

HOW THE INTERNATIONAL CRIMINAL COURT'S INABILITY TO DEAL WITH TERRORISM IS LEADING TO CALLS FOR INTERNATIONAL POLICING

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INTRODUCTION

With the destruction of the Berlin Wall, the apparent fall of the Soviet Union, and end of the communist threat to the United States, in the late 1980s the world seemed to be poised for an extended period of peace and prosperity. Unfortunately, it did not come to pass. Tyrants who had long tortured and abused their own citizens—as well as those of surrounding or warring nations—did not go away. Moreover, international terrorism emerged as a new threat to the world.

Most notably, Islamic militancy in the pursuit of religious and political goals increased in this era. Well-known violent acts that targeted civilians included the World Trade Center bombing in 1993, the Sarin gas attack on the Tokyo subway in 1995, and

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the bombing of Oklahoma City's Murrah Federal Building that same year. The most dramatic event, of course, came in 2001 with the attack on the twin towers of the World Trade Center and the Pentagon. Shortly following that, international attention focused on groups like Al-Qaeda and more recently ISIS.¹

International Organizations such as the United Nations have long been preparing to deal with criminal tyrants, such as those who were tried and sentenced at Nuremberg following the Second World War,² an effort that culminated with the establishment of the International Criminal Court (ICC) in 2002.³ Now into its second decade, the ICC has faltered badly.⁴ The problems it has

¹ The Islamic State of Iraq and Syria (ISIS), also known as the Islamic State of Iraq and the Levant (ISIL) and by its Arabic language acronym Daesh, is a jihadist militant group that follows an Islamic fundamentalist doctrine of Sunni Islam. It has proclaimed itself to be a worldwide caliphate and claims religious, political, and military authority over all Muslims worldwide. As of early 2016, the group had control over vast territory in Iraq and Syria. ISIS affiliates also control areas of Libya, Nigeria, and Afghanistan. See *THE PERSECUTION AND GENOCIDE OF CHRISTIANS IN THE MIDDLE EAST: PREVENTION, PROHIBITION, & PROSECUTION* (Ronald J. Rychlak & Jane F. Adolphe eds., 2017). Islamic terrorism did not develop in a vacuum. It was cultivated by leaders of the Soviet Union. See ION MIHAI PACEPA & RONALD J. RYCHLAK, *DISINFORMATION: FORMER SPY CHIEF REVEALS SECRET STRATEGIES FOR UNDERMINING FREEDOM, ATTACKING RELIGION, AND PROMOTING TERRORISM* vii (2013).

² Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 251, 280. Those trials provided a legalistic solution to the problem of how to administer justice to Nazi war criminals. This approach was successful in that circumstance because Nazi Germany was a conquered nation, and most of the principal defendants were already in custody. In fact, this approach was largely foreordained when the Allies, during the war, made the demand for an unconditional surrender. The Nazis did indeed use this demand to encourage Germans to fight until the bitter end, and General (later President) Eisenhower believed that it had prolonged the war. *Eisenhower Regrets Policy of Total Surrender*, N.Y. TIMES (Dec. 21, 1964), <http://www.nytimes.com/1964/12/21/eisenhower-regrets-policy-of-total-surrender.html> [<https://perma.cc/FAR5-REBD>]. The dynamics are very different in a society that is in the midst of (or just emerging from) a civil war.

³ International Criminal Court, *Understanding the International Criminal Court* 1 (May 2011), <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> [<https://perma.cc/R2SB-C67M>] [hereinafter *Understanding the ICC*].

⁴ Even the godfather of international law and a principal architect of the ICC, the late Cherif Bassiouni, started to come to this realization. In 2006, he wrote about the "objective difficulties" that the ICC had to face in its "[i]nitial [s]tage[.]" but he hoped that a then-current trial would "help to ease many doubts about the direction of the Court[.]" M. Cherif Bassiouni, *The ICC—Quo Vadis?*, 4 J. INT'L CRIM. JUST. 421, 421-23 (2006). The trial he cited did not go smoothly; by 2010 his doubts were not eased. In a keynote speech associated with the Phillip C. Jessup International Law Moot Court

are many,⁵ but one of the most significant is the lack of police power. The idea of an international police force sparks many concerns about national sovereignty and related matters, but calls for such a force come from across the political spectrum.⁶

I. INTERNATIONAL CRIMINAL COURT AND TERRORISM

The ICC came into being in April 2002, when the 60th ratification of the Rome Statute of the International Criminal Court (the Rome Statute) was submitted at the preparatory meeting held at the United Nations building in New York City.⁷

Competition, Bassiouni implied that the expense of the ICC and its bureaucratic framework was leading to the Court's irrelevancy. He was "quite doubtful" that the ICC would be able to meet the expectations of the international community. Renee Dopplick, *Bassiouni "Quite Doubtful" International Criminal Court Will Succeed—The Failures, Challenges, and Future of International Criminal Law*, INSIDE JUSTICE (Mar. 31, 2010),

http://www.insidejustice.com/intl/2010/03/31/cherif_bassiouni_international_criminal [https://perma.cc/SM9M-JVBR]. He predicted a shift from supranational criminal courts (like the ICC) to national courts, which he said would be more successful in prosecuting the guilty. *Id.* In 2015, Bassiouni called for a truth and reconciliation commission to deal with the conflict between Israel and Palestine. That, of course, would entail some form of amnesty or immunity, running counter to the theory that underlies the ICC. See John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55 (2003) [hereinafter *An Empire of Law?*].

⁵ *An Empire of Law?*, *supra* note 4.

⁶ While seeking the Republican nomination for the U.S. presidency, Ohio Governor John Kasich spoke about "joint policing & intelligence gathering by the entire civilized world." From a news interview broadcast on Apr. 25, 2016. See Fox News (@FoxNews), TWITTER (Apr. 24, 2016, 5:37 PM), <https://twitter.com/FoxNews/status/724396936938151936> [https://perma.cc/XD3P-254E].

⁷ When former President Bill Clinton signed the Rome Statute on December 31, 2000, he expressed concerns about its "significant flaws" and added: "I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until fundamental concerns are satisfied." *Statement by US President Bill Clinton, Authorizing the US Signing of the Rome Statute of the International Criminal Court*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT (Dec. 31, 2000), <http://www.iccnw.org/documents/USClintonSigning31Dec00.pdf> [https://perma.cc/4KLQ-RZFT].

President George W. Bush later took the unprecedented step of declaring that the United States was "unsigning" the Rome Statute. Brett D. Schaefer, *The Bush Administration's Policy on the International Criminal Court Is Correct*, BACKGROUNDER (Mar. 8, 2005), <http://www.heritage.org/research/reports/2005/03/the-bush-administrations-policy-on-the-international-criminal-court-is-correct> [https://perma.cc/Q32X-4FDG]. The world's

Unlike the International Court of Justice, which was established as the judicial arm of the United Nations to resolve disputes between nations, the ICC has jurisdiction over individuals who have committed the horrific crimes or the most serious international crimes within its jurisdiction.⁸

The Rome Statute was developed at the Diplomatic Conference of Plenipotentiaries for the Establishment of an International Criminal Court in the summer of 1998 in Rome (the Rome Conference).⁹ One hundred and sixty nations took part. The treaty adopted at the Rome Conference—the Rome Statute—defined the crimes falling under jurisdiction of the ICC, the rules of procedure and the mechanisms for nations to cooperate with the ICC. The countries that accepted these rules are known as States Parties to the ICC.¹⁰

The stated objective of the ICC is to bring an end to impunity.¹¹ The specific crimes that fall under its jurisdiction are: crimes against humanity, genocide, war crimes, and crimes of aggression.¹² Each crime is further broken down so that in certain cases the ICC has jurisdiction over matters such as serious injury to mental health and outrages upon personal dignity.¹³ The ICC's

four largest nations, the United States, Russia, China, and India, are not parties to the Rome Statute.

⁸ *Understanding the ICC*, *supra* note 3, at 4.

⁹ *Id.* at 3.

¹⁰ See Rome Statute of the International Criminal Court, July 17, 1998, art. 3, U.N. Doc. A/Conf.183/9, 37 I.L.M. 999, 1003, available at <http://legal.un.org/icc/statute/romefra.htm> [<https://perma.cc/JA3D-JM85>] [hereinafter Rome Statute].

¹¹ Rome Statute, *supra* note 10, pmb1. (“[T]he most serious crimes of concern to the international community as a whole must not go unpunished . . .”).

¹² *Id.* arts. 5-8.

¹³ For instance, the Rome Statute defines “crimes against humanity” so that it may include things such as murder, enslavement, and torture when they are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack[.]” *Id.* art. 7. The term may also include: “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity[.]” *Id.* art. 7(1)(g). A “war crime” is defined as any of several “[g]rave breaches” of the Geneva Conventions of 1949, “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law . . .” and similar offenses when the conflict is not of an international nature. *Id.* art. 8. Article Six of the Rome Statute defines “genocide” as actions taken with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . .” *Id.* art. 6. This can include killing members of the group, causing serious physical or mental harm, or forcibly

jurisdiction is said to be “complementary to national criminal jurisdictions[.]”¹⁴ As such, the Court is designed to take jurisdiction only when a nation is “unwilling or unable” to act.¹⁵ This language appears to protect national sovereignty and to assure that the Court does not intrude upon questions such as culture and religious practices that, according to the UN charter, are “within the domestic jurisdiction” of a nation-state.¹⁶

A. Introduction: The ICC and ISIS

There is little doubt that ISIS has repeatedly committed actions that are criminal under the Rome Statute. It has systematically murdered, exterminated, enslaved, forcibly transported humans, raped, committed other sexually violent acts, persecuted groups based on their religion and ethnicity, and committed “inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”¹⁷ The UN Assistance Mission for Iraq and the Office of the UN High Commissioner for Human Rights released a report on ISIS’s actions against civilians, specifically actions against women and children from July 6, 2014, to September 10,

transferring children of the targeted group to another group. Article 31 of the Rome Statute codifies grounds for excluding criminal responsibility, including: mental disease, intoxication, defensive force (self-defense), and duress or necessity. Article 32 also codifies the defenses of mistake of fact and mistake of law, and Article 33 codifies a limited defense of superior orders. Destruction of historical culture can also be prosecuted in the ICC. See Owen Bowcott, *ICC’s First Cultural Destruction Trial to Open in The Hague*, THE GUARDIAN (Feb. 28, 2016), <https://www.theguardian.com/law/2016/feb/28/iccs-first-cultural-destruction-trial-to-open-in-the-hague> [<https://perma.cc/3RB9-H87K>]. ISIS has certainly committed such crimes. See James Harkin, *The Race to Save Syria’s Archaeological Treasures*, SMITHSONIAN MAG. (Mar. 2016), <https://www.smithsonianmag.com/history/race-save-syrias-archaeological-treasures-180958097> [<https://perma.cc/KP7H-PURF>].

¹⁴ Rome Statute, *supra* note 10, pmb. & art. 1.

¹⁵ *Id.* at arts. 17(1)(a) & (b).

¹⁶ The decision as to whether an affected nation is “unwilling or unable” to prosecute is determined by judges from the ICC, meaning that the nation’s sovereignty may well be compromised. See Ronald J. Rychlak & John M. Czarnetzky, *The International Criminal Court and the Question of Subsidiarity*, 16 THIRD WORLD LEGAL STUD. 115 (2003).

¹⁷ Rome Statute, *supra* note 10, art. 7(1)(k) (defining crimes against humanity). See Nina Shea, *ISIS Genocide of Christian Communities in Iraq and Syria*, in THE PERSECUTION AND GENOCIDE OF CHRISTIANS IN THE MIDDLE EAST, *supra* note 1, at 17-56.

2014. The report described how ISIS forced children as young as 14 years old into service by donating their blood to treat wounded ISIS soldiers, patrolling ISIS controlled towns, and manning ISIS checkpoints.¹⁸ ISIS has also used children as shields in skirmishes with Iraqi and other resistance forces.¹⁹

While ISIS's actions against the minority populations have been heinous, there has long existed a question as to whether they met the strict interpretation of genocide that international tribunals such as the ICC required.²⁰ In 2016, much of the world community (including the U.S. Secretary of State John Kerry and the European Union) labeled these activities genocide,²¹ a step that subjected the members of ISIS to potential legal action. Unfortunately, ISIS remained (and will remain for the foreseeable future) beyond the reach of the ICC.

¹⁸ U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS & U.N. ASSISTANCE MISSION FOR IRAQ (UNAMI) HUMAN RIGHTS OFFICE, REPORT ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT IN IRAQ: 11 SEPTEMBER – 10 DECEMBER 2014 6 (2014), http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_Sep_Dec_2014.pdf [<https://perma.cc/7QAN-XRSG>]. See also Jane F. Adolphe, *Sexual Violence as a Tactic of Terror: The Plight of Christian Women and Girls, in THE PERSECUTION AND GENOCIDE OF CHRISTIANS IN THE MIDDLE EAST*, *supra* note 1, at 141-81.

¹⁹ Ever since ISIS first started operating in Iraq (as al-Qaeda in Iraq) it targeted civilians as well as military personnel. Most ISIS fighters are members of the Sunni Muslim sect, and at first ISIS primarily went after Shi'ite targets. (Shi'ites are a majority in Iraq, but a minority in ISIS-dominated northern Iraq). In 2014, however, ISIS began targeting other ethnic minorities including Christians, Yazidis, Shabak, Shi'ite Turkmen, and those Sunni Muslims who disagreed with ISIS's religious philosophy and actions. See generally *THE PERSECUTION AND GENOCIDE OF CHRISTIANS IN THE MIDDLE EAST*, *supra* note 1.

²⁰ See generally BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 451 (2d ed. 2010).

²¹ See Robert A. Destro, *Genocide, Statecraft, and Domestic Geopolitics, in THE PERSECUTION AND GENOCIDE OF CHRISTIANS IN THE MIDDLE EAST*, *supra* note 1, at 59-90; Tom Gjelten, *State Department Declares ISIS Attacks On Christians Constitute Genocide*, NPR (Mar. 17, 2016), <http://www.npr.org/2016/03/17/470861310/state-department-declares-isis-attacks-on-christians-constitute-genocide> [<https://perma.cc/FX63-FE53>]. Following the announcement from the U.S. State Department, a senior official said that this declaration placed "no new obligations" on the United States in its ongoing campaign against ISIS, but the designation would seem to provide a basis for the ICC to assert jurisdiction. Adam Chandler, *How Meaningful Is the ISIS 'Genocide' Designation?*, THE ATLANTIC (Mar. 19, 2016), <http://www.theatlantic.com/international/archive/2016/03/isis-genocide-designation/474414> [<https://perma.cc/93YE-9UYT>].

B. ICC Jurisdiction and ISIS

Under Article Five of the Rome Statute the ICC has jurisdiction to try individuals charged with committing genocide, crimes against humanity, war crimes, or the crime of aggression.²² The ICC may exercise jurisdiction²³ over these crimes in three situations: (1) a State Party refers a situation to the Prosecutor in accordance with Article Fourteen of the Rome Statute,²⁴ (2) the United Nations Security Council refers a situation to the Prosecutor (in accordance with Chapter VII of the Charter of the United Nations),²⁵ or (3) the Prosecutor initiates an investigation in accordance with Article Fifteen of the Rome Statute.²⁶ In addition, a private party may petition the Court to open an investigation.²⁷ If the Prosecutor investigates the allegations and

²² Rome Statute, *supra* note 10, arts. 5-8. “The crime of aggression” is a special case. *Id.* art. 5(1)(d). The Rome Statute provided that the court could exercise jurisdiction over such crimes once the statute was amended to provide the elements of the crime. *Id.* art. 5(2); see generally Dapo Akande & Antonios Tzanakopoulos, *The Crime of Aggression in the ICC and State Responsibility*, 58 HARV. INT’L L.J. 33 (2017), <http://www.harvardilj.org/wp-content/uploads/Akande-and-Tzanakopoulos-Formatted.pdf> [<https://perma.cc/8D2Q-S9QT>]. On December 15, 2017, the states parties to the Rome Statute approved a resolution activating the ICC’s jurisdiction over the crime of aggression, which will be effective on July 17, 2018. See *Assembly Activates Court’s Jurisdiction Over Crime of Aggression*, ICC (Dec. 15, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350> [<https://perma.cc/P858-LEFX>]. The states parties adopted the definition developed at the Kampala Review Conference in 2010, which provides that a crime of aggression is “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” Rome Statute, *supra* note 10, art. 8 *bis*.

²³ The proposed jurisdictional triggers for the proposed crime of aggression are somewhat different than those for the other crimes within the ICC’s jurisdiction. See *id.* arts. 15 *bis* & *ter*.

²⁴ *Id.* art. 13(a).

²⁵ *Id.* art. 13(b).

²⁶ *Id.* art. 13(c).

²⁷ Each year since it was founded, the ICC has received about 1,000 private-party petitions, but 14 years into its existence, it has never opened an investigation on that basis. See *Communications, Referrals and Preliminary Examinations*, ICC <https://web.archive.org/web/20110418121307/http://www.icc-cpi.int/Menus/ICC/Structure%2Bof%2Bthe%2BCourt/Office%2Bof%2Bthe%2BProsecutor/Comm%2BAnd%2BRef> [<https://perma.cc/P2C6-WJYM>] (last visited Feb. 22, 2018) (reporting that 9,214 “communications” were received by the court as of September, 2010, which equates to more than 1,000 per year of the court’s existence).

determines that one or more individuals should be charged and prosecuted, then proceedings before the ICC can begin.²⁸

Perhaps most importantly though, the Rome Statute asserts jurisdiction over defendants only if either the “State on the territory of which” a crime was committed or “[t]he State of which the person accused of the crime is a national” has ratified the statute.²⁹ On August 4, 2015, ICC Prosecutor Fatou Bensouda issued a statement on the difficulty of prosecuting the alleged crimes committed by ISIS. According to Bensouda, her office had been receiving “disturbing allegations of widespread atrocities” committed by ISIS in Syria and Iraq since the summer of 2014.³⁰ This included “mass executions, sexual slavery, rape and other forms of sexual and gender-based violence, torture, mutilation, enlistment and forced recruitment of children and the persecution of ethnic and religious minorities, not to mention the wanton destruction of cultural property.”³¹ Importantly for ICC jurisdictional purposes, she noted that “genocide has also been alleged.”³²

Bensouda agreed that these crimes “undoubtedly constitute serious crimes of concern to the international community and threaten the peace, security and well-being of the region, and the world[,]”³³ but she noted that Syria and Iraq are not parties to the Rome Statute. “Therefore, the Court has no territorial jurisdiction over crimes committed on their soil.”³⁴ She went on to note that the ICC may “exercise *personal jurisdiction* over alleged perpetrators who are nationals of a State Party, even where territorial jurisdiction is absent.”³⁵ Information gathered by the prosecutor’s office “indicates that several thousand foreign fighters have joined the ranks of ISIS . . . , including significant

²⁸ Rome Statute, *supra* note 10, art. 15.

²⁹ *Id.* art. 12(2).

³⁰ *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, On the Alleged Crimes Committed by ISIS*, ICC (Apr. 8, 2015), <https://www.icc-cpi.int/legalAidConsultations?name=otp-stat-08-04-2015-1> [<https://perma.cc/Q754-GHAA>] [hereinafter *Statement of Prosecutor on ISIS*].

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

numbers of State Party nationals.”³⁶ However, because “ISIS is a military and political organisation primarily led by nationals of Iraq and Syria,”³⁷ the prospects of the ICC prosecutor’s office prosecuting the leadership of ISIS “appear limited.”³⁸ In fact, Bensouda concluded that “the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage.”³⁹

Bensouda went on to emphasize that “the primary responsibility for the investigation and prosecution of perpetrators of mass crimes rests, in the first instance, with the national authorities.”⁴⁰ She pledged to “consult with relevant States to coordinate, and possibly exchange information on crimes allegedly committed by their nationals to support domestic investigations and prosecutions, as appropriate.”⁴¹

It is, of course, always possible that the U.N. Security Council could make a referral for prosecution.⁴² In fact, such a referral was seriously contemplated in 2014.⁴³ Unfortunately, both Russia and China exercised their veto power to prevent such an action.⁴⁴ Because of that, and due to the threat of repeated vetoes, there has been no further serious consideration of a Security Council referral. So, for the time being, it appears that the ICC will not be prosecuting ISIS leaders.⁴⁵

C. The ICC’s Lack of Police Power and Terrorism

Even though jurisdictional matters seem to preclude action in the ICC, one might hope that other tribunals could and would act. Unfortunately, that also seems unlikely. Before any tribunal could have an impact on ISIS leaders, those leaders have to be brought

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Rome Statute, *supra* note 10, art. 13(b).

⁴³ See Press Release, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Press Release SC/11407 (May 22, 2014), available at <https://www.un.org/press/en/2014/sc11407.doc.htm> [<https://perma.cc/XGK2-YA92>].

⁴⁴ *Id.*

⁴⁵ *Statement of Prosecutor on ISIS, supra* note 30.

before the court. This requires some sort of police or military action. The ICC, however, does not have its own force; it relies on State cooperation.⁴⁶ According to the Rome Statute, States Parties are supposed to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.⁴⁷

As the Court was planned, assistance of member states was axiomatic. In practice, however, this has not been the case. In some areas, the tyrants have been able to avoid capture by the forces of State Parties. For instance, State Parties have failed to capture Joseph Kony or other leaders of the Lord's Resistance Army in Uganda, despite their history of terrorism.⁴⁸ Over time, Kony's forces have shrunk, leading the United States and Uganda to end their active pursuit of him, though that decision is controversial in some quarters.⁴⁹ Assistance in capture would be far more helpful than the promise of an eventual trial.⁵⁰

⁴⁶ See Rome Statute, *supra* note 10, art. 89 ("States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.").

⁴⁷ *Id.* art. 86 ("States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."). The ICC is premised on the idea of deterrence. See Rychlak & Czarnetzky, *supra* note 16, at 129, 136. Certainty of punishment and severity of punishment are the keys to effective deterrence. The ICC, however, does not have authority to impose the death penalty. Thus, the severity of punishment imposed by the ICC is less than the punishment that one of its defendants would likely face in many other forums. Certainty of punishment is also weak, given that the ICC has no police authority and offers both legal advice and a form of due process to the defendant. As such, punishment by the ICC might actually prove a lesser deterrent to a terrorist who is willing to plot and plan (if not personally carry out) suicide bombings. Even without an ICC, terror leaders know that they cannot commit gross violations of human rights with impunity. The ICC does not matter to them.

⁴⁸ Kony was indicted for war crimes and crimes against humanity by the International Criminal Court in 2005, but he has evaded capture. See John M. Czarnetzky, *The International Criminal Court: An Obstacle to Peace?*, FIRST THINGS (May 15, 2007), <http://www.firstthings.com/web-exclusives/2007/05/the-international-criminal-court> [<https://perma.cc/X7PJ-ULC3>].

⁴⁹ See Zach Baddorf, *Uganda Ends Its Hunt for Kony Empty-Handed*, N.Y. TIMES, Apr. 21, 2017, at A13.

⁵⁰ Czarnetzky, *supra* note 48. Jan Egeland, former UN Under-Secretary-General for Humanitarian Affairs, described Northern Uganda as "the world's terrorism epicenter." *Id.* One of the main terror groups, The Lord's Resistance Army ("LRA"), killed thousands of people. In July, 2006, however, the prospects for peace brightened dramatically. President Yoweri Museveni offered amnesty for crimes committed in northern Uganda and LRA leader, Joseph Kony, accepted. The offer required the LRA to commit to peace talks and renounce violence.

In other cases, State Parties have had the opportunity to cooperate but have failed to act. For instance, Sudanese president Omar al-Bashir has made more than 75 international trips, including to seven states-parties of the ICC, since the ICC issued arrest warrants for alleged war crimes, crimes against humanity, and genocide in Darfur, Sudan.⁵¹ None of those nations, however, agreed to arrest him.⁵² In fact, many African nations that are obligated to capture him under the ICC appear also to be obligated *not* to detain him under African Union treaties.⁵³ Thus far, they

As explained in an article written in 2012:

Eventually Ugandans themselves shared the judgment that prosecutions were perpetuating the war. Whereas a 2005 survey conducted by the Human Rights Center at the University of California, Berkeley showed 53 percent of the public preferring peace with trials, by 2007, 80 percent had come to prefer peace with amnesty. In March 2008, even Uganda's President Yoweri Museveni reversed his position, announcing that traditional tribal reintegration rituals and national tribunals could together replace trials at The Hague. Ugandans had become weary of the ICC.

Daniel Philpott, *Peace After Genocide*, FIRST THINGS (June 2012), <https://www.firstthings.com/article/2012/06/peace-after-genocide> [<https://perma.cc/F6HP-BFDR>].

Leader of the Opposition in Parliament Ogenga Latigo agreed: "I think for us in the opposition and particularly the [sub-region most affected by the war], this is something we shall embrace. The amnesty will pave way for reconciliation. In our hearts we are prepared to forgive and start a new chapter." See Emma Mutaizibwa, *Gout Happy Kony is for Amnesty*, DAILY MONITOR (Oct. 2, 2007), <http://www.monitor.co.ug/News/National/688334-790954-cqoksyz/index.html> [<https://perma.cc/4NGR-XW54>]. Unfortunately, the peace process failed.

The ICC had issued an arrest warrant for Kony. While Uganda was eager to dismiss its warrants in exchange for peace, the ICC was not. As one account reported at the time: "Already, the government and the ICC are knocking heads over the amnesty matter. The ICC, which has indicted and issued arrest warrants for the LRA leadership, says Kony and his men should be arrested, not granted amnesty. The Ugandan government thinks otherwise, for the sake of peace." *Id.* Serious conflicts between national decision-makers and the ICC have also developed in the Democratic Republic of the Congo, South Africa, and Kenya.

⁵¹ Alexa Koenig, Victor Peskin & Eric Stover, *Arrest Bashir*, FOREIGN AFFAIRS (July 13, 2016), <https://www.foreignaffairs.com/articles/sudan/2016-07-13/arrest-bashir> [<https://perma.cc/F24Q-C5L8>].

⁵² See Coalition for the International Criminal Court, *Uganda Strains Diplomatic Ties by Welcoming ICC Suspect*, GLOBAL JUSTICE WEEKLY (May 20, 2016).

⁵³ Max du Plessis, Tiyanjana Maluwa & Annie O'Reilly, *Africa and the International Criminal Court*, CHATHAM HOUSE (July 2013),

have been more inclined to honor their African Union obligations than their ICC obligations.⁵⁴

Even when the defendants are handed over, that does not assure that the legal process will yield justice. Kenya's President Uhuru Kenyatta was indicted by the ICC in connection with post-election ethnic violence in 2007-08, in which 1,200 people died.⁵⁵ The case against him collapsed, according to the prosecutor's office, when the Kenyan government refused to hand over evidence vital to the case.⁵⁶ President Kenyatta said he was "excited" and "relieved," adding that his "conscience is absolutely clear[.]"⁵⁷ Many others, however, saw this as a reflection of the inability of the ICC to assure the delivery of evidence and as a potentially fatal flaw in the structure of the Court.⁵⁸

II. TOWARD AN INTERNATIONAL POLICE FORCE?

The ICC's failure to bring to justice perpetrators of heinous crimes within its jurisdiction has not gone unnoticed. The court's inability to ensure the arrest of such alleged criminals has led to several proposals to revamp the Rome Statute's reliance on State

https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf [<https://perma.cc/X95X-QK89>].

⁵⁴ Arrests do not necessarily end the terror. There are times when a new bad actor simply steps in to fill the gap. Thomas Lubanga Dyilo ("Lubanga"), former commander of the Patriotic Forces for the Liberation of the Congo militia and president of the Union of Congolese Patriots, was arrested in 2006 and charged with several crimes for which he stood trial at the ICC. It took six years to complete, but eventually the ICC convicted him of the war crimes of enlisting and conscripting children and using them to participate in hostilities. However, as soon as Lubanga was arrested, General Bosco Ntaganda, chief of military operations under Lubanga, stepped up and filled the leadership role. His forces were accused of summary executions, rape, and the forced recruitment of child soldiers. See The Hague, *ICC: Congolese Warlord to Go to Trial*, HUM. RTS. WATCH (June 14, 2014), <https://www.hrw.org/news/2014/06/09/icc-congolese-warlord-go-trial> [<https://perma.cc/DV48-V2UL>].

⁵⁵ *Uhuru Kenyatta Denounces ICC as Kenya Charges Dropped*, BBC NEWS (Dec. 5, 2014), <http://www.bbc.com/news/world-africa-30344320> [<https://perma.cc/9SNX-97SZ>].

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*; see also Eric Posner, *Assad and the Death of the International Criminal Court: The Failure to Prosecute Him Will Be the End for the ICC's Brand of Global Justice*, SLATE (Sept. 19, 2013), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/09/failing_to_prosecute_assad_will_be_the_death_of_the_international_criminal.html [<https://perma.cc/HP55-7AC4>].

Parties' cooperation in making arrests and punishing such persons.⁵⁹ These proposals include use of private bounty hunters,⁶⁰ improving incentives for voluntary surrender,⁶¹ trial in absentia,⁶² leveraging asset seizures and travel restrictions into arrests,⁶³ and, of course, the development of an international police force.⁶⁴ Each of these proposals is problematic to serve that purpose. For example, the use of private bounty hunters raises questions of the violation of national sovereignty. Trial in absentia is prohibited in the ICC, unless the defendant is disrupting the proceedings.⁶⁵ Enhanced incentives for voluntary surrender might be a solution in some cases, but such incentives likely would not be a solution in all cases. Police forces are necessary in domestic criminal cases because force must be applied to ensure the accused will be present to participate in the process. Experience with the ICC provides ample reason to believe that the similar application of force is necessary to bring a defendant before the ICC.

⁵⁹ Mary Margaret Penrose, *No Badges, No Bars: A Conspicuous Oversight in the Development of An International Criminal Court*, 38 TEX. INT'L L.J. 621 (2003); see generally Jenevieve Discar, Comment to *What More Can Be Done to Secure the Arrest and Surrender of Persons Subject to Arrest Warrants Issued by the International Criminal Court?*, ICC FORUM (Mar. 27, 2014, 12:58 PM), <http://iccforum.com/forum/permalink/93/4112> [https://perma.cc/D4XA-29EJ] [hereinafter ICC Forum] (continuing several comments analyzing and suggesting solutions to the lack of arrest power in the ICC).

⁶⁰ See David Kramer, Comment to *What More Can Be Done to Secure the Arrest and Surrender of Persons Subject to Arrest Warrants Issued by the International Criminal Court?*, ICC FORUM (Feb. 24, 2014, 9:08 AM), <http://iccforum.com/forum/permalink/93/4076> [https://perma.cc/KW88-9DGJ].

⁶¹ See Karen Kwok, Comment to *What More Can Be Done to Secure the Arrest and Surrender of Persons Subject to Arrest Warrants Issued by the International Criminal Court?*, ICC FORUM (Mar. 20, 2014, 10:06 AM), <http://iccforum.com/forum/permalink/93/4089> [https://perma.cc/8HTG-HMEN].

⁶² See Emily Given, Comment to *What More Can Be Done to Secure the Arrest and Surrender of Persons Subject to Arrest Warrants Issued by the International Criminal Court?*, ICC FORUM (Mar. 24, 2014, 9:17 AM), <http://iccforum.com/forum/permalink/93/4090> [https://perma.cc/C99Z-X7J2].

⁶³ See John Litwin, Comment to *What More Can Be Done to Secure the Arrest and Surrender of Persons Subject to Arrest Warrants Issued by the International Criminal Court?*, ICC FORUM (Mar. 13, 2014, 9:32 AM), <http://iccforum.com/forum/permalink/93/4086> [https://perma.cc/84W5-6RK4].

⁶⁴ See ICC Forum, *supra* note 59.

⁶⁵ Rome Statute, *supra* note 10, art. 63.

As a result, there is pressure to establish some sort of international police force to serve that purpose. Some practical steps along these lines are already underway. In September 2015, at the United Nations building in New York City, Attorney General Loretta Lynch announced that the Department of Justice was launching an international effort called the Strong Cities Network (SCN).⁶⁶ According to Lynch, “As we continue to counter a range of domestic and global terror threats, this innovative platform will enable cities to learn from one another, to develop best practices and to build social cohesion and community resilience here at home and around the world.”⁶⁷

The plan is for SCN to connect cities, city-level practitioners, and communities through a series of workshops, trainings, and partnerships. Network participants will share an online repository of municipal-level operating practices and web-based training modules. They will also be eligible for grants to support initiatives and strategies that contribute to building social cohesion and resilience to violent extremism. The intent is that this will “strengthen strategic planning and practices to address violent extremism in all its forms by fostering collaboration among cities, municipalities and other sub-national authorities.”⁶⁸ Stian Berger Røslund, the Governing Mayor of Oslo, Norway explained:

To counter violent extremism we need determined action at all levels of governance . . . To succeed, we must coordinate our efforts and cooperate across borders. The Strong Cities Network will enable cities across the globe pool our resources,

⁶⁶ U.S. DEP'T OF JUSTICE, LAUNCH OF STRONG CITIES NETWORK TO STRENGTHEN COMMUNITY RESILIENCE AGAINST VIOLENT EXTREMISM (Sept. 28, 2015), <https://www.justice.gov/opa/pr/launch-strong-cities-network-strengthen-community-resilience-against-violent-extremism> [<https://perma.cc/ND6V-YPWC>]. Welcoming remarks were offered by the United Nations High Commissioner for Human Rights, Prince Zeid Ra'ad Al Hussein and Mayor Bill de Blasio of New York City, who introduced keynote speaker Lynch. See also Pamela Geller, *Obama Administration and UN Announce Global Police Force to Fight 'Extremism' In U.S.*, BREITBART (Oct. 2, 2015), <http://www.breitbart.com/big-government/2015/10/02/obama-administration-and-un-announce-global-police-force-to-fight-extremism-in-u-s/> [<https://perma.cc/J4MQ-VTYM>].

⁶⁷ U.S. DEP'T OF JUSTICE, LAUNCH OF STRONG CITIES NETWORK, *supra* note 66.

⁶⁸ *Id.*

knowledge and best practices together and thus leave us standing stronger in the fight against one of the greatest threats to modern society.⁶⁹

SCN has an international steering committee of approximately 25 mayors and other leaders from cities and other sub-national entities from around the globe that provides strategic guidance.⁷⁰ SCN also plans to have an international advisory board, which will include representatives from relevant networks, to help ensure that the SCN builds upon the efforts of those networks.⁷¹ It will be run by the Institute for Strategic Dialogue (ISD), a leading international “think-and-do” tank dedicated to preventing violent extremism.⁷² According to CEO Sasha Havlicek of ISD, “The SCN provides a unique new opportunity to apply our collective lessons in preventing violent extremism in support of local communities and authorities around the world.”⁷³ Montreal Mayor Denis Coderre explains:

It is with great conviction that Montréal has agreed to join the Strong Cities Network founders . . . This global network is designed to build on community-based approaches to address violent extremism, promote openness and vigilance and expand upon local initiatives like Montréal’s Mayors’ International Observatory on Living Together. I am delighted that through the Strong Cities Network, the City of Montréal will more actively share information and best practices with a global network of leaders on critical issues facing our communities.⁷⁴

SCN held a Global Summit on May 11, 2016, in Antalya, Turkey. It featured testimony from the survivors of terrorist attacks, from former members of violent extremist groups, and

⁶⁹ *Id.*

⁷⁰ The Strong Cities International Steering Committee held its inaugural meeting at the United Nations (New York office) on Sept. 30, 2015. *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

from municipal leaders.⁷⁵ United States Secretary of State John Kerry recorded a statement about the Summit in which he said:

Unity is essential in countering violent extremism; we all know that. Terrorists can emerge in any country, and the lies they propagate can rapidly circumvent national borders. Through global gatherings such as the Summit, regional workshops, and the constant exchange of information and ideas, the Strong Cities Network can help us to implement best practices in responding to a threat that endangers us all . . . The Summit's major theme was the imperative for us all to work together—across political boundaries, but also across religious lines, across the divide between local and national, and across the separation between the public and private sectors.⁷⁶

Speaking immediately after the event, SCN Manager Rebecca Skellett said: “In unprecedented solidarity, representatives from across the Strong Cities Network agreed cities are the only antidote in the fight against violent extremism. Terrorist narratives act local, our response must be too.”⁷⁷

Obviously, SCN is a serious effort to at least share information and develop better standards for policing on matters that are of an international magnitude.⁷⁸ Of course, that is not

⁷⁵ Speakers included Dr. Seiny Boukar Lamine, Mayor of Kolofata, Cameroon, who told of his city's everyday efforts to counter the threat from Boko Haram and gave testimony of his own abduction and imprisonment by Islamist militants; Bjørn Ihler, a survivor of the 2011 attack by Anders Behring Breivik on Utøya Island in Norway; and Christian Picciolini, who spoke of his journey from being a member of an extreme neo-Nazi gang in the United States to where he now leads interventions across the U.S. as a mentor to help others at risk of extremism. STRONG CITIES NETWORK, *First-Ever Global Summit of Cities Reinforces Powerful Message for Countering Extremism at the Local Level* (May 25, 2016), <http://strongcitiesnetwork.org/first-ever-global-summit-cities-reinforces-powerful-message-countering-extremism-local-level/> [<https://perma.cc/GA48-GC8F>].

⁷⁶ *Secretary of State John Kerry Gives Support for the Strong Cities Network Global Summit*, STRONG CITIES NETWORK (June 6, 2016), <http://strongcitiesnetwork.org/john-kerry-address/> [<https://perma.cc/KF7Y-ZKD6>].

⁷⁷ *First-Ever Global Summit of Cities*, *supra* note 75.

⁷⁸ It also is in some ways an extension of the push towards nationalized standards for state and local police forces in the United States. Charles Ramsey, Former Co-Chair of the President's Task Force on 21st Century Policing called for a reduction in the number of police departments and consolidation of duties on CNN, July 10, 2016. *See also* Neil Munro, *Obama Pushes More Federal Oversight of Cops After Dallas Attack on*

something new. The International Criminal Police Organization, more commonly known as Interpol, was organized as the International Criminal Police Commission (ICPC) in 1923 and adopted its common name in 1956.⁷⁹ Interpol is an intergovernmental organization facilitating police cooperation among about 190 nations, with its headquarters in Lyon, France.⁸⁰ To keep Interpol as politically neutral as possible, its charter forbids it from undertaking interventions or activities of a political, military, religious, or racial nature or involving itself in disputes over such matters.⁸¹ Instead, it focuses primarily on terrorism, crimes against humanity, environmental crimes, genocide, war crimes, organized crime, pharmaceutical counterfeiting, sports fixing, weapons smuggling, human trafficking, money laundering, white-collar crime, computer crime, intellectual property crime, and the like.⁸² Unfortunately, as a new wave of international crime has come to the world's attention, Interpol has come under attack as a tool of dictators.⁸³

One noted shortcoming of Interpol is that it is not actually an international police force. Rather, it is an association of local police agencies, and it serves primarily as a clearinghouse to share information:

[T]he popular image of Interpol as a global police force chasing down jet-setting rogues with stacks of fake passports

Cops, BREITBART (July 9, 2016), <http://www.breitbart.com/2016-presidential-race/2016/07/09/dallas-obama-federal-shootings/> [<https://perma.cc/4KNH-CDLT>].

⁷⁹ The first International Criminal Police Congress met in Monaco in the spring of 1914. That meeting ultimately resulted in the creation of the International Criminal Police Organization. Interpol traces its lineage to this conference, but Interpol itself wasn't established until 1923. See *Name and Logo*, INTERPOL, <https://www.interpol.int/About-INTERPOL/Name-and-logo> [<https://perma.cc/K6RF-URHD>] (last visited Nov. 1, 2017); Kathy Gilsinan, *Interpol at 100: Does the World's Police Force Work?*, THE ATLANTIC (May 12, 2014), <http://www.theatlantic.com/international/archive/2014/05/interpol-the-global-police-force-that-isnt/362086/> [<https://perma.cc/9CD8-6PDK>].

⁸⁰ *Overview*, INTERPOL, <https://www.interpol.int/About-INTERPOL/Overview> [<https://perma.cc/SA4Y-R7Y4>] (last visited Sept. 12, 2017).

⁸¹ Interpol's constitution emphasizes that the cooperation it facilitates must take place "within the limits of the existing laws in the different countries and in the spirit of the Universal Declaration of Human Rights." *Id.*

⁸² *Crime Areas*, INTERPOL, <https://www.interpol.int/Crime-areas> [<https://perma.cc/N4SS-Y6Q8>] (last visited Sept. 12, 2017).

⁸³ Gilsinan, *Interpol at 100*, *supra* note 79.

is a myth. Interpol officers do not bust down doors to apprehend dashing art thieves. There isn't any such thing as an Interpol officer, and the people who work for Interpol can't conduct investigations or make arrests.⁸⁴

This limitation, of course, means that Interpol does not threaten national sovereignty the way a true international police force might. As such, Interpol is better able than some other organizations to function amid political tensions, or even where there is a lack of diplomatic relations. The problem with that limitation, of course, is that it limits Interpol's practical utility. Moreover, Interpol has limited jurisdiction, a small operating budget,⁸⁵ and a tiny staff.⁸⁶

Interpol's limitations make the turn to SCN logical, but without such limitations, an international police force can pose a different kind of threat. SCN, for instance, has been called a "global police force" designed to combat violent extremism in the United States.⁸⁷ According to attorney Kris Anne Hall, who released a video about the formation of SCN:

Something happened yesterday that I'm afraid will go completely unnoticed . . . Yesterday, the Department of Justice, several cities within the United States, several municipalities, linked up with the United Nations to form a global police initiative. It is called the Strong Cities Network . . . This is such an attack on our Constitution. This is such an attack on the sovereignty of our states . . . This will eliminate

⁸⁴ *Id.* Annual general-assembly meetings convene delegates from member countries to vote on policies and resources. Interpol's National Central Bureaus in member countries serve as contact points among them, with law enforcement responsibilities carried out by the relevant national institutions. *Id.* In 2016, Interpol plans to open a Global Complex for Innovation in Singapore as an R&D headquarters for combating cybercrime. *Id.*

⁸⁵ It had an operating budget of €70 million (\$90 million) in 2012. *Id.*

⁸⁶ Interpol's staff is comprised of about 650 people, mainly international civil servants and police on loan from various nations. For comparison purposes, the New York City Police Department had a budget of about \$4.9 billion in fiscal year 2012, and it had about 34,500 uniformed officers. *Id.*

⁸⁷ *AG Lynch Announces Global Police Force Partnership With UN, BARRACUDA BRIGADE*, <http://bb4sp.com/ag-lynch-announces-global-police-force-partnership-with-un/#> [https://perma.cc/Y42M-X2Q4] (last visited Oct. 3, 2017).

the rights of the people as we know them under a constitutional republic.⁸⁸

She warned that the initiative will be the vehicle used to usher in the UN arms treaty and the UN control of America.⁸⁹ She expressed concern that the implementation “will bypass Congress and the treaty process, and will be implemented on the local level so people will never even notice.”⁹⁰

Political activist Pamela Geller set forth similar concerns about federal and international interference at the local level. According to Geller, SCN “amounts to nothing less than the overriding of American laws, up to and including the United States Constitution, in favor of United Nations laws that would henceforth be implemented in the United States itself—without any consultation of Congress at all.”⁹¹ She called it an “abdication of American sovereignty” and warned that “this global police force will be used to impose the blasphemy laws under the sharia (Islamic law), and to silence all criticism of Islam”⁹²

Statements such as this are undoubtedly overstated, but it is undeniable that many rights assured to all criminal defendants in U.S. courts are denied to defendants at the ICC, including rules related to jury trials, venue, confrontation, hearsay, speedy trials, appointed counsel, and double jeopardy.⁹³ If those rights would be

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Geller, *supra* note 66. Geller refers to the United Nations as “a sharia-compliant world body.” *Id.*

⁹² *Id.*

⁹³ See Lee A. Casey, *The Case Against the International Criminal Court*, 25 *FORDHAM INT’L L.J.* 840, 861-63 (2002) (“[I]t is important to note that neither international criminal courts in general, nor the ICC in particular, provide protections to the accused equivalent to those guaranteed by the Bill of Rights.”); Lee A. Casey & David B. Rivkin, *The International Criminal Court vs. the American People*, 1249 *THE HERITAGE FOUNDATION BACKGROUNDER* 1, 4 (Feb. 5, 1999). On June 14, 2000, Senator Jesse Helms introduced Senate Bill S. 2726, the American Servicemembers’ Protection Act of 2000 (the “Protection Act”). That same day, Representative Tom DeLay (R-TX) introduced a similar bill, H.R. 4654, in the House. The Protection Act noted that “under the Rome Statute, U.S. citizens will be denied many of the procedural protections to which all U.S. citizens are entitled under the Bill of Rights to the United States Constitution, including, among others, the right to trial by jury, the right not to be compelled to provide self-incriminating testimony, and the right to confront and cross-examine all witnesses for the prosecution.” *But see* Teresa Young Reeves, *A Global*

in jeopardy for an American citizen facing trial at the ICC, what policing practices are likely to come from the internationalization movement?

One critic of the SCN says that it “looks at this stage to be a PR boondoggle, allowing globalist bureaucrats and diplomats to go on all-expense paid junkets, conferences, dinners and receptions on the tax cows’ dollar or Euro.”⁹⁴ While wasteful, this is not as serious as the concern about what the critic fears it could become:

[I]t has the potential to grow into something much more insidious, and that’s where what it doesn’t tell us about the information it will be sharing, and about ‘best practices,’ becomes exploration-worthy. Assuming the ‘intelligence’ will be ultimately exploitable to build cases involving U.S. citizens, what assurances are there that it will be gained in accordance with individual protections mandated in the Bill of Rights? Not to cast aspersions on member cities like Beirut, but just what ‘best practices’ are acceptable, and will the representatives of our people, that would be the Congress, have unfettered oversight of the process?⁹⁵

Given these strident criticisms of the SCN, a true international police force is a remote possibility at best.⁹⁶

Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification, 8 HUMAN RIGHTS BRIEF 15, 16 (“Contrary to the Protection Act’s assertion, the Rome Statute is consistent with the U.S. Constitution.”).

⁹⁴ David Codrea, *Strong Cities Network Should Raise Alarms for Liberty Advocates*, OATH KEEPERS (Oct. 7, 2015), <https://www.oathkeepers.org/strong-cities-network-should-raise-alarms-for-liberty-advocates/> [<https://perma.cc/97ED-GH7K>].

⁹⁵ *Id.*

⁹⁶ A manual on the ratification and implementation of the Rome Statutes explains that “the ICC is no ordinary international regulatory or institutional body.” Rights and Democracy & Int’l Ctr. for Crim. L. Reform and Crim. Just. Pol’y, *International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute* (May 2000), http://iccnow.org/documents/RightsDem&ICCLR_Manual_Eng.pdf [<https://perma.cc/6UBV-AH9U>]. This manual asserts that modifications must be made to a state’s “code of criminal law . . . and human rights legislation” because “should there be a conflict between the ICC legislation and existing [state] legislation[,]” international law established under the ICC “take[s] precedence.” *Id.* Accordingly, “[i]t would be prudent” for states “to incorporate all acts defined as crimes” into their own “national laws.” *Id.* The Lawyers Committee for Human Rights has said that “it will be legally and politically difficult to justify a two-tiered system of rights, one for ICC and another for purely domestic purposes.” Lawyers Committee for Human Rights, *Pre-Trial Rights in the Rules of Procedure and Evidence*, Vol. 2, No. 3, International Criminal Court Briefing Series (Feb. 1999) (expressing concern that the ICC Statute

CONCLUSION

The debate over an international police force to effectuate arrests for the ICC is the predictable fruit of a fundamental flaw in the ICC itself, a flaw that has been apparent from the start. The ICC is a freestanding court, independent of any polity or true political accountability. It is a creature of the treaty between its states parties, not an institution embedded in a legitimate, functioning, political system. As authors Rychlak and Czarnetzky predicted before the ICC was born,⁹⁷ the court's intentional separation from political accountability, done in the name of keeping politics out of the administration of justice, inevitably has led to a weak court. Law and legal institutions are tools of politics, not separate and superior alternatives to politics.⁹⁸ As such, it is unsurprising that sovereign nations, particularly those with the most at stake in the practice of international affairs, would object to the application of such tools divorced from true political accountability.

To the extent such concerns are powerful enough to cripple a court dedicated to the prosecution of persons accused of heinous crimes such as those within the ICC's jurisdiction, they are even more acute in the case of an international police force similarly divorced from a body politic. There is no true international police force because there is no legitimate, international government. Like courts, police forces are tools of politics, and must be accountable politically before powerful sovereign nations are likely to imbue it with the power to exercise the type of force required of it. An international police force that is, like the ICC, designed to be entirely separate from political accountability will suffer the same fate as the ICC, for the same reason—its separation from

does not protect persons suspected but not yet charged, and calling for additional procedural protections, particularly during interrogation and arrest). In other words, all nations will have to reduce their domestic rights down until they are the same as the international standard. Considering the Constitution of the United States, it might be worth noting that American judges have used that document to create new rights, such as the rights to contraception and abortion, that do not appear in the text of that document. What is to stop ICC judges from inventing new crimes, new rights, or otherwise trampling on national sovereignty? Why should we not expect its jurisdiction to expand in the same way that the jurisdiction of the federal courts has expanded?

⁹⁷ See *An Empire of Law?*, *supra* note 4.

⁹⁸ *Id.* at 62.

politics inevitably will yield an international police force with very little true police power in all but the least controversial cases. Indeed, the design of Interpol—which, it should be emphasized, was never intended to be a true international police force—supports this prediction.⁹⁹

There is an alternative to an expensive and weak international police force. The ICC could explicitly rely on nations, states parties or not, or international alliances of nations to act as *ad hoc* police forces where they are willing to do so.¹⁰⁰ Such *ad hoc* “police” actions would inject the type of political calculus that the framers of the ICC sought to exclude from the design of the court. Once again, and predictably, real progress toward the ICC’s goal of ending impunity depends upon the enhanced political legitimacy of the ICC.

⁹⁹ See *infra* notes & authorities cited therein.

¹⁰⁰ See ICC Forum, *supra* note 59.