The International Criminal Court: A Budget of Paradoxes*

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The International Criminal Court, to be established under the Rome Statute of 1998, is a major step in the process by which the world is moving from a state-centered international system to a genuine global community. Nonetheless, in part because it is the product of a transitional era in international relations, the Statute embodies certain contradictions or paradoxes. This Essay aims to set out some of these paradoxes. First, the primary function of the ICC will be its symbolic affirmation of the ties that hold the international community together; yet this function presupposes the existence of an international community that is not completely in being. Second, the Rome Statute, in a number of ways, undercuts by its very terms the idea that the ICC will be an organ of universal law: states are only tenuously obligated to cooperate with the Court, the principle of "complementarity" presupposes the primacy of national jurisdictions, the Court's jurisdiction is not clearly universal, and the law to be applied by the ICC is not necessarily general international law. Finally, although the Statute embraces the principle of legality, it can do so only in a qualified manner because that principle, as it nowadays is understood in domestic systems, presupposes legal and political institutions that do not exist on the international level: the Statute represents, in effect, criminal legislation without a legislature, international governance without a government. None of this constitutes a reason for giving up on efforts to enforce international criminal law through the ICC; but it does suggest that there will be certain abiding paradoxes in efforts to do so.

I. INTRODUCTION

On July 17, 1998, a six-week United Nations Diplomatic Conference held in Rome concluded with the adoption of a treaty which, when it comes into effect, will establish a permanent

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* I have borrowed the subtitle of this Essay from AUGUSTUS DE MORGAN, A BUDGET OF PARADOXES (David Eugene Smith, 2d ed. 1915) (1872).

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international criminal court.[1] Some 120 countries voted in favor of the so-called Rome Statute.[2] The United States was one of seven countries voting no,[3] and is not likely to become a party to the Statute in the foreseeable future.[4] The Statute will come into effect when ratified by sixty states.[5] That is likely to happen in the foreseeable future. To date, the Statute has been signed by ninety-six states.[6] It has been ratified so far only by eight,[7] but a concerted push for ratification, particularly in Europe and in Africa, is likely to succeed in bringing the Statute into force within a decade.

The International Criminal Court (hereinafter the Court) will have jurisdiction to try accusations of genocide, crimes against humanity, and war crimes.[8] In principle, it also will have jurisdiction

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1. Rome Statute of the International Criminal Court, U.N. GAOR, 53d Sess., U.N. Doc. A/CONF. 183/9 (1998), *reprinted in* 39 I.L.M. 999 (1998) [hereinafter Rome Statute].

2. *See* U.N. Press Release L/ROM/22, July 17, 1998 <www.un.org/icc>.

3. There also were 21 abstentions. *Id*. The vote was taken electronically, but not recorded, so there is no official record of how particular states voted. Different sources give different accounts of which countries voted no. All lists include the United States, China, and Israel, which publicly announced that they had voted no and explained why. The other four did not. Speculation as to who the other four might be is said to include Iraq, Iran, Libya, Yemen, Qatar, Indonesia, Russia, India, and Saudi Arabia. *See* Christopher C. Joyner & Christopher C. Posteraro, *The United States and the International Criminal Court: Rethinking the Struggle Between National Interests and International Justice*, 10 CRIM. L.F. 359, 360 n.5 (1999).

4. *See Hearings on the Creation of an International Criminal Court Before the Subcommittee on International Operations of the Committee on Foreign Relations*, 105th Congress (1998).

5. More precisely, the Statute will "enter into force on the first day of the month after the 60th day following the date of the deposit of the sixtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations." Rome Statute, *supra* note 1, art. 126(1). "For each State ratifying, accepting, approving or acceding to the Statute after the deposit of the sixtieth instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the sixtieth day following the deposit by such State of its instrument of ratification, acceptance, approval or accession." *Id.* art. 126(2).

6. This figure is as of April 5, 2000. *See Rome Statute Signature and Ratification Chart* (last modified Apr. 5, 2000) <http://www.igc.org/icc/rome/html/ratify.html>.

7. Senegal, Trinidad and Tobago, San Marino, Italy, Fiji, Ghana, Norway, and Belize. *See id.*

8. "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; and (c) War crimes . . . ." Rome Statute, *supra* note 1, art. 5. Genocide is defined in article 6, in terms that track the Genocide Convention of 1948. A "crime against humanity" is defined in article 7 as one of certain enumerated inhumane acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack[.]" Under article 8(1), the Court will have jurisdiction "in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." War crimes are defined in article 8(2) to include a long list of "[g]rave breaches" of the Geneva Conventions of 1949, of "[o]ther serious violations of the laws and customs applicable in international armed conflict," of "serious violations of article 3 common to the four

to try charges of aggression,[9] but it will not be able to do so until the crime of aggression has been defined in an amendment to the Statute.[10] The Court will have eighteen judges.[11] Five judges, including the President, will serve as an Appeals Division.[12] Trials will be conducted before three-judge panels.[13] The Court is also to have a Prosecutor's Office which is to "act independently as a separate organ of the Court."[14] Cases may be referred to the Court by the United Nations Security Council acting under Chapter VII of the U.N. Charter.[15] Cases may also be initiated by a state which is party

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Geneva Conventions" of 1949, and of "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character."

9. *See id.* art. 5(1)(d).

10. "Aggression" is not defined in the Statute. The Rome Conference was unable to agree on a definition. The Statute, therefore, provides: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime." Rome Statute, *supra* note 1, art. 5(2). Article 121(1) sets out procedures for amending the Statute; it begins by providing that amendments may be proposed only "[a]fter the expiry of seven years from the entry into force of this Statute . . . ." Article 123(1) provides for a "Review Conference" to consider amendments to the Statute, to be convened "[s]even years after the entry into force of this Statute . . . ." Taken together, these provisions would seem to indicate that the amendment defining aggression may not be adopted for at least seven years after the Statute comes into effect. *See, e.g.*, David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529, 534 (1999) ("The final text of the Treaty includes the crime of aggression, albeit undefined until a Review Conference seven years after entry into force of the Treaty will determine the meaning of aggression."). But it has been argued that adoption of an amendment defining aggression pursuant to article 5(2) is not subject to the seven-year period provided for in articles 121 and 123; the cross-reference in article 5(2) to articles 121 and 123 is said to be "limited to the *ways of adoption* mentioned therein but not to the time limit contained in these articles." Otto Triffterer, *Preliminary Remarks: The Permanent International Criminal Court—Ideal and Reality*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 17, 40 (Otto Triffterer ed., 1999) [hereinafter COMMENTARY ON THE ROME STATUTE]; *see also* Joyner & Posteraro, *supra* note 3, at 365 ("no amendments may occur for a period of seven years after entry into force, save for the definition of aggression").

11. Rome Statute, *supra* note 1, art. 36(1). Article 36(2) provides for increasing the number of judges by a two-thirds vote of members of the Assembly of States Parties. Since there is no cross-reference in article 36(2) to the provisions for amending the Statute in articles 121 and 123, an increase in the number of judges, if it became necessary during the Court's first seven years, would not seem to be subject to the time limit on amendments contained in those articles.

12. *See id.* art. 39(1). The Statute calls for assigning the eighteen judges to an Appeals Division, a Trial Division, and a Pre-Trial Division. *See id.* art. 34(b). "Judges assigned to the Appeals Division shall serve in that division for their entire term of office," *id.* art. 39(3)(b); while judges assigned to the trial and pretrial divisions will serve for a three-year period. *Id.* art. 39(3)(a). The Trial Division shall be composed "of not less than six judges and the Pre-Trial Division of not less than six judges." Rome Statute, *supra* note 1, art. 39(1). "The Appeals Chamber shall be composed of all the judges of the Appeals Division[.]" *Id.* art. 39(2)(b)(i).

13. "The functions of the Trial Chamber shall be carried out by three judges of the Trial Division." *Id.* art. 39(2)(b)(ii).

14. *Id.* art. 42(1).

15. *See id.* art. 13(b).

to the Statute, or on the Prosecutor's own motion.[16] But, except in cases referred by the Security Council, the Court's jurisdiction may not be exercised unless the state of the nationality of the accused or the state on whose territory the conduct in question took place has accepted the Court's jurisdiction by becoming a party to the Statute, or otherwise by filing a declaration of consent.[17] This permits prosecution of nationals of a country, which is not a party to the Statute, if the country on whose territory they committed their crimes consents to the Court's jurisdiction. The United States has been particularly vociferous in objecting to this feature of the Statute.[18]

The Rome Statute constitutes a major step in the process by which international law is coming to focus more and more on the rights and welfare of individual human beings rather than of states. Until the middle of the twentieth century, international relations and international law both were based on the exclusive primacy of the nation-state. This old system of international relations—the so-called "Westphalia system"—is passing away. A new system of international order, a more inclusive global community in which individual human beings are the ultimate participants, is coming to be, although it is not yet entirely in being.[19] This process of transition has been going on at least since the end of the Second World War. It is displacing states as the sole subjects of international law and placing

16. *See* Rome Statute, *supra* note 1, arts. 13(a), 13(c), 14 & 15.

17. *See id.* art. 12(2)-(3).

18. *See, e.g.*, David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18-20 (1999).

19. A more elaborate, but perhaps more accurate, way of putting the same point would be as follows: It is possible, at any given time, to describe the nature of international relations in terms of three competing, one-sided views or paradigms: (1) the "realist" view, which sees nation-states as existing in a Hobbesian state of nature, a field of perennial conflict and power politics, guided by nothing more than national interest, and not subject to law; (2) the "classical" view, which agrees that states are the chief actors in international relations, but which sees them as members of a loosely organized "society of states" and therefore subject to rules of international law which impose certain minimum prescriptions regarding toleration and accommodation that make it possible for states, although pursuing their own interests and purposes, to continue to exist as a society; and (3) the "cosmopolitan" view, which sees states as an intermediate level of political organization in a wider and genuine "community of mankind" which imposes certain universal objects and moral imperatives that limit the action of states and impel them to cooperate for the common good of a community of which everyone in the world ultimately is a member. Each of these three views corresponds to persistent elements in international relations and has some measure of validity. The second view was for a long while predominant and shaped the development of modern international law. In our time, international law is again being reshaped, to bring it more nearly into line with the third view. For a more detailed discussion of these paradigms, and further references, see M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 28-36 (1995).

the concern with individual human rights at (in Hersch Lauterpacht's words) "the very centre of the constitution of the world."[20]

The long-term process of transition to a more inclusive global community is reflected in myriad developments in contemporary international law. That we are living through such a transitional epoch is commonplace in practically every discussion of the direction that contemporary international law is taking.[21] The Rome Statute represents an especially significant moment in this process, for reasons I will come to shortly.[22] Nonetheless, because it is the product of an era of transition between two patterns of world order, one superseding the other, but so far only in part, so that at least for the time being the two systems coexist, the Statute embodies certain internal contradictions or paradoxes. In this respect, the Statute has been said to incorporate an "uneasy revolution": while it is designed to have "revolutionary" effects, it is not altogether "easy" about the revolution it is trying to bring about.[23] Although it is the product of a movement aimed at diminishing state sovereignty, the Statute also reaffirms state sovereignty in ways that are positively regressive in light of its overall aims.[24] Although the Statute as a whole presupposes that the law to be applied by the international criminal court will be "universal law," it also denies, quite explicitly in some instances, that this is actually the case.[25]

The Statute embodies certain other paradoxes as well. Although some are common to all systems of criminal law, they appear in high relief when criminal law is projected from the domestic context in which it usually applies onto the international stage, where the social context is different from what it is within nation-states.[26] Others inhere in the effort to achieve criminal justice apart from the political

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20. HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 463 (1950).

21. Again, this is nothing new. It is a central motif, for instance, in ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD (1986); P.E. CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES (1951); WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964); PHILIP C. JESSUP, A MODERN LAW OF NATIONS (1948). Richard Falk spoke nearly thirty years ago of "a situation of transition from one world order system to another, from a statist logic which is *no longer adequate* to a normative logic associated with the United Nations Charter and the Nuremberg Principles that *does not yet pertain*." Richard A. Falk, *Nuremberg: Past, Present and Future*, 80 YALE L.J. 1501, 1511 (1971).

22. *See infra* Part II.

23. *See* Leila Sadat Wexler & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. (forthcoming 2000).

24. *See infra* Parts III.1, III.2.

25. *See infra* Parts III.3, III.4.

26. *See infra* Part II.

institutions that are taken for granted within national systems of criminal law.[27]

This Essay will try to provide a tentative inventory of at least some of the inconsistencies—the paradoxical features—to be found in the Rome Statute. Most of them are also paradoxical in an older sense of the term: beyond or contrary to prevalent opinion.[28] They involve features of the Rome Statute that run counter to common or general opinion about what the Statute can be expected to accomplish, and about the place of the international criminal court in the international legal order as a whole. Exposing these paradoxes may help to dispel some misconceptions, as well as throw light on certain problems inherent in the Statute.

II. CRIMINAL LAW AND COMMUNAL COHESION

The first paradox to which I want to call attention is one that is common, to some extent, to all systems of criminal justice. It figures in an observation about the nature of crime and punishment made by the French sociologist, Emile Durkheim. His observation applies with particular force to the Rome Statute. The role of punishment, says Durkheim,

> is not what it is ordinarily perceived to be. It does not serve, or serves only incidentally, to reform the offender or to scare off potential imitators. Its effectiveness in these respects is questionable—at any rate, mediocre. Its real function is to maintain intact the cohesion of society by sustaining in all its vigor communal consciousness.[29]

Punishment reaffirms and reinforces collective beliefs about what constitutes right and wrong. It is most important for the effect it has not on criminals, but on honest, law-abiding people. It not only keeps them law-abiding; it helps hold the community together. If crime did not exist, a community would have to invent it in order to retain its sense of being a community.

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27. *See infra* Part IV.

28. The English word "paradox" derives from the Greek *paradoxos*, which means contrary to received opinion or expectation. Although it is now used to refer to an apparently self-contradictory statement, it originally referred, following the Greek meaning, to a statement that runs contrary to received opinion. It rarely has been used in this sense in English since the seventeenth century, although this is sometimes insisted upon as the only proper sense of the word. *See* 11 OXFORD ENGLISH DICTIONARY 185 (2d ed. 1989).

29. EMILE DURKHEIM, DE LA DIVISION DU TRAVAIL SOCIAL 76-77 (7th ed. 1960) (1893) (author's translation). For other translations of this passage, see EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 108 (George Simpson trans., 1933) (1893); DURKHEIM AND THE LAW 68-69 (Steven Lukes & Andrew Scull eds., 1983).

Durkheim's ironic insight about punitive reactions to crime being an "integrative element" in society is embedded in a theory of law as a straightforward mirror of communal consciousness that is open to a number of objections.[30] I do not mean to adopt all of its implications.[31] But this particular insight about the function of criminal law in affirming and strengthening feelings of social solidarity and community seems peculiarly apt—indeed stunningly apt—when we consider the likely effects of the Rome Statute.

Most arguments for the International Criminal Court suggest that the main idea behind it is to create a meaningful deterrent, to make the prospect of punishment for atrocities sufficiently certain so as to discourage their commission. It is not clear the Court will work that way. It is not clear that deterrence works that way, even with ordinary criminal law. Deterrence is not simply a matter of intimidating potential offenders who consciously calculate the prospective costs and benefits of criminal activity. There is reason to believe it operates more subtly and indirectly, in part by helping to form and reinforce popular perceptions and social norms about what constitutes right and wrong, and in part, as Durkheim suggests, by serving as a symbolic affirmation of the ties that hold a community together and by fostering a sense that one is a law-abiding citizen.[32]

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30. *See, e.g.*, DAVID GARLAND, PUNISHMENT & MODERN SOCIETY: A STUDY IN SOCIAL THEORY 23-81 (1990); H.L.A. HART, *Social Solidarity and the Enforcement of Morality*, *in* ESSAYS IN JURISPRUDENCE & PHILOSOPHY 248, 248-62 (1983); Lukes & Scull, *Introduction*, *in* DURKHEIM AND THE LAW, *supra* note 29, at 22-27.

31. Durkheim's theory recognizes that punishment may have important "symbolic" (as opposed to instrumental) functions, but his supposition that law mirrors social consensus downplays the possibilities of conflict and dissensus within a given society. It may be more accurate to represent punishment as an effort to establish and reinforce certain structures of power and authority; how far doing so will further serve to foster social unity and solidarity depends on a host of contingent factors. *See* GARLAND, *supra* note 30, at 78-80. Thus, even domestically, we have something like the paradoxical situation that has characterized international efforts to promote human rights: "The underlying problem can be stated in a paradoxical way—the function of international legal mechanisms is to establish the rule of law, but legal mechanisms only work satisfactorily when the conditions embodied in the notion of the rule of law already exist." A.W.B. Simpson, *Rights talk, rights Acts*, TIMES LITERARY SUPP., Aug. 27, 1999, at 9.

32. There is an older body of literature suggesting that, so far as deterrent value goes, punishment is effective indirectly, mainly as a "moral teacher." *See* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 78 (1974). It helps to sharpen, internalize, and confirm perceptions of right and wrong. *See, e.g.*, JOHANES ANDENAES, PUNISHMENT AND DETERRENCE (1974); FRANKLIN ZIMRING & GORDON HAWKINS, DETERRENCE 74-89 (1973). See also references cited in Edward M. Wise, *The Concept of Desert*, 33 WAYNE L. REV. 1343, 1348 n.18 (1987). Its role as a "moral teacher" also figures in theories that emphasize the "expressive function of punishment." *See, e.g.*, JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING AND DESERVING 95, 95-118 (1970); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363-97 (1981). It likewise figures in more recent writing about the role of law, particularly criminal law, in shaping

If this is right, the primary significance of the International Criminal Court will be its symbolic significance. That will not make it any less important: symbols can have real effects. The punishment of criminals is a particularly vivid symbol of the existence of a real community. Criminal law is supposed to be concerned, after all, in Blackstone's words, with harms to "the whole community, considered as a community, in its social aggregate capacity."[33] To make a show of closing ranks against criminals, to engage in the rituals of reprobation that the criminal trial and punishment represent, is perhaps the most striking possible way to say that we are indeed a cohesive community. The International Criminal Court will be saying that. Thus, although the Rome Statute is only one of a countless number of developments in the contemporary movement towards a more inclusive global community, it is a particularly significant development because of the constitutive symbolic function of criminal law as a community-creating, community-maintaining device.

One incidental problem is that the International Criminal Court may speak for a community that does not include a large part of the world. The sixty states whose ratifications will bring the Rome Statute into force will constitute slightly less than a third of the membership of the United Nations, which now stands at 188. If one goes by population figures, even the 120 states that voted in favor of the Statute at the Rome Conference account for less than half the world; those reported to have opposed the Statute represent more than half the world's population.[34] That raises a possible question of how a community that excludes half the world can be said to constitute the "international community"—"considered as a community, in its social

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social or community norms. *See, e.g.*, Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997). Insofar as all such theories postulate that the object of punishment is to express condemnation and thereby signal society's commitment to the values that the wrongdoer has denied, they bear a family resemblance to Durkheim's views. And, like Durkheim's views, expressive theories of punishment become problematic whenever social consensus cannot be taken for granted. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

33. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769).

34. The estimated population of the world in the middle of 1999 was 5.996 billion. *See* THE WORLD ALMANAC AND BOOK OF FACTS 2000, at 878 (1999). It passed the six billion mark later that year. *Id.* The mid-1999 population figures (in thousands) for the countries thought to have opposed the Statute, *see supra* note 2, are as follows: China, 1,246,872; India, 1,000,849; Indonesia, 216,108; Iran, 65,180; Iraq, 22,427; Israel, 5,750; Libya, 4,993; Qatar, 724; Russia, 146,394; Saudi Arabia, 21,505; United States, 272,640; and Yemen, 16,942. *Id.* 878-79. Taken together, these figures total 3,020,384,000—appreciably more than half the world's population.

aggregate capacity."[35] Thus, instead of being a World Criminal Court, the International Criminal Court may well turn out to be more aptly described as—that is, it may be open to the reproach of being—a "Half World Criminal Court."[36] According to an old paradox stated by Hesiod around 700 B.C.E., there are circumstances under which half can be "more" (greater or better) than the whole.[37] But, at least in modern politics, rule by an enlightened few is usually thought to be inconsistent with the ideals of democratic governance to which we supposedly adhere.[38]

III. THE STATUTE AS UNIVERSAL LAW

Even apart from the problem just described, the Rome Statute itself, as the product of two intersecting but opposed conceptions of world order, undercuts in significant ways—indeed it sabotages by its very terms—the idea that the International Criminal Court can claim to be an organ of the universal law of an inclusive global community. Consider the following points:

(1) The Statute sets out procedures for getting a case before the Court and for enforcing the Court's orders that seem to be peculiarly solicitous of state sovereignty. This is particularly true with respect to Part 9 of the Statute, headed "International Cooperation and Judicial Assistance."[39] It is said to be

> the least "supranational" section of the Treaty. Although article 86 requires States Parties to "cooperate fully with the Court in its investigation and

35. BLACKSTONE, *supra* note 33. "International community" is a slippery expression precisely because it can evoke different, competing conceptions of world order. Does it refer to the so-called "community of mankind"—in which case population figures might be more relevant—or to a "community" ("society" would seem the more appropriate term) composed entirely of states? If it refers to the latter, the crucial figure might be—it would not necessarily have to be—the number of states that have adhered to the Statute rather than the population figures for those states. The question of who can be said to represent the "international community" is complicated by the fact that decisionmaking by one-half plus one usually is deemed an acceptable procedure in communities composed of actual human beings, but not in societies composed of supposedly "sovereign" states.

36. I am borrowing here from the characterization of the "World's Temperance Convention," held in New York in May 1853, as the "Half World's Temperance Convention;" it was so dubbed by women's rights advocates because it excluded female delegates from speaking. *See* 1 HISTORY OF WOMAN SUFFRAGE 152-63, 506-17 (Elizabeth Cady Stanton et al. eds., 1881). I derived this reference from SANDRA F. VANBURKLEO, BELONGING TO THE WORLD: WOMEN'S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE (forthcoming 2000, Oxford Univ. Press).

37. *See* HESIOD, *Works and Days*, line 40, *in* HESIOD, THE HOMERIC HYMNS AND HOMERICA 5 (Hugh G. Evelyn-White trans., Loeb Classical Library 2d ed. 1936); HESIOD 23 (Richard Lattimore trans., 1959).

38. *See* Alfred P. Rubin, *A Critical View of the Proposed International Criminal Court*, 23 FLETCHER F. WORLD AFF. 2, 145-46 (1999).

39. *See* Rome Statute, *supra* note 1, arts. 86-102.

> prosecution of crimes," the articles that follow are so riddled with exceptions and qualifications, that it becomes impossible to think of this as anything but an exhortation. The prevarications and equivocations of the text underscore the very fragile consensus that brought the States of the world together in Rome to approve the Treaty; indeed, it suggests that while States agree to the establishment of the Court in principle, and even to its jurisdiction in theory, they are not willing to make the kinds of concessions to international cooperation needed to truly make the Court a success in practice.[40]

(2) The so-called principle of "complementarity" presupposes the primacy of national systems of criminal law and of prosecution before national courts.[41] A basic principle of the Statute is that the Court must defer to national authorities except where they are unwilling or unable genuinely to prosecute.[42] A case is otherwise "inadmissible."[43] If the state whose nationals are involved objects to the Prosecutor's undertaking an investigation, a chamber of the Court has to authorize the investigation.[44]

(3) Preconditions to the exercise of the Court's jurisdiction include the consent of the state on whose territory the offense occurred or of the statute of which the accused is a national.[45] The idea of basing jurisdiction on the consent of any state having custody of the putative offender was rejected.[46] As a result, it is hard to say that the Court will exercise "universal jurisdiction"—except perhaps in cases referred to the Court by the Security Council. Exactly how its jurisdiction should be characterized is controversial. Some

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40. Wexler & Carden, *supra* note 23, pt. VI (footnote omitted).

41. Article 1 states, among other things, that the International Criminal Court "shall be complementary to national criminal jurisdictions." Rome Statute, *supra* note 1, art. 1; *see also* Preamble, para. 10 ("emphasizes" the point). This contrasts with the provision of the Statute for the ICTY, art. 9(2), which provides that "[t]he International Tribunal shall have primacy over national courts. . . ." Similarly, article 8(2) of the ICTR provides: "The International Tribunal for Rwanda shall have primacy over the national courts of all States. . . ."

42. As the chair of the committee on the whole at the Rome Conference has said:

> Complementarity is a key principle of the ICC [International Criminal Court] Statute. The ICC may exercise jurisdiction where national systems are unable or unwilling to genuinely investigate or prosecute offenders. The ICC, not States, has the last say as to whether a case is admissible. However, it is the essence of the principle that if a national judicial system functions properly, there is no reason for the ICC to assume jurisdiction.

Philippe Kirsch, *Keynote Address*, 32 CORNELL INT'L L.J. 437, 438 (1999).

43. Rome Statute, *supra* note 1, art. 17.

44. *See id.* art. 18(2).

45. Cases referred by the Security Council are an exception. *See id.* art. 12(2)-(3).

46. *See Introduction/General Remarks* on Art. 12, by Sharon A. Williams, in COMMENTARIES ON THE ROME STATUTE, *supra* note 10, at 329-38.

commentators insist it is "universal";[47] others say it cannot fairly be described as "universal" at all.[48] In any event, there is an ellipsis in the Court's jurisdiction that will prevent charges from being brought against the most obvious suspects—the leaders of countries that have not ratified the treaty who continue to massacre their own people in circumstances that do not attract the attention of the Security Council. Likewise, because the Statute does not apply to offenses committed before it comes into force, there is the inevitable irony, or paradox, that the miscreants whose misdeeds have inspired its creation will not be triable before the Court.

(4) Common opinion has it that the Court will apply general international law. That is what the Court exists to do: to apply universal norms prohibiting genocide, crimes against humanity, and war crimes in cases in which they might not otherwise be enforced. Part 2 of the Statute includes what might be regarded as a restatement of those norms (although in instances where existing norms are unclear or fluid, the definitions in Part 2 go beyond restatement and constitute, as it were, codification or progressive development of the law). As a practical matter, both the provisions of the Statute and interpretations of those provisions by the Court undoubtedly will have an important "radiation effect"[49] on general international criminal law as it develops apart from the Statute.[50] Nevertheless, by its own terms, the Statute does not purport to be a statement of universal law. It defines crimes "for the purpose of this Statute" only.[51] Further, article 10 states that nothing in the definition of crimes in the Statute "shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."[52] In other words, on its face, the Statute speaks as if there

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47. *See, e.g.*, Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Reply to Ambassador Scheffer*, LAW & CONTEMP. PROBS. (forthcoming Spring 2000).

48. *See, e.g.*, Gerhard Hafner et al., *A Response to the American View as Presented by Ruth Wedgwood*, 10 EUR. J. INT'L L. 108 (1999); Ruth B. Philips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 CRIM. L.F. 61, 71 (1999).

49. I have borrowed the term "radiation effect" from Rudolf B. Schlesinger, who used it to refer to the principle in German law by which constitutional values play a role and thereby have an important, albeit indirect, effect (*Drittwirkung*) in cases involving the interpretation of private rights under the Civil Code. *See* RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 809-10 nn.12, 13 (6th ed. 1998).

50. The likelihood that this will be the case is explored in a section on the Rome Statute and General International Criminal Law in Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 MICH. J. INT'L L. (forthcoming 2000).

51. *See* Rome Statute, *supra* note 1, arts. 6, 7(1), 8(2).

52. *Id.* art. 10.

were two distinct regimes of international criminal law: one under the Statute, one outside it.

IV. LEGALITY AND ITS IMPLICATIONS

The assumption of two distinct regimes crops up as well in connection with the Statute's treatment of the principle of legality—the principle that requires crimes to be specifically proscribed by law in advance of the conduct sought to be punished.

The Rome Statute grew out of a draft prepared by the International Law Commission in 1994.[53] The International Law Commission proposed to leave undefined the offenses over which the Court would have jurisdiction. Instead, it contemplated that the Court would apply, in effect, customary international law.[54] This approach did not prevail in subsequent drafts of what became the Rome Statute.[55] It was accepted that the Statute itself should define the offenses over which the Court would have jurisdiction, and, more than that, it should set out not only offense definitions but also the general rules of criminal liability and exoneration to be applied by the Court. Part 2 of the Statute, among other things, defines—not merely lists—the crimes that come within the jurisdiction of the Court.[56] Part 3 sets out at some length the "general principles of criminal law" to be applied by the Court.[57] Thus, the Statute embodies the view that the rules defining offenses and the rules pertaining to the conditions under which criminal liability can properly be imposed should be laid down more or less definitely in advance in a written text.

This would appear to be a very significant development. In Europe, as in England, down through the eighteenth century, criminal as well as civil law largely took the form of common or customary law.[58] The situation is described in scathing terms in the opening lines of the preface to Beccaria's essay *On Crimes and Punishments*, first published in 1764:

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53. *Draft Statute for an International Criminal Court*, Report of the International Law Commission on its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994).

54. More precisely, the Commission contemplated that the Court would have jurisdiction over both crimes defined in certain listed treaties as well as crimes under general international law. *See* James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT'L L. 140, 143-47 (1994).

55. For a collection of these drafts, see THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (M. Cherif Bassiouni ed., 1998).

56. *See* Rome Statute, *supra* note 1, arts. 5-21.

57. *See id.* arts. 22-33.

58. *See* Marc Ancel, *The Collection of European Penal Codes and the Study of Comparative Law*, 106 U. PA. L. REV. 329, 341-42 (1958).

> A few remnants of the legislation of a former conquering people compiled by a prince who reigned at Constantinople twelve centuries ago, afterwards mixed up with the customs of the Lombards, and buried in a voluminous muddle of obscure commentaries—these comprise the hodgepodge of opinions to which a large part of Europe has given the name of law; and thus, even today, it is as deplorable as it is common that an opinion of Carpzov, an ancient practice noted by Claro, a torture proposed with barbaric complacency by Farinacci, provide the rules so confidently administered by men who ought to tremble when they decide on the lives and fortunes of their fellow citizens.[59]

The eighteenth-century movement for penal reform swept all this away.[60] Article 8 of the French Declaration of Rights of Man and of the Citizen of 1789 declared: "no one may be punished except by virtue of a law (*loi*) drawn up and promulgated before the offense is committed. . . ."[61] The principle of legality was taken to require that crimes be specifically proscribed by a statute (*loi*, *lex*) in advance of the conduct sought to be punished. "The rule, become [sic] a democratic platitude, spread to other Continental countries and to other parts of the world."[62] It was turned into the maxim or apophthegm *nullum crimen, nulla poena sine lege* by Anselm Feuerbach.[63] In this maxim, the word *lege* means written law.[64]

International lawyers, however, have been wont to settle for a diluted version of the principle of legality.[65] Thus, article 11(2) of the Universal Declaration of Human Rights and article 15 of the International Covenant on Civil and Political Rights stipulate that "[n]o one shall be held guilty of any criminal offense on account of

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59. CESARE BECCARIA, DEI DELITTI E DELLE PENE 3 (Franco Venturi ed., 1965). The three writers mentioned by Beccaria—Benedikt Carpzov (1595-1666), Giulio Claro (1525-1575), and Prospero Farinacci (1544-1618)—were indeed the leading continental authorities on criminal law during the sixteenth and seventeenth centuries. *See* MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE 1000-1800, at 222 (Lydia G. Cochrane trans., 1995).

60. *See* Stefan Glaser, *Nullum Crimen Sine Lege*, 24 J. COMP. LEGIS. & INT'L L. 29, 30 (1942).

61. "[N]*ul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit . . . .*" *Déclaration des droits de l'homme et du citoyen, août 1789*, art. 8, *reprinted in* LES DÉCLARATIONS DES DROITS DE L'HOMME (DU DÉBAT 1789-1793 AU PRÉAMBULE DE 1946), at 9, 14 (Lucien Jaume ed., 1989).

62. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 576 (2d ed. 1961).

63. *See* Glaser, *supra* note 60, at 31. Jerome Hall attributes to Feuerbach the cognate maxims, *nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali*. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 34 (2d. ed. 1960).

64. *See* Glaser, *supra* note 60, at 30.

65. Modern human rights instruments have allowed for common law crimes. To stipulate otherwise would be to condemn the persistence of common law crimes in English-speaking jurisdictions, and also international war crimes trials from Nuremberg on, as violations of human rights.

any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed."[66] Nothing is said to indicate that the law must be a written law. In fact, article 15 of the Covenant adds the qualification: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[67] Accordingly, the International Law Commission in 1994 was able to contemplate the possibility of prosecution for crimes supposedly prohibited by customary international law.

By contrast, the approach taken in the Rome Statute rejects continuing reliance on customary international law as a source of criminal prohibitions. Three of the articles in Part 3—articles 22, 23, and 24—purport to restate various aspects of the principle of legality as it is understood in national law. These aspects include the twin principles of *nullum crimen sine lege* and *nulla poena sine lege*,[68] a requirement of strict construction,[69] a ban on extending the law by analogy,[70] the notion of *favor rei*,[71] and a rule against the retroactive application of criminal law.[72]

Yet, if one looks at what the Statute actually says in article 22—entitled *Nullum crimen sine lege*—it is that no one shall be "criminally responsible *under this Statute* unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."[73] The same article goes on to stipulate that

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66. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 15, 999 U.N.T.S. 171, 177 [hereinafter Covenant]. The language of article 11(2) of the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 194, U.N. Doc. A/810 (1948) [hereinafter Declaration], is practically identical; the only difference is that the Declaration uses the term "penal offense" where the Covenant speaks of a "criminal offense."

67. Covenant, *supra* note 66, at 177.

68. *See* Rome Statute, *supra* note 1, arts. 22-23. Article 22 of the Statute indeed is titled *Nullum crimen sine lege*, while article 23 is titled *Nulla poena sine lege*. Alfred Rubin refers to these two maxims as "Grotius' well-known aphorisms" and complains that they are (cited in articles 22 and 23 "as if beyond dispute and without attribution."); Rubin, *supra* note 38, at 148. But attribution to Grotius would have been incorrect. *See supra* note 63.

69. "The definition of a crime shall be strictly construed[.]" Rome Statute, *supra* note 1, art. 22(2).

70. "The definition of a crime . . . shall not be extended by analogy." *Id.*

71. "In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted." *Id.*

72. "1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of this Statute . . . . ; 2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply." *Id.* art. 24.

73. *Id.* art. 22(1) (emphasis added).

"[t]his article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."[74] In other words, the principle that no one should be punished except pursuant to a preexisting law is equated with the narrower proposition that no one should be punished by the Court except for conduct defined in advance as a crime within the jurisdiction of the Court. The possibility of punishment for conduct not defined as a crime within the jurisdiction of the Court is not precluded, so long as someone else imposes it. It could hardly be otherwise, perhaps, in a statute that falls short of being a comprehensive codification of international criminal law. Whatever the reason, article 22 does not, by its own terms, unqualifiedly embrace the legality principle.

There are certain other respects in which it may be questioned whether the Statute really adheres, despite the headings of articles 22 and 23, to the principles of *nullum crimen* and *nulla poena sine lege:*

(1) Questions have been raised about whether the Statute defines, with the definiteness and precision that would be expected in domestic criminal law, the offenses falling within the Court's jurisdiction. At the Rome Conference, the United States took the position that the Statute did not define the crimes subject to the Court's jurisdiction with sufficient precision and specificity to satisfy the principle of *nullum crimen sine lege* articulated in article 22 of the Statute.[75] As a result of the insistence of the United States delegation, the final text of the Statute makes provision for adoption by the parties to the Statute of a supplemental set of "Elements of Crimes" designed to "assist the Court in the interpretation and application of articles 6, 7, and 8 [the three articles defining genocide, crimes against humanity, and war crimes]."[76] This might be taken as an endorsement by the Conference of the view that the Statute itself does not define these offenses with sufficient precision to satisfy the legality principle.

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74. *Id.* art. 22(3).

75. *See* William K. Lietzau, *Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 CORNELL INT'L L.J. 477, 480-84 (1999).

76. Rome Statute, *supra* note 1, art. 9(1). While article 9(1) speaks of the "Elements of Crimes" as designed to "assist the Court" in its interpretation of the Statute, article 21, dealing with "applicable law," *directs* the Court to apply "[i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence . . . ." *Id.* art. 21(1)(a). The latter provision suggests that the Court could not properly refuse the assistance offered by the "Elements of Crimes." But this is controversial; it has been suggested that the "Elements" should rather be regarded as having "an indicative and not . . . a normative nature." Didier Pfirter, *The Position of Switzerland with Respect to the ICC Statute and in Particular the Elements of Crimes*, 32 CORNELL INT'L L.J. 499, 503 (1999).

(2) The Statute seems less than scrupulous in carrying through on the idea of *nulla poena sine lege*, which is normally taken to require that criminal legislation specify the penalties to be imposed for the various offenses it proscribes. Although article 23 of the Statute is titled *Nulla poena sine lege*, all it provides is that "[a] person convicted by the Court may be punished only in accordance with this Statute."[77] Nowhere in the Statute does one find particular penalties stipulated for particular offenses, which is what the maxim *nulla poena sine lege* is usually interpreted to require. Article 77, Part 7, provides that crimes under the Statute are punishable by imprisonment for up to thirty years; by life imprisonment when "the extreme gravity of the crime and the individual circumstances of the convicted person" warrants it; by fines to be imposed under criteria to be provided for in the Rules of Procedure and Evidence; and by forfeiture of proceeds, property and assets derived from those crimes.[78] It is otherwise left entirely to the Court to determine what type and quantum of punishment would be appropriate in a given case. Article 78 directs the Court to take into account "such factors as the gravity of the crime and the individual circumstances of the convicted person."[79] But there is no effort in the Statute to grade particular offenses in relation to other offenses.[80] This complies, only in the loosest way, with the principle *nulla poena sine lege*. The whole idea behind the *nulla poena* principle is that the precise penalty to be imposed for an offense should be more or less definitely set out in the law. The principle is usually taken to require legislative grading of offenses. It might be argued that the crimes made punishable under the Rome Statute are all by their nature so serious—indeed so monstrous—that they should all be subject, at least potentially, to the most rigorous penalties the law allows. Thus, whether the circumstances of a particular case actually warrant imposition of that maximum, or something less, has to be left to the

77. Rome Statute, *supra* note 1, art. 23.
78. *See id.* art. 77.
79. *Id.* art. 78(1).
80. *See* Rolf Einar Fife, *Penalties, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE-ISSUES, NEGOTIATIONS, RESULTS 319, 327 (Roy S. Lee ed., 1999). Fife reports that, in the Preparatory Committee, although some delegations would have preferred to have the Statute set "precise maximum penalties for specific crimes or categories of crimes . . . there was widespread recognition of the practical difficulties in attempting to agree on a differentiated set of rules for various crimes, in particular with regard to war crimes which may cover a very broad spectrum in terms of comparative gravity. Giving flexibility to the judges on this account was not found to be inconsistent with requirements of the principle of legality. This approach, which proved decisive for the structure of the provisions on applicable penalties, was confirmed at the Diplomatic Conference[.]"

judges to determine on the basis of the facts of the particular case. Nonetheless, the practice of giving judges full discretion to impose any penalty the law allows for all offenses within their jurisdiction is precisely the sort of situation that the *nulla poena* principle seems to be meant to preclude.

(3) Another corollary of the principle of legality is the ban on *ex post facto* legislation—the rule that a criminal statute cannot be applied to acts that took place before it was enacted. But with respect to the Rome Statute, or any other multilateral treaty, what exactly is the equivalent of the date of enactment of a piece of domestic legislation? Article 24, curiously titled *Non-retroactivity ratione personae*, provides that no one "shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute."[81] Similarly, article 11, titled *Jurisdiction ratione temporis*, stipulates that "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."[82] But article 11 recognizes that the Statute will enter into force at different times for each state beyond the first sixty to ratify, and further stipulates that "[i]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless the Statute has made a declaration under article 12, paragraph 3."[83] Article 12, paragraph 3, provides that a State which is not a party to the Statute may nonetheless authorize the Court to exercise jurisdiction with respect to a particular crime committed on its territory or by one of its nationals.[84] These provisions create problems. These problems stem from the fact that the Statute, although meant to function as criminal legislation or quasi-legislation, is not really a legislative enactment taking effect for all persons subject to its proscriptions on the same definite date.

Our usual notions of legality presuppose the existence of a legislature which will enact and promulgate criminal prohibitions in advance of the conduct prohibited. Whatever may be the case with the rest of the law, criminal law is not supposed to be a "brooding omnipresence in the sky" but rather the "articulate voice of some sovereign or quasi-sovereign that can be identified"[85]—someone who has spoken beforehand, and in legislation. To put it another way: the

81. Rome Statute, *supra* note 1, art. 24(1).
82. *Id.* art. 11(1).
83. *Id.* art. 11(2).
84. *See id.* art. 12(3).
85. Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

concept of legality, as usually understood, presupposes the kind of governmental arrangements that exist within nation-states, but which do not exist on the international level. As DeGaulle said to Sartre, "I have no need to tell you that justice of any sort, in principle as in execution, emanates from the State."[86]

The principle of legality is sometimes associated with the idea of fair notice, of giving people proper warning that certain acts are prohibited and subject to certain kinds of punishment. But if we try to unpack the notion of legality, we find underlying it a number of considerations other than fairness—considerations based on the values of liberty, equality, and democracy.[87] These considerations include the demand that it is for legislators and not judges to lay down the law and prescribe penalties; that judges should not take it upon themselves to make conduct criminal but, rather, inflict punishment only under statutory authorization. Behind this demand is the notion that decisions about what is and is not criminal should be made by democratically elected legislators.[88]

We do not have anything like a democratically elected legislature at the international level. The delegates attending the Rome Conference did not comprise a democratically elected legislature. The Assembly of States Parties, which has authority to amend the Statute, will not be democratically elected.[89] What we have in the

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86. Letter from Charles DeGaulle to Jean-Paul Sartre (Apr. 19, 1967), *in* AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL (J. Duffett ed., 1968), *quoted in* ROBERT COVER, *The Folktales of Justice*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 200 (Martha Minow et al. eds., Univ. of Mich. Press 1992).

87. The interaction of these four values has been described as follows:

> The principle of legality is in reality a mixture of four values that jointly justify a wide variety of criminal-law doctrines. The values are those of fairness, liberty, democracy, and equality, which are unpacked as follows. It is *unfair* to surprise citizens with liability to criminal sanctions when they reasonably relied on their actions not being criminal at the time they were done. It impedes *liberty* if citizens cannot know the content of the criminal law well enough to take into account the possibilities of penal liability in planning their actions. The value of *democratic decision-making* requires that elected legislatures decide what is and what is not criminal, and (not electorally responsive) courts would frustrate that value if they were to take it upon themselves to make conduct criminal without statutory authorization. *Equality* dictates that those who are in all morally relevant respects alike should be treated alike, and this requires that neither legislatures nor judges single individuals out for arbitrarily different treatment.

MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 239-40 (1993).

88. Like everything else connected with the principle of legality, this states an ideal that is imperfectly realized even in the best of domestic systems. It also involves repudiation of much of the history of criminal law in common law countries.

89. *See* Rome Statute, *supra* note 1, art. 112.

Rome Statute, then, is what appears to be a body of criminal legislation, but without a legislature; we have intimations of international governance, but without a government.

If world criminal law is to satisfy all the implications thought to be required in a domestic context by the principle of legality, we would probably need world government, with all of the institutions that we associate with a properly constituted, politically legitimate democratic government. The essence of the deep-seated objections to the Rome Statute, which underlie the surface objections thrown up by the United States government, is that the Statute will set up an incipient form of world government incompatible with the full sovereignty of the United States.[90] A bill introduced in the House last year would have Congress find that "[t]he creation of this permanent, supranational Court, with the independent power to judge and punish elected officials of sovereign nations for their official actions, represents a decisive break with fundamental United States ideas of self-government and popular sovereignty" and "would constitute the transfer of the ultimate authority to judge the acts of United States officials away from the people of the United States to an unelected and unaccountable international bureaucracy."[91] Although exaggerated, this is not entirely off base. Such objections are not entirely without validity. It is rather a question of how sanguine one is about the prospect of aspects of state sovereignty being ceded to supranational institutions.

For the present, we are not likely to see real world government, or a democratically elected international legislature, Tennyson's "Parliament of man, the Federation of the world" where "the common sense of most shall hold a fretful realm in awe, and the kindly earth shall slumber, lapt in universal law."[92]

I am not entirely persuaded that we should want to see it. I am not sure how far Tennyson himself meant to hold out the vision of a

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90. *See, e.g.*, John Boulton, *Reject and Oppose the International Criminal Court*, in COUNCIL ON FOREIGN RELATIONS, TOWARD AN INTERNATIONAL CRIMINAL COURT? THREE OPTIONS PRESENTED AS PRESIDENTIAL SPEECHES (1999) <www.foreignrelations.org/public/pubs/CriminalCourtCPI.htm>; Lee A. Casey & David B. Rivkin, Jr., *The International Criminal Court vs. the American People* (The Heritage Foundation Backgrounder No. 1249, Feb. 5, 1999) <http://www.heritage.org/library/ backgrounder/bg1249.html>; Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court* (Cato Policy Analysis No. 311, July 16, 1998) <www.cato.org/pubs.pas.pa-311.html>.

91. Protection of United States Troops From Foreign Prosecution Act of 1999, H. R. 2381, 106th Cong. § 2(B)-(C) (1999).

92. Alfred Tennyson, *Locksley Hall*, *in* THE POETICAL WORKS OF ALFRED LORD TENNYSON 85, 89 (1898).

slumbering earth "lapt in universal law" as a desirable prospect.[93] The language of universality often has been used as a pretext, as a rhetorical cloak, for parochial objectives.[94] Even where this is not the case, even where we can be sure that a genuine communal consensus favors inflicting punishment, the result may not necessarily be one that is entirely to our liking. The emerging global *Gemeinschaft* conceivably may turn out to be a negative utopia. In any event, there is no guarantee that it will conform precisely to our own preferred political arrangements.[95]

That is not a reason for giving up on efforts to enforce some modicum of international criminal law and to ensure that the "greater

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93. Tennyson "was a Liberal in politics" and "shared the watery Liberal faith in progress;" but "his temper was in many ways conservative. He hated pacifism and was always ready to sound the call to arms when Britain was threatened. He was the first of Liberal Imperialists." HERBERT J.C. GRIERSON & J.C. SMITH, A CRITICAL HISTORY OF ENGLISH POETRY 401 (1947). The relatively optimistic mood of "Locksley Hall," published in 1842, when Tennyson was 33, is sometimes contrasted with the more conservative and pessimistic mood of his later poem, "Locksley Hall Sixty Years After," published in 1886, when Tennyson was 77. *See* ELTON EDWARD SMITH, THE TWO VOICES: A TENNYSON STUDY 43-44 (1964). Yet, even in *Locksley Hall*, the line about the "Parliament of man" appears as part of a recollection of how, when the young man-speaker was even younger, before he loved and was rejected, he believed in progress, identified with humanity, and had the vision of a federated and peaceful world. *See id.* at 44. All of this is in the past tense. *See id.* In the present, he resolves ultimately to overcome his despair, go "forward," and glide along with the progressive currents of his age, but in a wiser, sadder, more ambivalent, and less enthusiastic frame of mind than that which characterized his very early youth. *See id.* at 44-45.

94. As I noted on a previous occasion:

> To cite only historical examples, the misappropriation of cosmopolitan ideals to serve the ends of power or ideology appears, for instance, in the appeals to solidarity by which the Holy Alliance sought to guarantee the existing order against revolution, and in the recurrent tendency to refer to opponents as *hostis humani generis* (enemies of all mankind), the expression typically applied to pirates. Tertullian, Apology, XXXVII, 8, at 170 (Loeb Classical Library 1931) indicates that the expression was applied to early Christians as well. William the Silent was assassinated in 1584 pursuant to a decree in which Philip II likewise condemned him as "an enemy of the human race." See *The Proscription of William the Silent, in* THE LOW COUNTRIES IN EARLY MODERN TIMES 71, 79 (Herbert H. Rowen ed. 1972).

BASSIOUNI & WISE, *supra* note 19, at 36 n.90.

95. More than fifty years ago, T.S. Eliot observed:

> [T]he zealots of world-government seem to me sometimes to assume, unconsciously, that their unity of organisation has an absolute value, and that if differences between cultures stand in the way, these must be abolished. If these zealots are of the humanitarian type, they will assume that this process will take place naturally and painlessly: they may, without knowing it, take for granted that the final world-culture will be simply an extension of that to which they belong themselves.

T.S. ELIOT, NOTES TOWARDS THE DEFINITION OF CULTURE 61 (1949). Others, added Eliot, "who are more realistic, if not in the long run any more practical, are much more conscious of irreconcilability between cultures; and appear to hold the view that any culture incompatible with their own should be forcibly uprooted." *Id.*

felons"[96] who commit genocide and other crimes against humanity—crimes that "demand not only condemnation, but *damnation*"[97]—are, if only once in a while, brought to book for their misdeeds. But it does mean that there inevitably will be certain abiding paradoxes, and also potential dangers, lurking in our efforts.

96. I am thinking here, of course, of the old rhyme: "The law locks up the man or woman / who steals the goose from off the common, / but lets the greater felon loose, / who steals the common from the goose." A modern equivalent is the mordant comment that murderers who kill one or two victims are likely to go to prison, those who kill dozens are likely to be sent to an insane asylum, while those who kill thousands are likely to be invited to Geneva for peace negotiations.

97. PETER L. BERGER, A RUMOR OF ANGELS 67 (Anchor Books ed., 1970). Berger, it should be said, uses this expression in a different context.