

The International Criminal Court Arrives:
Establishing an Ethic of Peace and Justice

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I'm going to deal this morning with the International Criminal Court and its relation to Humanist Values as I understand them. I think that you yourselves are the best place to look at this connection after I've described it, and develop on your own a forward movement toward creating an Ethic of Peace and Justice based on that relationship between your values (as I understand them) and the Court. But first let me begin with such background, as has Mr. Arisian, beyond what he's already given you.

In 1995 the Countries of the United Nations surprised themselves and outside observers by agreeing about the nature and the actions to be taken on War Crimes, Crimes Against Humanity, and Genocide. They agreed that the peoples of these countries, over 160 of them meeting together -- of whatever religions, beliefs or non-beliefs -- held in common that these acts were both all too human and at the same time unworthy of human beings. These countries decided that this universal understanding and loathing of such crimes justified an international court to try and punish the perpetrators. In other words, they determined there was sufficient international agreement about these crimes—their character and the moral consequences thereof—that they had a foundation already in place, and that what lay before them was, of course, the extremely difficult work of constructing the Court and a whole jurisprudence, including an international organization to sustain the Court's underlying purpose. They felt with a surety among themselves that with a foundation of conviction concerning the nature of those crimes and their inhuman implications, they would get to work.

At Rome, in July 1998, just three years later, the same nations, 120 of them, against the opposition of the United States and 6 other countries, adopted the Rome Statute establishing an International Criminal Court. An extraordinary document, the Statute is several things all at once: it is a very practical blueprint with all the administrative, logistical, budgetary, financial, operational systems described and laid out in place before the Court; it is the structure of an organization laid out both in its operations and in the way its pieces are put together, its primary organs; it is a massive piece of jurisprudence, drawn from basically Treaty Law comprising a genocide treaty, a very extensive body of conventions and protocols on war crimes, a convention on torture and a very detailed convention – a draft-treaty --on crimes against humanity; these were adopted, customized and put in place for the Court to exercise its jurisprudence.

There's also extensive provision for governance of the Court. There is an Assembly of States Parties composed of all the nations that ratified the Rome Statute, which means that the United States will not be a part of it for a considerable period. This Assembly of States Parties hires, fires, disciplines, holds accountable, determines the budget, and assesses its members to pay for the budget.

An important part of this statute is its preamble; this is where direct obvious statements are made by the countries which created the statute regarding the Court, *why* the Court is essential and what it is supposed to represent. In the preamble, the Nations state: *“Conscious that all peoples are united by common bonds, their cultures [are] pieced together in a common heritage and concern that this delicate mosaic may be*

shattered at any time...” The preamble goes on to talk of unimaginable atrocities that deeply shock the conscience of humanity.

As you have heard, on July 1st, the jurisdiction of this Court began. This means that crimes committed after July 1st, will be — all other criteria being met — eligible for the Court’s jurisdiction. It will not have retroactive, only prospective, jurisdiction. The framers of the Court, and for this Court we speak of founding mothers as well as founding fathers, agreed that they did not want to run into the criticisms that have been made of the Rowandan and Yugoslav tribunals, even more, of the Nuremberg tribunals. They did not want any defendant to say, “Look, you’re trying me in a Court that didn’t exist when I was supposed to have committed these crimes.” All persons inclined to be involved with atrocities of this kind are now on notice for the future.

From September 3-10, the first meeting of the Assembly of States Parties will be held here in New York. It will be convened by the UN Secretary General. He will preside over the election of Officers of the Court, Officers of the Assembly of States Parties, its President and Vice-president, and so forth; and as he hands the gavel over to the newly elected president, the role of the United Nations in the creation of this Court will formally come to an end, and the life of this new organization will begin physically with this Assembly of States Parties— one of its’ three major organs— as well as legally, as it began on July 1st.

This will be a moment of high celebration: many heads of state and government will have already gathered, ready to participate in the General Assembly— with light bulbs flashing, pictures taken, cheers and tears, all of us in this city being present at the creation of what the Secretary General has called, “The most important international organization to be created since the United Nations itself.” It will be for this century, according to the Secretary General, what the United Nations was to the last century. Unfortunately, our country will not be a participant in the formation of this Court as it was so important, so central, to the formation of the UN.

Just to complete the timeline for you: in January and February of 2003, there will be another meeting of the Assembly of States Parties; a nomination process, the nominating of judges, will conclude with their election; senior staff of the Court will be confirmed in their employment, prepared to go to work in premises which have now been identified by the Dutch government. At the Hague, these premises will be ready for them to use right down to the last computer and paperclip. In early March of 2003, there will be a monumental gala celebration sponsored by the Dutch government, no expense spared: the city will be illuminated, there’ll be fireworks, band concerts and parades, an enormous, wonderful, European-style celebration presided over by the Queen of the Netherlands in the presence of heads of state and government from all over the world, except for the United States and a handful of other countries; the judges will be formally sworn in, robed in their red vestments, and their legal functions will then be able to get underway. Because of all the spade work being done, experts on the Court believe that it will be able to start processing its first cases by June or July 2003, with trials to begin during the last half of the year.

Unfortunately, before all these good things can happen, we had to get through something very unpleasant the last day of June at the UN: The Security Council met at 4 p.m. on demand of the United States that in language renewing the police functions of the United Nations in Bosnia, in the Security Council's resolution, there be provision for giving blanket exemption to Americans from jurisdiction of the International Criminal Court.

There's a certain amount of understandable concern the US could have about protecting its people; there are status- of- forces agreements that have long been established which recognize that when a UN member donates members or officials to a peacekeeping operation, those soldiers or civilians are to be retained in the jurisdiction of the country that has sent them out, in this case, the United States. It appears however, that the US is not prepared to accept compromises which would meet that reasonable concern based on those existing agreements both between the UN and the sending state, and between the UN and the state within whose territory these peace- keeping activities are taking place. It does seem in its obduracy and rigidity that the United States is seeking in this way to demonstrate power over the International Criminal Court to cut back its jurisdiction, or at least to start a process toward that end.

Now let me provide you just a few more details about the nature of the Court, to give you a general sense of how it will function and what its highlight characteristics are. The most single important thing about this Court is that it will try *individuals* for crimes against humanity, war crimes and genocide. There will be no discrimination among these individuals; it does not matter what their sex, their present or previous positions of power or importance, their political situation, their nationality, or their region is— none of these things matter. You get excused from these crimes only if you are underage or mentally incompetent. If you are under duress, that will be taken into account in considering imposition of the sentence upon you should you be convicted. Otherwise, there is absolute liability for these crimes once you are determined to be responsible for them.

Crimes against humanity, genocide, and war crimes each have what lawyers call a “high threshold.” This means that the crimes— as you can tell from language I quoted from the preamble— must be especially grave and atrocious: they must shock the conscience of humankind, they must be systematic and in most cases, widespread, massive, and a consequence of some plan or policy established either by an organization or a government. Note that even with this kind of high threshold, the crimes of September 11th— had the Court then been in existence— would have been eligible to be tried before the Court. This is the kind of crime for which the Court was created, Osama Bin Laden being the kind of person the Court is intended to reach.

It is this element of trying individuals and holding them personally responsible for the crime and focusing on them as individuals which makes this Court, as a permanent body, so very special. We've had Nuremberg, we've had the Rowanda tribunals, but these have not been permanent bodies. Nor were they focused on the future. This is focused on the future, this is permanent and it deals with individuals.

Cases can come to the Court in two ways: one has to do with states, where you have a state which has ratified, or a state which has given consent to the Court's jurisdiction; secondly, crimes committed on the territory of such a state or by one of its nationals are eligible for its jurisdiction. In the case of a ratifying state, that jurisdiction is automatic because consent is given permanently; unless the country later chooses to withdraw, it is given permanently at the moment of ratification so the Court need not ask or consider the question of consent where there is a crime having to do with a ratifying state. The consenting state must give consent to an entire situation in regard to which the alleged crime has occurred. This makes it impossible for the leadership of a country to pick a crime to be tried in which they are not involved and avoid the Court's jurisdiction over which they themselves may be responsible. Saddam Hussein could not pick an alleged crime committed during Desert Storm by the United States or other members of the Alliance and remain protected for his own crimes. The leader of a state cannot, in the words of one of the government delegations, "cherry-pick" the crimes to which he or she chooses to give consent.

I've already mentioned that these crimes and the jurisprudence of the Court reflect the current state of international law but for a couple of important exceptions. The most important of these exceptions is that this Court marks a major advance in the matter of gender crimes, of describing and defining and identifying gender crimes, because of an extraordinarily able women's caucus for gender justice which participated in the Rome negotiations and thereafter. The Rome statute renders, as triable crimes, offenses that have been identified by conferences on the status of women at Beijing and before. The conference at Beijing dealing with coverage of crimes against women has in fact been turned into an implementable document by the Rome statute. This is particularly important in matters such as enforced pregnancy, and mass rapes for political purposes.

Another major advance is the very careful and extensive attention given to victims. There is a Victims and Witnesses Unit which provides practical and psychological support by trained experts to victims and witnesses to help them through the trauma of testifying to crimes in which they have been badly injured and as a result of which they may remain emotionally and psychologically fragile. This Unit will have staff especially trained for this work.

There will also be a Representation and Reparations Unit, which will deal both with the question of legal representation for victims and the arrangement of reparations for them out of assets which the Court may seize as the result of cases involving this kind of witness. These arrangements for victims are based on the Rwanda and Yugoslav tribunals but go a long way further in meeting the needs of victims, and respecting their status. The provision for victims goes so far as to give them standing in these cases before the Court, so that in the trials, instead of the *two* parties that we are long familiar with, the prosecution and the defense, we will now have the prosecution, the defense and witnesses. Witnesses will be represented by counsel.

At the same time, recognizing some of the lessons of the Rowandan and Yugoslav tribunals, the Rome statute makes full provision for all of what Americans call due process rights, rights in criminal trials accorded to defendants in our own Constitution's Bill of Rights. The exception for jury trials is a result of the consideration of the impracticality of empanelling an adequate jury to try someone like Milosevic or Hitler. A criminal defense unit will be available to assist lawyers. The Court, taken overall, will be fully familiar to most people; any one of us would recognize it immediately while those thousands, hundreds of thousands, perhaps millions of our fellow citizens, who will watch this Court on Court TV a year hence, will see a court which will look a lot like the courts that they are already familiar with and will respond to their intense interest in courts and law and criminal defense proceedings that we know from the popularity of television shows like *Law and Order*.

The Court will have its own jails, premises, staff, equipment, all that it needs that will be part of its assets as an international organization. Finally, the Court can impose sentences of life imprisonment, but not capital punishment.

I've given a little thought, with some trepidation, about the relationship between the Court and humanist values as I understand them, but let me, with your indulgence, give this a bit of a shot. The ICC represents a *collective* decision among nations to hold individual human beings accountable for crimes committed against other human beings. Such crimes entail many victims, but the Court is designed to recognize and respect the individual worth and dignity of *each* individual as a person. The idea here is that simply because there are large numbers of victims, they must not be allowed to blur out into some undifferentiated mass, and that therefore the representation of victims is essential to the Court's work so that the world watching them will recognize that victims are individual persons who may have been brought together in large numbers for reasons of efficiency but who are, nonetheless individual persons each with his or her own dignity that has been grossly violated.

The Rome Statute and the Court thus expresses a collective human conscience. The Rome Statute speaks of this clearly. The premise of its preamble is that human beings, as a race, a collectivity, have a kind of combined conscience that works in the same way, despite huge differences of culture, time, place, civilization and religion. This conscience, spelled out in the premises of the Rome Statute, tells peoples everywhere that certain crimes are especially wicked not only inherently, but in what they do to both the victims and to the perpetrators. The targets again are individual persons like Idi Amin, Pol Pot, Hitler, Osama Bin Laden, Saddam Hussein, Peron and Pinochet.

It's not just the intrinsic horror of these crimes on which the Court focuses; it's the use of atrocities by those like the leaders I named, to get and keep power in two ways: of course, by eliminating opponents, but much more important and especially, by getting followers to participate in criminal and heinous acts so that those followers will be bound to the leader as he or she seeks and attains power, because it's only by what the leader tells them that they can be relieved from their natural feelings of guilt (the leader being the only protection they have against the guilt they experience).

This was a theme raised again and again by governments in their interventions and discussions in the course of the debates. Part of this is that once these followers have committed such acts and are bound to the leader in this way, they see their victims as subhumans, even as things. The great ultimate emotions and psychology that have driven this Court into existence is the revulsion of peoples and governments who have historic memories of these kinds of atrocities at crimes that dehumanize both the victims of these crimes and those duped into committing them. Again, it's this dehumanization that is a major theme in what governments and countries have said about why they want this Court. The countries that want this Court are the 139 nations that have signed the Rome statute, and the 76, which, so far, have ratified it. We've had a whole lot more ratifications since we got to the magic number of 60 back in April. These myriad nations all share the emotional background and political commitment I've mentioned.

The United States government has great difficulty in understanding the question of a court which tries individuals for their crimes against individuals. There are a great many reasons why the US is opposed to the Court but it is apparent to me, and from my work in Washington, that the fundamental thing here is that the United States can't get away from the idea that this Court is about *states*; that it is directed somehow toward what *states* do, thus causing the US government to see the Court as directed at *it*, as a nation, rather than, as most other countries view the situation, as a court directed at individuals no matter who they are and where they come from.

The US opposes the Court because it says it has special obligations and consequently needs special accommodations and privileges owing to its superpower status. We have greater military deployment, therefore greater exposure to our military forces around the world, and the Court, it is consequently believed, will be a constraint and exercise a chilling effect on policy makers and their decisions. This means that the Court, from the US government's point of view, will be an anti-American organization, biased politically in favour of abusing US officials and soldiers.

The best quick response to our nation's opposition to the ICC has to do with the question of individuals and our current accepted legal practice of extraditing our citizens to be tried in foreign courts; we regularly recognize that Americans can be tried in courts other than those of the United States, since we have extradition treaties under which we extradite citizens to be tried in such foreign venues. Furthermore, the ICC is not a court of the United States, it does not need to be established through our constitutional processes for domestic courts; it is a foreign court in which we would participate, along with more than 100 other governments in establishing. A major psychological breakthrough here needs to be created which we have not yet achieved. And this is important to understand; certainly there is ill-will, this ideological rigidity and blindness in positions taken by the US government, but there is also a genuine psychological obstacle which we saw in the Clinton Administration, as well as in this one, which we have to break through; my last few words are going to be about how we do that.

You have been told that I convene the American NGO Coalition for the International Criminal Court and also co-chair a working group in Washington committed to advocacy and education, one in Washington and one across the country. We have, therefore, a left hand and a right hand; it became obvious from our work in Washington that we had to go to the people. So we formed the nationwide coalition which we call AMICC. I am delighted that through the relationship between the National Service Conference and the American Ethical Union, American Humanists have committed themselves to the Court, and through the National Service Conference, to our participants in AMICC work.

In this issue our government does not represent us. We know from polls that Americans, by figures like 66%, support the Court, believe it should come into existence early, that the United States should participate in it from the beginning and should ratify its statute. However, as practical people, with a lot of experience in politics, we all know that the trouble with these polls is that they show a support which is a mile wide and an inch deep. This constitutes *passive* support, it's feel-good support, not the kind of support that leads people to *act* when they actually get in the voting booth and are thinking about whom to choose for Senator or Governor. This issue, because of its drama, its concreteness, the universal loathing of these crimes which is felt right across our political spectrum, offers us a unique opportunity to reach out and take this passive support and turn it into active, positive, consistent pressure on Congress and on the Administration. And it is to this that AMICC, with your support and help, is now committed.

This cause offers us the great and exhilarating choice to work together with groups and organizations we know well, but also with others that we have never known or been in solidarity with before. This issue appeals to conservatives, it appeals to people who are fundamentally religious, it appeals to people in ethnic groups, it appeals to lawyers, it appeals to people who are engaged in conflict resolution and psychological rehabilitation. We bring together a vast panoply of civil society, organizations with different commitments and interests but all with a common conviction that this offers them a unique empowerment of their shared issue and a unique way to implement it. Before the great crimes that this Court will try, it will help us know the voices of a common, deeply felt humanity. We will see that, and we will join in this feeling of humanness with our brothers and sisters across the country and across the world. I appreciate your joining in it, I look forward to working with you more intensely on this whole project, a cause that is already bound to success, a success of which we can be a joyful part. It shall be so. Thank you for your attention.