceive the state as the ruling entity, and tend to only look inwards. It's extremely important that the ICC has a structure that can be seen as legitimate, or else the court will not get much respect from anyone.

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[7] Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9* (1998),

[8] The Coalition for the International Criminal Court http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/ accessed on 18 of March, 2009

Operating the Court

Different procedures happen before the ICC can hear a case. First and foremost, the ICC has to have an agreement with the UN to be a court that has the power to have cases differed to it. The UN Charter sets up in article 95 the ability to enter into other tribunals or institutions as they arise. UN drafters knew that the International Court of Justice alone was not going to be the sole judicial organ of the international court system. This court is the chief organ for judicial matters in the UN, but has recently been more for settling civil disputes over treaties and such, rather then the equivalent of the criminal prosecution that the ICC deals with. The difference between the ICJ and ICC is that the ICJ handles civil disputes between states, and has traditionally left the prosecution of criminals to domestic courts. The UN and the ICC are officially in agreement under the UN-ICC agreement, which went into effect on April 4, 2004. Article 17 outlines how a case will be referred to the court. The Security Council will refer a situation to the court when it believes that one of the crimes outlined in article 5 of the Rome Statute has been committed. This referral will go to the office of the prosecutor. It will then be the prosecutor's decision of whether or not an investigation should be continued. The registry will make sure that the defendant has had an opportunity to obtain legal counsel. Since the ICC is not an official UN entity, the actual state actor makes the arrests by the direction of the Security Council. The trials are held at The Hague, Netherlands, but the court can sit in other locations depending on the situation. The court has a whole list of procedures that outlines how the cases will be run, as well as how such things as evidence will be presented.

The issue of Jurisdiction

Before a case can be officially heard, the court must hold a pre-trial hearing.[9] In this hearing, the prosecutor must stipulate what the charges are, and whether or not they are applicable to the defendant. After the pre-trial hearing, a confirmation hearing will be held to determine whether or not there will be a trial. At this phase, the court must also determine whether or not it has the jurisdiction to hear the case. Most defendants will claim that the ICC does not have jurisdiction. Jurisdiction issues are the first place that the ICC runs into a problem. This area of the procedure is tricky because of the varying viewpoints about jurisdiction. One view sees the ICC having universal jurisdiction. The international community agrees that some crimes are so outrageous and violent that they can be tried anywhere. Universal Jurisdiction was uses mainly for pirating[10], since borders were not clear and distinct. Pirating was so outrageous empirically not because of the theft, but because of the killing and violence that violated English Common Law. The same argument could be made now since even though borders are distinct, there is still a need for universal jurisdiction because of the responsibility to protect doctrine. This idea came out of a cosmopolitan view that people need to be aware of the entire world, and not just themselves. Donovan and Roberts propose two different schemas to view universal jurisdiction. "The two- part schema is comprised of prescribing law and enforcement. The other view is a three- part schema, and has the parts of prescriptive, adjudicatory, and

[9] Rules of Procedure and Evidence Adopted by the Assembly of States Parties First session New York, 3-10 September 2002 Official Records ICC-ASP/1/3

[10] The Emerging Recognition of Universal Civil Jurisdiction Donald Francis Donovan and Anthea Roberts, *The American Journal of International Law*, Vol. 100, No. 1 (Jan., 2006), pp. 142-163 American Society of International Law

enforcement."[11] The schema most commonly used up to now has been the two- part schema. Another way of saying this is to describe it as the execution use of sovereignty. A state would prescribe its own law in a situation, and then would do things to enforce it. However, because of the new paradigm shift, it is now the three-part schema that must become the new standard for handling international issues. The two-part schema was very narrow because it only focused on the authority of the state. The new paradigm requires a middle ground for handling global war crimes. The three-part schema has to become the new standard because the ICC now needs the power to prescribe, adjudicate, and enforce its rulings. The two-part schema was designed for state action, and now the three part schema has evolved from the new concentration of International Organizations like the ICC. Another difference between the two schemas is the adjudication step, which means to make a judicial ruling. What this does is it allows a body to issue a decision that will first set a standard; and secondly becomes a way to handle things in the future. Jurisdiction is an important problem because it limits how much the court and other international tribunals can do. Based on what is happening now, "Universal jurisdiction is justified by the need to facilitate enforcement of fundamental norms that, at the present stage of national and international enforcement mechanisms, are not at risk of overenforcement [12]. Universal jurisdiction requires the three-part schema to work. The ICC does not have the force to seek out those who commit war crimes. The state works in its traditional role in the two-part schema to allow the ICC to utilize the three-part schema to establish justice.

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11 The Emerging Recognition of Universal Civil Jurisdiction Donald Francis Donovan and Anthea Roberts, *The American Journal of International Law*, Vol. 100, No. 1 (Jan., 2006), pp. 142-163 American Society of International Law

12 The Emerging Recognition of Universal Civil Jurisdiction Donald Francis Donovan and Anthea Roberts, *The American Journal of International Law*, Vol. 100, No. 1 (Jan., 2006), pp. 142-163.

Procedural Legitimacy in the Court

After the case is accepted to be heard, a trial will be held. The defendant is issued a warrant to appear before the court. If the defendant does not appear, then the ICC can issue a warrant for the arrest of the individual at the discretion of the Security Council. Article 61 of the Rome Statute lays out that the defendant can object to the charges, challenge the evidence of the prosecutor, or present evidence. There is a separate way to go if the defendant pleads guilty. The defendant will be scheduled for a hearing where an appropriate sanction will be given. A regular defendant receives all of the same rights that are considered to be universal rights of the accused. Rights include the presumption of innocence, right to submit evidence, right to council etc. what this process shows is that the ICC is just as legitimate as any domestic court. Defendants have the right to due process under the law. Defendants are also afforded with some benefits like the presumption of innocence, which is not a feature that some defendants have if they come from an Arabic country for example that operates on a roman law code, which puts the burden on the defendant to prove their innocence. A defendant has every procedural benefit that they would be afforded if they were tried in the U.S., which has some of the strongest due process rights in the world.

Legitimacy Problems

Legitimacy is a problem that is tied to the trial process, as well as the ICC as a legal entity.

> Institutions that are seen as more conservative may often have their opposition discounted as ‘‘cheap talk.’’ However, the latter institutions are well equipped to convince audiences to support policies by granting their authorization. While institutions may vary in their conservatism across issue contexts, fixed membership and voting rules can make some institutions more or less conservative, suggesting an important link between institu-

tional rules and effectiveness.[13]

Courts are supposed to be conservative because courts decide based on previous agreements and rules. It is especially important to have a conservative international court. A bias could deeply hurt the balance of power in international tribunals. Though referring back to the previous statement of legitimacy, the power and legitimacy of the court could lie in its nature of following the rules. A court has to follow its procedure. The Rome Statute is detailed and in depth for a reason. Courts have always had the reputation for functioning strictly on procedures. The ICC has penalties for not following procedures just like other courts do. So, the problem is not in the structure of the courts. The legitimacy problem is mainly rooted in the ICC's effectiveness to handle war crimes cases. Historically, war crimes cases have been handled by the state. States prosecuted those who had committed wrongs in times of war. The focus has now shifted to an international focus because of all of the treaties and conventions and pacts that countries have entered into. Mainly, the evolution of universal human rights has been the issue that is driving the prosecutions of war crimes.

Working with International Law

Another justification for legitimacy comes from the flexibility of international law. International law is based on consent, which means that whatever is being referred to more or less is *jus cogens*, which means that a principle is generally accepted by the international community. The UN has no official legislating body that is binding. All treaties have to be consistent with the U.N. Charter. Prosecutors do have much room to investigate and indict

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[13] Terrence L. Chapman , 'International Security Institutions, Domestic Politics, and 'Institutional Legitimacy ' *Journal of Conflict Resolution,* February 2007; 51: 134 - 166.

people, but they are also under the control of the Security Council, which acts as an oversight body. The registry also does the same in making sure every organ of the ICC is following the rules that have been set. The office of the prosecutor is also separate from the court, which puts it on the same level as the accused. The ICC acts in a legitimate fashion, but people need to realize that a court can not be proactive in gaining legitimacy. The only real way to accredit or discredit a court is to wait and see what kind of decisions come out of the court. Judgments can not be personal because courts are for distributing justice. Courts are not legislators who have to please constituents. This idea generally gets confused with the latter, which makes it hard to legitimize if the world sees the ICC as an unpopular governmental body, rather then a normal court. Legitimacy is that important, because if the ICC does not have it then it will most likely have substantial troubles in the enforcement of whatever it sets forth.

Defining War Crimes

The Rome Statute establishes war crimes in article 8 as, "Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention."[14] Crimes range from willful killings to the taking of hostages. What is noticeable is that this clause leaves room for interpretation. The article does not say that these crimes need to be committed in a time of war. This means that the term "war" has become an all-encompassing principle. In this view, war crimes can take place outside of the conventional idea of war. War crimes have many implications for the image of a state. Implications range from a perceived lack of authority to overall weakness in international affairs. Most

[14] Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9* (1998),

people do not think of this, but soldiers are also ambassadors of their nation. States do have official ambassadors and all, but it is the soldiers that civilians have direct interaction with. These interactions are how individuals of other nations develop an idea about other countries. If soldiers from one state rape woman or kill unjustly, then those soldiers will portray a negative image for that state. At the end of the day, these soldiers are still ordinary men and women. This is a disadvantage because those individuals are sometimes judged and held to higher standards then ambassadors because soldiers carry weapons. This interpretation is needed because not all "wars" are based on the conventional idea. One side could recognize something as a war, while the opposing side may only consider it a conflict. This can prevent the argument of it being impossible to have committed a war crime because a state was not at war. Referring back to Smith and the new paradigm; this is an example of how the idea of war has changed. Wars are no longer state-to-state confrantations.

Adjusting to New War

War is now a collection of random skirmishes that seek to achieve some type of overall goal or set of objectives. The world is now in a state of constant conflict and negotiation. This concept relates back to why prosecutors have to be un-bias in their actions. The structure of politico-cultural influence makes it a challenge to stay impartial. Politics are now so deeply intertwined with culture, i.e., identity that bias could mean the difference of an outcome for an entire group of people. War is now, "constitutive war' — that is, a period in which wars are fought to determine the very ontology of the units entitled and

able to exercise control over the means of violence."[15] Stakes have never been higher because the decisions of international courts will affect a groups ability to self-determine itself despite state pressure. Such stakes were also present in WWII, but to avoid another genocide the likes of the holocaust, it is important to take what was learned from that period, and apply it to the postmodern period. WWII and the holocaust was the first major incident of genocide the world saw, but actions like this have become more common in the 20th and 21st centuries. After the Rwanda incident, "The killing of lawyers, prosecutors and judges, and the fleeing from Rwanda of many others, had left the country's legal system unable to cope with the tens of thousand of cases generated by the genocide. [16] The Rwanda Court was not structurally, nor mentally capable of putting the criminals on trial. The power and need for enforcement was crucial in this situation, but was not present.

The Question of Policing

There is not a court that has a standing police force that can go out and get the people they put warrants out for, nor can they go and directly penalize those who do not follow the decree of the court. Internationally, this is a big problem. In the state system, it is the actual policing powers that the state extends to the courts to enforce its ruling. If a person does not show up for a court hearing, then a warrant is put out for his/her arrest, and the state police execute the warrant. When citizens do not abide by the ruling of the court, then the state sends the police to find and arrest the person, and detains him/her if the court has issued a prison sentence. On the international level, there is not a standing policing force that does all of the things the state does. Kaldor mentions this problem, and says there is a need for

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15 Andrew Latham, "Warfare Transformed: A Braudelian Perspective on the `Revolution in Military Affairs' European "*Journal of International Relations* ,Vol. 8, No. 2 (2002) pp. 231-266.

16 Carla Del Ponte "The Role of International Criminal Prosecutions in Reconstructing Divided Communities" Paper Presented at the London School of Economics, 20th of October, 2003.

some type of cosmopolitan police force that has the power to function like state police forces. The reality is the court does not have the sufficient support of the international community to have such a force. Article 17 of the UN-ICC agreement establishes that the ICC has the power to refer problems it has with the cooperation of parties involved to the Security Council to handle accordingly. The problem here is that the Security Council as an entity can not do that much. The Council can sanction a state, but the people who have committed gross war crimes do not have to worry about such sanctions because they are not connected to the state. It then becomes a problem to find a state that is willing to arrest those who are accused of war crimes. The ability to prosecute these crimes has to be a unified effort. The international community has to recognize the problem, and then has to deal with it accordingly. A cosmopolitan police force will not be formed until the international community establishes a balance that would satisfy states. A possible solution could require states to set aside soldiers for an international police force that could be given the power to arrest and detain individuals for trial. This will not happen until states become comfortable with the idea of universal jurisdiction. The following example will show why the ICC is the new way to deal with war crimes in the era of new war.

The Case of Rwanda

As referred to above, the Rwandan Genocide was one of the most horrific events in recent history. The basic outline of the story was that the status quo at the time (Hutus) mounted a huge campaign to extinguish the Tutsis after the Hutu president's plane was shot down on its way to peace talks. The Hutus shut down the country, and even forced the U.N. to leave because the level of killing was getting so bad. The Hutus then began to systematically kill as many Tutsis as possible; mainly using machetes. The state broke

down, and a power vacuum was created. Carla Del Ponte stated, "no one in this state would have the courage to step up and assume the role of putting justice back into this torn society."[17] The only option is to have a body that has the force of law to handle gross violations of the law. The answer is not to just let the state rebuild itself without any help. The answer is to apply a cosmopolitan approach to make the problem a global one, because the implications of Rwanda were that in could happen in almost any underdeveloped nation. The court has to act as a deterrent to crimes like genocide to at least cut down on the possibility of it happening again.

The International Criminal Tribunal for Rwanda (ICTR)

The response that the international community gave as a whole was the International Tribunal for Rwanda (ICTR). The reason for this tribunal is to restore justice in the region by trying those who were responsible for the mass atrocities committed. It seemed at the time that the best way to handle this issue was to set up a body that could be specially tailored to handle the Rwanda incident. There have been staggering results from this tribunal, namely that the now Democratic Republic of the Congo, which was a safe haven for many Hutus, is now in constant feuds with Rwanda. Justice can not be instilled when the feud itself can not be diffused. Rwanda has one of the largest peace forces the world has ever seen. Even this is not enough to stop all of the fighting. The tribunal only has power to take care of those who committed the genocide in 1994, but their charge ends there. This sets up a big problem for this tribunal, as well as the idea as international tribunals in general. The general weakness of the ICTR response creates many gaps that have no answers. The ICC is the future, so what has to be shown is why the past approach

[17] Carla Del Ponte "The Role of International Criminal Prosecutions in Reconstructing Divided Communities" Paper Presented at the London School of Economics, 20th of October, 2003.

to handling war crimes is no longer sufficient.

The Problem with Tribunals

The tribunal that was set up in Rwanda was done with good intentions. People could not just sit by and not do anything about the situation. This response was good for the time being, but now is inadequate. The ICC and international tribunals are not the same. Tribunals are directed at handling a specific issue, and usually have a time limit. A Tribunal is like an ad hoc committee. An ad hoc committee is a specialized group that is formed to handle a specific problem. As soon as the problem is resolved, then the committee is disbanded. Tribunals like Rwanda were crucial building blocks toward international justice. The building period for this is over now, and now the flaws outweigh the benefits. First, as stated above, tribunals are not permanent. They are constructed for a problem and one problem only, and after then reason is fulfilled, then the tribunal is disbanded. There is no longevity with these tribunals because the problems they handle could range from needing labor-intensive solutions to moderately short term problems. Without longevity and stability, there is no way to establish precedents that judges can look to in cases. Second, tribunals are specialized, thus limited in scope. The main problem with this is that they only deal with one issue at a time. These tribunals also take much of agreements and resolutions to form. If there is an international crisis occurring, then there is not enough time to go through all the red tape to set up a tribunal. It is also not cost effective to set up a tribunal every time a problem arises. Third, tribunals are harder to legitimize. It is hard enough to make a court like the ICC legitimate. It takes many years of agreements and planning before states even considers participating in a body like this. Tribunals therefore lack the ability to develop legitimacy. Without legitimacy, there is no

way to enforce decisions that are made. Fourth, tribunals lack adequate structure to handle abuses. Tribunals are supposed to be immediate responses to resolve law violations. The immediacy causes a lack in structure because the mind set is to get the Tribunal up and running as soon as possible. International Organizations that have been successful have all needed time to develop legitimacy. An institution like the American Red Cross could not do what it does without credibility that comes from legitimacy. Tribunals lack this credibility. States are not going to want to surrender their sovereignty to these temporary bodies. Fifth, these tribunals tend to overlook the victims in these abuses. "While the ad hoc criminal tribunals do benefit from the participation of victims as witnesses, victims have no opportunity to participate in their own right, nor are victims able to request compensation in proceedings before the tribunals."[18] The process again seeks to work to find a resolution, and tends to forget that horrific events create victims who need to be heard. In this regard, international tribunals, "have failed their forward-looking role"[19] which is supposed to appeal to the people, and not against them. The answer is to have a permanent; long standing body that is ready to go whenever it is needed. The ICC provides the reverse to all the problems because it is already established, and seen to be legitimate by most, and has the infrastructure to handle big problems.

The ICC is here to stay

The topics so far have covered the operating procedures of the court, along with its problems and solutions. This discussion has led up to why the ICC is going to not only

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[18] War Crimes Research Office, "Victim Participation before the International Criminal Court" *American University Washington College of Law*, November, 2007

[19] Ellen Stensrud "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia", *Journal of Peace Research*, 2009 vol. 46 (1) pp. 5.

have stay, but will become the new way of prosecuting war crimes. The new paradigm has created a shift away from the domestic scene, and has taken human rights to a new level. International tribunals are ineffective to be a long-term answer to the problem. The ICC now has an opportunity to establish itself as a standing organ. War crimes are now going to be viewed as an international issue, besides a contained issue based on different regions and situations.

Positive Foundation

The first positive aspect to consider about the court and its lasting presence is the strength of the Rome Statute. "The strengths of the Rome Statute[s][….] the wide support for the Rome Statue, and the related amendments of national law[….] ensure the basis of [….] international life."[20] What is most important is that states are incorporating the ICC into its domestic laws. So far, over 100 different states have ratified the Rome Statue and incorporated the statutes international laws and standards into their domestic laws. This shows a level of support that tribunals can not acquire. One of the biggest problems with any court is establishing jurisdiction. So far to date, one hundred and forty countries had signed onto the Rome Statute, and sixty states have ratified the agreement. This shows a good level of participation that will only continue to give the court more power and more legitimacy in its actions.

The ICC-United States dilemma

All recent literature on the ICC points to a major area of conflict with the United States. It is important to understand this conflict, as it is one of the central issues hat surrounds the court. The United States was not always a big proponent against the court.

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[20] Bruce Broomhall *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press, New York , 2003 P(g). 189

> The United States was an active participant on the Rome negotiations, but in the end refused to vote for the statute. The United States envisioned the court[….]to[….]refer situations for investigation and prosecution. Most other states[……]pressed for a court that could act independently[…..] of the veto by its permanent members. The United states pressed for the adoption of […..]provisions[…..]that would have eliminated the possibility that U.S. nationals could be prosecuted without U.S. consent. Unable to achieve its goals on the issue, the United Sates vetoed against the treaty.[21]

The U.S. refuses to sign because it did not get what it wanted out of the negotiations. It seems as if the first issue could have been solved, but eventually led to more issues that have formulated a platform against the ICC. The general Objections can be broken up into five main objections.[22] The main areas were concerned with how much jurisdiction the ICC could assert. The U.S. felt as if the ICC is too unchecked, and the system will only be used to stage a massive campaign against U.S. soldiers. The U.S. fears that states like Saudi Arabia will use the court to unjustly accuse U.S. soldiers. The fear is that U.S. soldiers will get involved in so many legal proceedings that the military will become less effective, and Americans will not want to join the military in fear of being prosecuted for any action they take in the line of duty. Universal jurisdiction is another issue for the U.S.; mainly y that the U.S. does not want a foreign court to supersede the U.S. Supreme Court. Policymakers feel that the U.S. will loose the control it has over its domestic court system. Incorporating international law into domestic law is also problematic because there are areas of international law that the U.S. has strong feelings against.

Diffusing U.S. Concerns

To address the fear of unjust cases, prosecutors are the ones who bring the cases to the court. The Security Council also refers what cases go to the ICC. This mechanism is in

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[21] Jeffrey L. Dunoff, Steven R. Ratner, David Wippman, *International Law Norms, Actors, Process: A Problem-Oriented Approach* 2nd Edition, Aspen Publishers, New York, NY P (g) 662.
[22] Jennifer K. Elsea "U.S. Policy Regarding the International Criminal Court" *Congressional Research Service The Library of Congress*, August 29, 2006. P (g) 5

place especially to regulate the amount and type of case brought to the ICC. The Security Council will not put these frivolous claims through, especially when the states that have the most concerns with this situation are permanent voting members on the Council. As far as universal jurisdiction, the U.S. need not worry about a hostile takeover because international law is based on consent. Whatever happens with the ICC has to be agreed upon by whatever states are involved. If the ICC turns into a "rogue" institution like the U.S. expects, then the Security Council can choose to not enforce ICC decisions. The General Assembly could also put forward a resolution to terminate the UN-ICC agreement, which would disband the ICC all together. Incorporating international laws into domestic ones are also a choice. Congress would have to pass whatever incorporations made into law. It is highly doubtful that both the house and senate would incorporate laws into U.S. domestic law that would ultimately weaken the state. With this in mind, the U.S. reluctance to sign is because the conditions that the U.S. wanted early on were not met. Whether the U.S. likes it or not, the ICC is the future, and as long as other superpowers like China, India, and Russia are on board, the ICC can sleep at night without the U.S.

A Lasting Peace

The ICC is not perfect. However, it is a first step on the way to international peace. This court is the first of its kind. Never before has there been an international court that operates in the way that the ICC does. The power of this court is that it will be able to engage in cases that no other court has ever done before. Most importantly, a new type of peace will develop over time. "At a policy level […..] the court[can be seen] as an institution that will further peace and security while eventually limiting the need for costly

and dangerous foreign deployments."[23] The ICC can be a deterrent for making people think before they carry out wrongful crimes against people who do not have the ability to protect themselves. Peace can only be achieved if there are systems in place that can restore justice. It is not true that peace always have to come from war. In this new age of warfare, peace is a principle that may be a bit harder to achieve since the world seems to be interlocked in constant conflicts. The prime objective of institutions like the ICC is to have the structure and capability to effectively deliver peace to the world. It is no longer a story of individual states. Collective peace among nations is the new standard that is articulated through every treaty and convention. The reasons for these documents are to make sure that what is agreed to and acknowledged as a problem does not happen once or ever again. Peace comes from these efforts to stop war and conflict, and specifically for the ICC, to handle issues as they come about.

Conclusion

The ICC is established to judge war crimes that are committed everywhere. This paper has addressed why the new paradigm of warfare now requires a judicial body to deal with the new type of crimes that arise through new ways of conflict. A court really is the best way to go about instilling order. Courts are conservative in nature and practice. This allows courts to be fair and impartial in whatever case comes before them. War crimes require a different level of impartiality. Globalization has set new standards for the treatment of people. The logic behind this is that the world is now globalizing, and everything the past generation experienced will be nothing like what the coming generation will go through. The world, even though it is big, is now relatively small in how easy it is

[23] Council on Foreign Relations "Toward an International Criminal Court" 23 Apr. 2009.

to connect with different locations. All of this movement and change needs to be ushered in, and not allowed to simply take over. War is not what it used to be, and now requires closer regulation and restriction to protect people who have nothing to do with the fighting. There will always be conflict, and there will always be pain. Some would argue that peace and justice do not coincide with one another. Peace only works if there is a way to keep the peace. It is in this respect that the ICC is the justice, and we as people, as cosmopolitan citizens of the world, have to supply the peace. This statement by Paddy Ashdown, a representative to Bosnia and Herzegovina, best serves the overall idea of this paper,

> Crime and corruption follow swiftly in the footsteps of war, like a deadly virus. And if the rule of law is not established very swiftly, it does not take long before criminality infects every corner of its host, siphoning off the funds for reconstruction, obstructing the process of stabilisation and corrupting every attempt to create decent government and a healthy civil society.[24]

[24] Paddy Ashdown, "Peace Stabilisation: The Lessons from Bosnia and Herzegovina, Paper resented at the London School of Economics on 8 December 2003.

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