International Criminal Law and the International Criminal Law Court

By Leila Sadat

Weidenbaum Center on the Economy, Government, and Public Policy
Breakfast Presentation
October 9, 2002

Thank you so much for getting up early and doing this. My students are usually sleeping at this hour. Victor LeVine kindly told me that the International Criminal Court was, again, in the *New York Times* this morning. There's an article on page A6 called, "U.S. Presses for Total Exemption from World War Crimes Court." So I think it is appropriate that we talk about this since it's in the news and obviously there's a disconnect between the United States and the rest of the industrialized world. What I'd like to do today is explore some of the reasons that this might be true, and talk a little bit about the history of the Court.

As of today, 139 countries have signed the International Criminal Court Statute and 81 countries have ratified it. Earlier this year, a special ceremony was held at the United Nations, on April 11 when the requisite number of parties was achieved to bring the treaty into force. The United States had *signed* the statute on December 31, 2000. However, on April 27, 2002, approximately two weeks after the Statute entered into force, Under-Secretary of State for Arms Control and International Security John Bolton sent a letter to the United Nations Secretary General Kofi Annan, stating that the United States did not ever intend to ratify the treaty and therefore would have no legal obligation from its signature. Sometimes in the press that's referred to as 'unsigning.' You can't actually unsign a treaty, for obvious reasons, because a President can only commit his or her administration, a President obviously can't commit future Presidents. So, once a treaty has been signed the signature remains. But, what the United States did was file a

supplemental deposit to its deposit of the signature saying, “we never intend to ratify,” and therefore do not need to adhere to the object and purposes of the treaty.

In spite of the United States government’s opposition to the ICC, the coming into force of the treaty has engendered excitement around the world. After nearly a century of hard work and false starts, those committing the worst international crimes will no longer be able to assert impunity from international justice. Instead the principle of accountability for crimes against humanity, genocide, and war crimes, so often declared but so seldom enforced, will acquire a permanent enforcement mechanism. Nominations for judgeships are now being tendered by States; a special advance team is in place to prepare the site in the Hague where the Court will ultimately meet; and the Assembly of States’ Parties, the Court’s oversight organ, has adopted Rules of Procedure and Evidence, Elements of Crimes, a Relationship Agreement between the Court and the United Nations, Financial Rules and Regulations, and a host of other documents that will be required to bring into existence this new international organization.

What I’d like to do today is in two parts. First, to retrace the history and the context within which the ICC Statute’s adoption took place, and secondly to briefly describe the Statute and what it does, and talk a little bit about the United States’ position.

We begin our journey into history with World War I. The horrible slaughter of the First World War enflamed public opinion and it was not surprising that after Germany’s defeat a preliminary peace conference nominated a fifteen-member commission to determine responsibility for the war. The Commission produced an extensive report, recommending among other things the constitution of an international high tribunal to try all enemy persons alleged to have been guilty of offenses against the laws and customs of war and the laws of humanity. In contrast to the pivotal role that the United States

would later play at Nuremberg, the American members of the commission dissented. They objected to the very use of the term 'laws of humanity' stating that war was by its very nature inhumane and acts of war that were illegal might be immoral, but could not be heard by any court of international justice. The British objected and the British and the Americans achieved a compromise that would submit the Kaiser to trials for arraignment for violation of the sanctity of treaties and war crimes, but, however, left crimes against humanity untouched. As many of you may know, no trials were ultimately held due to American and Dutch recalcitrance and the entire affair was generally considered a fiasco.

The world attempted to establish institutions to address international conflict after World War I, but that history, of course, is an unhappy one. The League of Nations was brought into existence, the Kellogg-Briand Pact was signed, but unfortunately all of that really fell by the wayside when in 1933 a young Austrian by the name of Adolph Hitler rose to power. He pulled Germany out of the League, repudiated the Treaty of Versailles and in 1939 invaded Poland and the rest of Europe fell shortly thereafter. During the war that ultimately ensued, fifty to sixty million people were killed; almost half of them were civilians. The Allies announced their intention to try the Nazis, as well as the Japanese (but I'm not going to talk about Tokyo, in the question period we can talk about that if you want) in three separate declarations during the course of the War, the most famous of which was the Moscow declaration of 1943, which announced their intention to try any Nazi leaders that committed war crimes or crimes against humanity. Disagreement now ensued between the United States and Britain once again, but this time it was the Americans that were very much pushing for trails; Winston Churchill announced categorically that he wanted the Nazis shot. Now on June 6, 1944, as we all know, the Allies invaded the Normandy beaches; on May 8, 1945, Germany unconditionally surrendered and France was liberated two days later. Many Nazis and

their leaders were captured, some others, such as Hitler and Goebbels, committed suicide.

In his report to President Roosevelt, June 7, 1945, Justice Robert Jackson, Chief Prosecutor for the United States at Nuremberg, stated the American position regarding the fate of those captured. What Jackson said, and I'll quote because I think his words are still inspiring today. He said:

> "An inescapable responsibility rests upon this country to conduct an inquiry, preferably in association with others, but alone if necessary, into the culpability of those whom there is probable cause to accuse of atrocities and other crimes. We have many such men in our possession. What shall we do with them? We can, of course, set them at large without a hearing, but it has cost unmeasured American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living. On the other hand we could execute them or otherwise punish them without a hearing, but undiscriminating executions or punishment without definite findings of guilt fairly arrived at would violate pledges repeatedly given and would not set easily upon the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit and upon a record that will leave our reasons and our motives clear."

Shortly after these words the International Conference on Military Trials was convened on June 26, 1945, and after protracted and difficult negotiations between the four allied powers, the agreement for the prosecution and punishment of major war criminals of the European Axis was signed, more commonly known as the London Accord. Attached to it was the Statute of the International Military Tribune at

Nuremberg. Building on the experience, both practical and theoretical that had come out of World War I, the Accord and the Charter, even with their flaws, represented a quasi-revolution in international law. Article six of the Charter provided the Tribunal with jurisdiction over three crimes for which there was to be individual criminal responsibility: crimes against peace for the waging of an aggressive war; war crimes, namely serious violations of the laws and customs of war; and crimes against humanity, namely murder, extermination, enslavement, deportation, and other inhumane acts committed against a civilian population, even if it was lawful under the domestic jurisdiction of country involved.

The four Allied prosecutorial teams hotly debated who would be indicted at Nuremberg. Ultimately the trial was limited to the major war criminals whose offenses had no particular geographic location. Under this arrangement, minor criminals would be tried by municipal or military courts under the jurisdiction of each individual state. After much haggling, a list of twenty-four defendants, as well as seven organizational defendants, was published on August 29, 1945. Twenty-two were individually tried. The trial began on November 20, 1945, and ended on October 1 of the next year. Three of the individual defendants and three of the organizational defendants were acquitted.

Nuremberg, of course, was not without its critics. Many argued it represented 'victor's justice' because the victors sat in judgment of the accused. The assertion was also made that this was *ex post facto* retroactive justice. Finally, the Tribunal was conservative in interpreting its own charter, which disappointed many human rights activists. Yet all agreed that the trials were procedurally fair, and this helped to establish an enduring legacy. Moreover, Nuremberg spawned the idea that grave and massive violations of human rights can become the concern of the international community, not just that of the individual state. And finally, the Nuremberg judgement has been

generally taken to affirm the idea that war, as a way of solving interstate conflict, is morally, legally and politically wrong.

In spite of its success, however, Nuremberg and the law it subsequently spawned was like a dormant volcano—incredibly powerful and yet quiescent. Indeed, until recently one stood a much better chance of being tried for the murder of one person than the massacre of thousands. Believing themselves to be unaccountable and invulnerable, since World War II despotic rulers have committed some of the worst atrocities humankind has ever seen. The figure of one-hundred-seventy-million dead in more than 250 conflicts since World War II is a depressing one. Genocide, crimes against humanity, and war crimes have become part of the international lexicon, and despite cries of 'Never Again!' have been perpetrated again and again in horrific conflicts in Europe and Asia and Africa.

During the Cold War, little progress was made on preventing and punishing mass atrocities. But, following the fall of the Berlin Wall in 1989, the international community finally responded with a program for international justice. Following America's example at Nuremberg and the example of the Tribunal itself, the United Nations promoted the establishment of international legal norms and international institutions to bring to justice the perpetrators of terrible crimes. Thanks mainly to strong American leadership, two ad hoc international criminal tribunals were established to address the crimes committed in the former Yugoslavia and Rwanda. Hybrid tribunals have been set up for East Timor and Sierra Leone; and, negotiations are ongoing with respect to a tribunal for Cambodia.

The effort to bring international criminals to justice is part of a long-term solution to address the needs of victims and prevent conflicts from reigniting in the future. Criminal trials before an impartial international judiciary provide an official accounting of the wrongs perpetrated, and may prevent revisionist history from subsequently taking root. They also represent the most powerful condemnation of the international

community of as a whole, and a declaration that the commission of atrocities will no longer be part of business-as-usual, but it's pathological, criminal behavior that can send a leader to jail.

International justice, like its domestic counterpart confronts many challenges, of course. Yet there are good reasons to continue to press the case for the prevention and prosecution of international crime. First, the international justice movement has produced results. The two ad hoc international tribunals have now tried and judged forty-one defendants and eighteen trials are ongoing. They have also offered hundreds of lesser-known judgements on important legal questions about jurisdiction, procedure and evidence. And, after a rocky start, have even been able to apprehend most of those accused of the most heinous crimes. As you know, Milosevic is currently on trial in The Hague and the former Prime Minister of Rwanda was sentenced to life imprisonment three years ago. The International Criminal Court has inherited this legacy.

So, let me turn to a brief description of the ICC. The ICC statute was adopted by a diplomatic conference, at which I was a delegate, that was held in Rome in the summer of 1998. The statute that was adopted was based on a text that was prepared by the International Law Commission in 1994, that was worked on, negotiated and debated for four years leading up to the statute's ultimate adoption. The Court was seen as the direct successor of the Nuremberg tribunal and the two ad hoc tribunals in The Hague, and was to be a permanent institution that was, in the words of the Statute, to hear "only the most serious crimes of concern to the entire international community as a whole."

A permanent court was preferred to ad hoc tribunals for several reasons: To avoid charges of victors' justice; to establish a professional core of personnel trained in criminal investigation and prosecution that could react quickly to any new crisis before evidence could be destroyed, and who would be trained not only in criminal

investigation, including forensics, the exploration and exhumation of mass grave sites and deciphering satellite and other intelligence information, but who would also have well-trained staff to address the terrible psychological problems and problems of personal safety that beset victims and witnesses of mass atrocities.

Following well-established, customary international law, the Court has three crimes within its jurisdiction—crimes against humanity, genocide, and serious war crimes. Aggression is included, but not defined in the statute. If the States' Parties to the treaty so desire, they may amend the treaty in seven years time to include aggression, assuming they can manage to define it, which is probably unlikely. The State's Parties to the statute, the Security Council, and the ICC prosecutor can bring cases to the Court, but only if jurisdiction exists and no state is willing or able to bring the case to their own courts. Individuals cannot.

Among the countries ratifying the Court's statute are our closest allies—Canada, France, The United Kingdom, the entire European Community. The German Bundestag approved ratification by a vote of 561-0. Russia has signed the statute, and even China has recently expressed its support for the court. Alone among Western nations, alone among industrialized nations, and possibly alone among permanent members of the Security Council, the United States has declared its opposition to the ICC Treaty; opposition that has become increasingly belligerent with the passage of time. Congress adopted and the President signed legislation that, among other things, prohibits U.S. cooperation with the Court, cuts off U.S. military aide to non-NATO countries that ratified the treaty, prohibits U.S. participation in peace-keeping forces unless U.S. troops receive immunity from prosecution, and authorizes the use of force to free American service members that could be brought before the court, earning the bill the nickname 'The Hague Invasion Act.'

Some have suggested that the Court lacks sufficient due process protections for the defendant and that it might therefore be unconstitutional, suggesting that adherence to the statute would undermine American values. Yet the United States government has undertaken studies that clearly establish the treaty's compatibility with the Constitution and the jurisprudence of the United States Supreme Court. Indeed, the most common American vehicle used for the prosecution of U.S. soldiers who are accused of violating the laws of war are military tribunals that offer many fewer protections to the accused than the provisions of the ICC treaty, which is in full compliance with all international human rights norms. The other principle argument mustered against the accord is that it impermissibly and irrevocably erodes American sovereignty by depriving us of a per se veto over prosecution of our nationals; opponents argue we are unduly exposing our country, and more particularly its leaders and soldiers, to potentially hostile and even frivolous prosecutions brought by a runaway prosecutor and supported, perhaps, by a biased judiciary. I should say that given the candidates likely to become judges thus far, the United States has little to be concerned about. Moreover, pursuant to a fundamental principle enshrined in the treaty's text, known as the Principle of Complementarity, to which I alluded earlier, the United States can render a case impermissible to the ICC merely by opening an investigation. That is, the Court is a Court of last resort, not a Court of first resort. It is seen as a facility to States' Parties and a facility to the Security Council.

Ironically by rejecting the ICC treaty, the government has in fact deprived American soldiers of an important legal protection they could rely upon if they were captured abroad and accused of war crimes by a hostile nation. Short of obtaining the prisoner's complete release, surely the United States would prefer to see the soldier transferred to The Hague than tried in the courts of a hostile nation, such as Afghanistan or Iraq. Perhaps this is why the United Kingdom deposited its instrument of ratification

on October 4, 2001, right after it had committed its forces to combat in Afghanistan. Moreover, Article 124 of the statute, a provision the United States proposed at Rome and which was adopted by the diplomatic conference, permits any country to opt-out of the war crimes jurisdiction of the court for seven years.

Finally, by ratifying the Statute, United States' nationals are eligible to be named to the Court's bench as judges, to serve as the Court's prosecutor, and more generally to shape the Court's personnel and jurisprudence as an influential insider, rather than a hostile outsider. The other governments objecting to the court include the governments of Iraq, Yemen, and Libya, governments accused of committing human rights abuses against their own citizens and whose leaders scoff at the notions of international justice, human rights, and democracy—core values of the United States of America.

Ratifying the Statute will also mute, if not silence America's critics who claim that the U.S. believes only in victor's justice, not universal justice, and permit the United States to take its rightful place as the leader of the free world, committed to international peace and human rights.

Finally, I believe we should ratify the ICC Treaty to honor the victims of atrocities everywhere by proclaiming our commitment to bringing their oppressors to justice. Like the crisis that befell our nation following the bombing of Pearl Harbor and the rise of Hitler's Germany, the attacks of September 11, 2001, represent an extraordinary challenge, but an extraordinary opportunity to reshape and strengthen the institutions and norms of international law. The U.S. should seize this opportunity and should seize this opportunity to support this court, which after all, ironically, is an American court. It's Nuremberg's legacy, the legacy we spilled American blood to establish and to preserve and it is a legacy that we should cherish and honor.

Question 1: Could you explain a little bit how, if the United States had ratified the court and the court was up and operating, how the War Against Terrorism might be affected? Would, if the U.S. participated in this process, would a captured terrorist be handled in any different way? Or, because they're non-state actors, is this still kind of a special case or a special problem for international law?

Response: Well, the problem of terrorism is a problem that is obviously facing the entire world community, not just the United States. Specifically, the ratification of the ICC Statute wouldn't actually affect the War on Terrorism at all. The only way it could affect, because terrorism is not within the court's jurisdiction; the attacks of September 11th probably qualify as 'crimes against humanity.' So, if the United States—the Statute has no retroactive jurisdiction, so it would be inapplicable—but if similar acts were carried out by Al Qaeda in the future, they could come within the jurisdiction of the Court as crimes against humanity. Now again, it's a facility to States' Parties, it's not mandatory. So, if the United States captured international terrorists, it could just try them itself. If they were captured in another state, for an act subsequent to July 1, 2002, which is when the treaty entered into force, it might provide actually a very positive incentive for that state to turn over those terrorists to the ICC, rather than to the United States. And the reason I say that it might be very positive is some of the accused are likely to be found in states very hostile to the United States. They might be Pakistan, and while Musharraf might want to turn them over, it might be politically impossible to do so. And so, being able to hand them over to a third, more neutral forum, would be something that obviously would facilitate the transfer of the accused to stand justice. So, after 9/11, many people argued that the best thing to do would be to set up an international tribunal, not necessarily to keep—you know, the ones who committed the acts in the United States are dead and anyone the United States can find, obviously the United States has jurisdiction over and

is perfectly capable of trying itself. The difficulty is Al Qaeda has 3000 members spread out across 60 countries and unless the United States intends to invade sixty countries, which is probably you know, diplomatically and legally and politically infeasible, some of those other members are going to be found in states not very friendly to the United States. So, actually, most people believe that the ICC would be a facility and one of the things—your question raises an interesting issue because one of the things that the initial resolution that called for the establishment of the Court said was that we want this Court not for the big crimes, not what we call the 'core' crimes in international law—genocide, crimes against humanity and serious war crimes—but for drug trafficking and terrorism. And the initial resolution was sponsored by Trinidad and Tobago and a coalition of Caribbean countries because they felt they could not deal themselves with the issues of drug trafficking and terrorism because the terrorists had more money than they had and were corrupting their police and killing their judges and so those countries wanted assistance, basically, in international law enforcement. The U.S. has objected, not for political reasons, but initially the administration under the Clinton administration opposed the inclusion of those crimes arguing we could better do it ourselves—that we had better intelligence, that our law enforcement personnel were perfectly capable of doing the job. But they weren't thinking of networks like Al Qaeda that are so extensive and so international in scope. But, it's a great question.

Question 2: Am I correct that ICC does not have the death penalty as an option?

Answer: That's right, that's right. And, ironically, Trinidad wanted the death penalty as an option and Trinidad argued and lobbied very hard for it at Rome. In international law, I would not say it's illegal to have the death penalty, but the trend in international law is in opposing the death penalty and many of the Court's most staunch allies could not

ratify the Statute if the Court had the death penalty. And what's often surprising to my students is there are many states that prohibit life imprisonment as a punishment because they deem life imprisonment as cruel and unusual. And so those states actually had to amend their constitutions in order to be able to ratify the treaty because the treaty provides for life imprisonment. So, that's a great question.

Question 3: You alluded to the complexity of the statute and I think that everybody—I hope that everybody would applaud the goals of the court. What incentives would there be, if any, for the judges that are chosen to maintain honesty and integrity and enforce the statute, given its complexity, given the history of international organizations, and their inability to uphold their glorious charters? Why would we have confidence that this would be different?

Answer: I would say the more appropriate analogy, would be the two ad hoc tribunals. There have been problems in the Rwanda tribunal with corruption, but essentially the ad hoc tribunals have functioned extremely successfully. In terms of the guarantees they tried to put in the Statute to avoid problems, obviously the Statute has very complex provisions on judges. They have to be eligible to be Supreme Court justices in their home state, they have to maintain judicial integrity, etcetera, they have to be geographically balanced, balanced in terms of the legal system they represent, there have to be judges that know criminal procedure and there have to be judges that know international law. These are all requirements of the treaty. Judges can be removed if they are incompetent or corrupt, and they're removed by the Assembly of States Parties, which is a new institution. We've seen this in other international conventions; the Law of the Sea Treaty has this kind of idea. New institutions, unlike the World War Two international institutions, usually have oversight bodies now. And the States Parties to

the treaty obviously have an incentive, because how is this court funded? It's not funded from the U.N. budget; it's funded by the States Parties. So the States Parties actually, it's not even an institution—I should say that this Court is a separate free standing institution, and mostly that was done because they couldn't amend the Charter in order to do this and the U.N. charter would not have permitted the establishment of a criminal court. So, I think they've thought about this. I've gotten into long conversations; they don't permit reelection of judges. Now, that was designed to prevent electioneering; they didn't want judges electioneering, because that has, not corrupted, but that has infected the process of selecting judges for the International Court of Justices. Though I think we think the American judge has never been a problem, you know, and we've had American judges that have had successive terms at the ICJ, but nonetheless, people feel that sometimes the electioneering that goes on is unseemly. So, the ICC judges only have one term, which means basically, I think that cuts both ways—it means they have to go back to their home state at the end of their term; they can't develop the long term judicial competence that might help—these are incredibly complex cases.

Question 4: What do think the chance is of the current administration to change its view? What do you think the chance is a future administration would change its view? And finally, do you think that would depend on whether it's a Republican or Democratic administration?

Answer: That's a great question. I think the current administration will never change its view. And I think most of us in the field look at this long term—the only way that this Court is ever going to be effective is through Security Council referral. So the only time this administration might, and initially they did leave the door open because they realized, hey, if we catch Saddam Hussein, for example, and there's a war—it's not

retroactive so you can't try him for genocide of the Kurds or things like that. But, if there's a war and war crimes are committed, this might be a great situation for a Security Council referral. Nobody internationally is going to believe the trial is fair if we try him in our own courts. We can send him to a military tribunal, we can send him to Guantanamo, you know, we can do lots of things. But for dictators of this ilk, particularly in a country where you want to rebuild the country afterwards, the whole point of the trials is to serve as an historic lesson and to bring reconciliation to the state. That's the basis upon which the tribunals were created for Yugoslavia and for Rwanda. I mean, we've learned through the difficult experience of the ad hoc tribunals, which are almost ten years old, that it's really hard to do that because you can only try a few. The revisionists are still out there. If you look at the evidence Milosevic is presenting at the Hague Tribunal right now, it's kind of unbelievable, but basically he says 'the war in Bosnia wasn't started by me; it wasn't Serb aggression; it was French spies, Muslim-Islamic extremists'—he kind of bought into the terrorist angle now—'and Croatian fascists.' And he's still reliving the battle of Kosovo, you know, 1365. But what the Court will do for the victims, and I've talked to human rights advocates in Belgrade who are Serbs, who hated Milosevic not because of the war, but because he was an oppressive and very unpleasant dictator. And they say what's important is an official recording of the proceedings and that they're done in an international forum that at least most would say is neutral and well done. So I think if the administration has the opportunity to use the Court through the Security Council, then that might be an appealing option to it. But I think there's an ideological component, John Bolton, our undersecretary—who's quoted in today's article, you know John's just been a huge opponent of the thing for a long time for purely ideological reasons. And so I think the difficulty of their position is that because it's been so unsubtle—it hasn't been, 'well we'll wait and see and we're not really sure and this might not be a very good idea because of these following reasons'—

it's been a real unsubtle world campaign to destroy the Court. Even to the extent of calling foreign ministers and threatening them and threatening to pull American aid. I think the U.S. will eventually come on board, and I think for just very practical reasons it'll want to use the Court as the vehicle for the Security Council to take care of cases like Milosevic or Saddam Hussein or Foday Sankoh in Sierra Leone. And, in fact we think now the first cases are going to come from The Congo, from Africa, because there are terrible wars raging, as you know, in Africa. There are a lot of dictators there that are massacring their own people, there are religious atrocities, the eighteen or nineteen-year old war in the Sudan is just unbelievable—they had a peace deal on the table. The peace deal's not going to go because they're leaving the same guys in power that have been committing the atrocities, so you know once they have the oil money and they have their peace deal they go right back to doing what they're doing. So I think that's how most people see that in a ten to twenty year window, assuming the Court doesn't have major problems and takes sort of safe cases, that aren't going to inflame the U.S. further, probably the U.S. will come back just for practical matters. Because the Court itself, I should say this, Court has no enforcement power unless the Security Council refers the case. And as you know, the United States as a permanent member can veto any prosecution it doesn't want. Unless the Security Council refers the case, the Court has virtually no enforcement capacity. And so the irony of the U.S. position is that most human rights advocates were very on the fence as to whether they would support the Rome statute at all because the Court created was so weak and so dependant on the will of the Council. But ultimately they said, 'look, something is better than nothing, you always have to make compromises.'

Question 5: You've mentioned ideological reasons for opposing the court. What are those?

*Answer. W*hat I perceive is a deep ideological suspicion which is historic in the United States—a suspicion of international institutions, less in the trade area than in the human rights area. We've been pretty big supporters of GATT, the WTO even when it rules against us—right? I mean there there's a little tension. But essentially there has been a real antagonism towards the human rights instruments. And it's partially I think our blessed situation—we don't have huge human rights abuses in the United States. So, when we talk about the Convention on the Rights of the Child, we're one of two countries that hasn't ratified and the other is Somalia. We could talk about the Convention for the Elimination of Discrimination Against Women. Again the United States was alone—virtually—in it's opposition. I think we've been very blessed here, not to really have first hand-experience, thank God, of what it means to be tortured, to be imprisoned, to have religious atrocities committed, to have massacres occur, to be disappeared in the middle of the night because of a junta that has no respect for human rights. So, I think there's just a sense of, I don't want to say naïveté, but just not having experienced that, and there's an ideological aversion to international entanglements, which is historic. And I do think there is a sense of impunity, not that America would use its power improperly, but that we are the sole superpower and therefore we can do as a matter of power what other states can't do. And there's been a sense that we should use that power; use it militarily and use it economically and use it in other ways. When you go over the arguments about the ICC and you say okay, we're all lawyers, here's the text: tell me which article bothers you. You don't actually get lawyer-like responses, or rational responses. You get essentially political ideology.

Question 6: But that doesn't seem to be ideology.

Answer: No, the reason for the vehemence is ideology; it appears to be an opposition to all human rights treaties. I've read the opposition papers—they reflect a deep political ideological opposition to the ICC treaty and it goes very much to questions of American power.

Question 7: So, moving away from ideology, are there features of standard military doctrine, how to prosecute a war, that would be considered or could be emerge as violations, you know, of the rights that are to be protected by this court? Is it a crime against humanity for a navy vessel to fire a large artillery shell into a village where there's a target identified by the military, but of course there're civilians around—could that be a crime against humanity?

Answer: Normally when you talk about military operations you're talking about war crimes, not crimes against humanity. And the reason is that to have a crime against humanity you have to be deliberately implementing a plan to either systematically or on a wide spread basis attack a civilian population. So the kind of thing that you're talking about is either a targeting mistake or what they call 'collateral damage'—we have to get the military objective and there're civilians next to it—that's typically falling under the law of war, not under crimes against humanity. The Rome statute has been carefully vetted by our military. And in fact there is nothing in the war crimes provision of our statute that was not carefully reviewed by the Pentagon. Now, the laws of war, where do they come from? They come from The Geneva Conventions of '49, the two '77 protocols, as well as the Hague Convention of 1907 and some supplemental declarations. Those conventions are not crystal clear and the difference between the Rome statute and those conventions is that those treaties did not generally create individual criminal responsibility. States were supposed to criminalize breaches of the conventions. The

United States has done that: in our Uniform Code of Military Justice we provide that war crimes are defined by the laws of nations; we have no problem saying we adhere to the 1949 Geneva Conventions and we adhere to the 1907 Hague Convention. In terms of the Military Necessity Doctrine, which is sort of what you're getting at, there is the question of what is a legitimate target. The Rome statute gives military commanders much greater leeway than what we would argue is in customary international law. And that was, in fairness, because of the difference between individual criminal responsibility—and state responsibility. Essentially, if a commander is following orders and those orders aren't manifestly illegal, the commander is completely protected under the Rome statute. So, the human rights community feels that the Statute didn't go far enough. Obviously the States' Parties to the Treaty, all of whom had their defense departments with them negotiating these provisions, were not going to go further than the customary international law of war and in fact felt, I don't think inappropriately, that they should have a narrower class of cases that would be the most serious crimes of concern to the international community as a whole.

Question 8: If you keep all those things out, how do you prosecute a case of genocide?

Answer: Well, the way you prosecute it is you need an intent to exterminate a group in whole or in part, carried out by murder, torture, inhumane treatment, detention, etcetera. Or, imposing living conditions on the group that shows an intent to destroy the group.

Question 9: I'm still a little uncertain why it is that the current regime of ad hoc tribunals isn't enough. It gives the U.S. the flexibility it wants and the worst cases are being managed through the International Court of Justice, which surely has legitimacy and worldwide support. What's gained by establishing a permanent court?

Answer: The International Court of Justice is state versus state only and so that's only for civil cases. And there are cases, like the former Yugoslavia sued NATO saying the bombing is illegal; Bosnia sued the former Yugoslavia saying you are committing genocide, please stop it. So, there are cases like that, but they're not criminal cases. The ad hoc tribunals are both successful and problematic; I mean that's really the short answer. The difficulty is that you have to have first the political decision to create the tribunal and that is a political decision and, you know, the U.S. could want one and Russia could veto it and China has said it will support no more ad hoc tribunals. So on the Security Council, which is the only way that you can create them, you now have a political impasse. So it's very difficult to see how we will have future ad hoc tribunals.

Question 10: On a practical basis, could you tell us about the judges—what kind of terms they're appointed for, and is there a staggering so that you have continuity without everybody rolling over every so many years?

Answer: The statute doesn't provide for staggering, but the Assembly of States' Parties, which is overseeing the court, is going to stagger the terms. And so they're going to be initially shorter terms. They have nine-year, nonrenewable terms. They can have no more than one judge from each nationality; that is, you couldn't have two U.K. judges or two Canadian judges. Just to show how much the international community wants the U.S., they've been trying to actually find a dual national. For those of us who teach international law, it's just unbelievable to imagine a major international institution without an American judge. We even had an American judge on the Permanent Court of International Justice, even though we didn't ratify the League Treaty, we signed it.

Question 11: Wouldn't a unilateral invasion of Iraq by the U.S. be a violation of every international law as written today?

Answer: Oh my goodness. I am a lawyer, I deal with law, I deal with text. Given that the prevailing Constitution for the international community is the United Nations charter, which the United States has ratified; in fact the United States practically wrote. So, it's not a strange instrument to us. The United Nations charter has an article, 2(4), that says "states may not use force against the territorial integrity or political independence of other states." The only exception in the charter to that prohibition on the unilateral use of force by a state is article 51, which permits states that have suffered an armed attack— and that is the Charter's language— to respond in self-defense until the Security Council has acted. Now, the Security Council can authorize the use of force, and so I think that if the Security Council authorizes the United States to go forward, then there's no problem. I think that without Security Council authorization, this is just my opinion, it is absolutely illegal under international law. International law does not, and never did have a preemption doctrine. There is arguably, an anticipatory self-defense argument, but that's very different than preemption. It's also been accepted to use force discretely to go rescue your own nationals if they're taken hostage. And so usually, most states won't complain of a unilateral incursion into another state territory to rescue your nationals. Regime change, however, using force is illegal under international law. Now the appropriate mechanism is to indict the leader of the regime and then pressure the state to get rid of him, which is exactly what we did in Milosevic's case and what we should do with respect to Saddam Hussein.