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Human Rights & the International Criminal Court

From the EPIIC Symposium at Tufts University

John Shattuck, CEO of the John F. Kennedy Library Foundation and former Ambassador to the Czech Republic:

I must take you first into the heart of the U.S. government which is where I spent eight years and more. The U.S. government's bureaucracy is often compared to that of a university and having worked at a university I can tell you that there are some comparable elements. On the one hand, there is a tremendous amount of lip service that is paid to the subject of human rights in the U.S. government and values and norms of international law find their way into the discourse of leaders frequently. We certainly know that President Bush, when he appeared before the UN General Assembly last fall [the fall of 2002], spent a great deal of time speaking about human rights in the context of Iraq. We also know, to be bipartisan about it, that my boss, President Clinton, spent a great deal of time speaking about the issue of human rights, particularly in China during the campaign for the presidency in 1992. There are many, many other examples obviously.

On the other hand, we need to know right on the front end that the U.S. government is not a human rights organization. It is a vast collection of competing interests that are struggling with each other bureaucratically in every conceivable way; and human rights is often seen to be a threat by other elements of the bureaucracy because it limits the freedom of those other competing interests be it trade with China or indeed U.S. sovereignty in the context of the International Criminal Court. So there is a constant tug of war inside, not surprisingly.

It's very important for human rights advocates inside that government to find ways of demonstrating how values and national interests coincide and indeed they do in many, many contexts. Certainly, the genocide in Bosnia and Rwanda, which were the two catastrophic events of the post-Cold War world, created major instability in both central and southeastern Europe and central Africa, and millions of refugees, and the crisis became a national security interest to the United States even though in both cases it wasn't perceived to be so at the start. Certainly the issue of democracy and human rights repression in Islamic countries today is a matter of national interest in the United States in that it clearly blocks political expression and often can be seen as the cradle of terrorism.

There are plenty of examples of what can happen when we ignore our values in pursuing what we may at that time think our interests are. Let me give you one poignant and very credible example, a recently declassified 1990 State Department cable on Iraq which begins, and I quote: "Human rights and chemical weapons aside, the interests of the United States and Iraq are generally the same." Now even

where international human rights values and national interests can be shown to be very coincidental and they come together and the bureaucracy is willing to generally give lip service to it, there are tremendous bureaucratic impediments to actually moving forward and using the resources of the U.S. government working with other governments to do such things as intervene in Bosnia or Rwanda to stop genocide.

There are five Washington syndromes that I would just quickly point out to those of you who are not familiar with the way the federal government works. First is what I call inter-agency gridlock, which is that consensus on a new policy is required before it can move forward and if one agency, the Pentagon for example, wants to block a new policy, the new policy being the insertion of troops in Bosnia, that's what will happen.

Then there is the presidential decision-making syndrome and that is because the only way to break the gridlock of the inter-agency process is to get a presidential decision but you're not likely to get such a decision on a tough political issue that may have costs to the President without some degree of political support, which then leads you to what I would call the public opinion syndrome and, particularly in foreign affairs, the public is often not interested until there is presidential leadership. So the President isn't going to act without the public behind him.

Then there is what I would call the Vietnam syndrome which is a combination of fears that come from Vietnam and the crisis of Somalia, which, of course we all know went on to be a film, *Black Hawk Down*, what happened when eighteen U.S. rangers were killed in a peace-keeping mission in October 1993. It created tremendous fear in the bureaucracy that body bags were going to be accompanying various human rights adventures in the future. This may not seem to be so applicable under the presidency of George W. Bush.

Then there is the human rights catastrophe syndrome which is that we need action before a crisis becomes so severe but that is often not likely because there isn't enough attention paid to it until you see the horrors beginning to flash across the television on CNN.

You can overcome these various bureaucratic gridlocks internally by, frankly, guerrilla warfare and those of you who are planning to go into the U.S. government in the foreign affairs area let me make some recommendations to you. Much of the government works on paper, paper is very important but paper is also very dangerous because it has to be cleared. It goes up through the system, that is, various other elements of the bureaucracy have to look at your paper in order to be able to get it up to the Secretary of State or higher up and see whether they approve it. If they don't approve it, once again the inter-agency gridlock will settle in on you. So what you need to do is find your own channels and this is happening frequently within government and I can tell you in the case of Bosnia in 1995 I established a channel with Richard Holbrook and on directly to the President and that was certainly the way to accomplish something that had not been accomplished before. In the case of Haiti in 1994, a channel was established with the Deputy Secretary of State and on to the President. No paper whatsoever. Phone calls.

It is a cardinal rule in Washington that no subordinates' phone calls are ever returned. That is to say, if you want to make a phone call to your superior you've got to make sure you've got meetings with him or her because you're not very often going to get a phone call returned. But I did find that there was a way to get phone calls returned when I was trying to move through the bureaucracy and that was to travel to Sarajevo or Port au Prince or Beijing and then phone back to Washington with a report of what was happening or what I was doing or what I was seeing, and

these were authorized trips, of course. Then I would get through right away.

Finally, meetings; the key rule in Washington is that the only important meetings are the ones to which you are not invited. That being the case, you've got to figure out how to get yourself invited or figure out how to get your bureaucratic opponents who are on the same level as you disinvited or keep them out of the meeting in some way.

Now to be serious, beyond these bureaucratic struggles there are other impediments in the U.S. government and, in fact, going far beyond the government, embedded frankly in the American position on human rights, and that is the impediment in particular of what I would call U.S. exceptionalism. That American exceptionalism is deeply rooted in our history and in our Bill of Rights on human rights in that we believe, and rightly so, that we have an outstanding system of justice and rights in our own country and therefore we don't necessarily have to adopt the rights systems that are in international law.

This is a position that has been picked up politically and made very serious particularly on the right side of the political spectrum and I can tell you of many instances running across it when I was involved in the U.S. government. I made a report to the United Nations on the UN Convention on Civil and Political Rights and I described in my report some of the efforts that the U.S. was engaged in to try to bring its own civil rights record to a higher level, particularly since there was a long history of past abuses. Well there was a big fight inside the State Department and even more importantly in the Congress over whether that report should be made because it effectively involved an American government official going to the UN and saying we are, in fact, equal to other countries and we have plenty of human rights difficulties that we need to struggle with.

That's the background. Let me then move to the context today, the struggle for human rights today. What is it all about. Let's cut to the chase; it's clearly about the crisis of human rights and terror, or more specifically human rights in the context of the U.S.-led war against terrorism and how that is beginning to play out. The background that I think we need to know in looking at this is that before September 11 in the whole decade of the post-Cold War reality, the world fundamentally changed and yet in some ways Americans didn't realize that. We were self-absorbed. The Cold War was over, Communism was dead, we had every reason to focus on domestic issues. President Clinton ran on a campaign "It's the economy, stupid," at least the bumper sticker, not what he was saying but what his campaign manager had said.

But there were two great forces that were at work in the world throughout that decade leading up to September 11. There were the forces of integration and those were the forces that, in fact, reflected the end of the Cold War, that reflected the fall of the Berlin Wall and the elimination and the victory over apartheid in South Africa. But they also reflected the triumph of market economics and the technology boom, the communications revolutions and the fall of various borders leading some commentators to call this the end of history.

Those were the forces that we hooked up with largely in the decade of the nineties but there were equally powerful forces of disintegration. As the repression of the Cold War was lifted and states failed, such as Yugoslavia in particular, there was growing ethnic and religious conflict, there were economic disparities. It became clear as a result in some ways that the very globalization process reflected the forces of integration and certainly there was the rise of terrorism leaving some commentators to refer to this as the clash of civilizations.

Now throughout the nineties U.S. policy was largely focused on promoting the

forces of integration and surely that was a correct policy but almost as an after-thought we were also trying to contain the forces of disintegration and nowhere near enough resources, political and otherwise, were going into that struggle. It was very hard to build domestic support to address crises in such places far away, Bosnia and Rwanda; Afghanistan and the Washington syndromes that I referred to earlier often kicked in to prevent the kind of action that could have been taken.

But there were major warning signals throughout the decade and these warning signals were showing where the forces of disintegration were going. Five million civilians killed in internal conflicts in the decade after the Cold War, according to statistics of the UN: massive regional instability, the Balkans, Central Africa, certainly the Middle East; Thirty million refugees by the end of the decade; soaring costs of humanitarian assistance; and terrorist bombing and attacks in 1998 in the American embassies, and the growth of terrorism leading to September 11.

September 11 was certainly a powerful statement of what those forces were about and it had two immediate consequences. Americans violently were awakened by these forces and now no longer saw them as simply operating in faraway places. I think the second result was that the underlying conditions that spawn terrorism became visible to everyone in places like Afghanistan, Egypt, Saudi Arabia, Pakistan, the Sudan. These were all human rights disasters where there was religious intolerance, repression of civil society, torture, and other kinds of gross human rights abuses.

The Bush administration pushed human rights off the agenda largely after September 11. There were really three reasons for this and three manifestations of it. First the administration characterized again and again the war against terrorism as a zero sum game, you were either with us or you were against us. There's a cartoon that I think speaks more than any analysis can of this, which is that a U.S. official in Guantanamo is explaining to an Al Qaeda prisoner that international law doesn't apply to his case, and the prisoner responds by saying, "Don't worry, we understand, we would have done the same thing to you if we had won ourselves."

The second reason, and real manifestation I think, is that in order to assemble a coalition to deal with the immediate after-effects of the terrorism and effort to go into Afghanistan the administration in the United States began to condone human rights crimes of any country that was with us. In Russia, Chechnya no longer was an issue of concern. In the central Asian republics we winked at most of the repression that was going on there, in Pakistan, in China, in Saudi Arabia, in Egypt more than usual.

Then the third manifestation, I think, was the Bush/Ashbrook war on civil liberties at home as part of the war on terrorism around the world where we had seen, of course, the round-up of prisoners, often of foreigners based on their national background, brought under surveillance in great secrecy, treatment of prisoners, and the like.

The bottom line in my personal view is that the war on terrorism as it is now being conducted is weakening, not strengthening, international security and undermining, not promoting, our national interests. We are losing the support of moderates all over the world who should be our allies. We are strengthening the hand of authoritarian governments who are cracking down on reformers in the name of fighting terrorists. We are increasing the likelihood that terrorism will be bred by repression in places like Egypt and Pakistan, Chechnya, Uzbekistan, and Indonesia. Above all, I believe we are destroying what Joe Nye has called "our soft power," our commitment to human rights, our commitment to democracy and the persuasion of

people that those are values worth accepting, and replacing it with military force, our commitment to holding an increasingly hostile world at bay.

Let me conclude by moving to strategies for peace, I believe there is another way. I believe there are other approaches that could be taken to this overall issue and I will be the first to say that I have inadequate information to prescribe anything like a set of policies. I think an orientation of our approach toward policies needs to be fundamentally different. We need to connect our interests with our values. Surely there are those within the administration who say that what they are planning with respect to Iraq is precisely that, but let me come to that in a moment. We need to recognize that terrorism and the forces of disintegration cannot be stopped without a strategy for promoting human rights and I think this is a strategy for peace and it requires a different approach. It draws on the lessons that we have learned in the human rights wars of the 1990s, most of which we lost, I would say because we weren't paying sufficient attention or because we were diverted by the relative calm in the domestic situation.

There are really seven key points to this strategy. Let me outline them very quickly. First it needs leadership from the top, not surprisingly, but I think anyone who has served in government knows that it needs that leadership. The only way to break out of those gridlocks that I described earlier is to get that kind of leadership and it may be a pipe-dream but I believe the President should announce that it is an explicit goal of the United States to work with other countries to promote international human rights and standards at home and abroad, a statement of policy that is clear and filters down to the bureaucracy. There is no question that that's the only way to mobilize the bureaucracy in the U.S.; presidential leadership has been shown again and again to be important in human rights. Unfortunately, there are too many examples in the wrong direction. Certainly President Bush after September 11 with the USA Patriot Act is an example, I think, of the wrong kind of signal on human rights. After the Somalia disaster, President Clinton issued a new policy restricting U.S. peacekeeping understandably because he felt the political pressures as a result of the disaster of Somalia, but that in many ways led to our disengagement from some other disasters, particularly Rwanda.

Second, the strategy must be multilateral. U.S. unilateralism is indeed one of the main causes of the world's distrust of our motives and objectives in the war on terrorism. When it comes to human rights a multilateral approach always increases the legitimacy of the argument and a unilateral approach always raises suspicions that it is being pursued only for national political reasons.

Third, we need a strategy for preventing or heading off human rights catastrophes before, not after, they lead to genocide. Here we need to work with other governments and we have plenty of tools at our disposal. We can jam hate radio, we can engage in aerial photography of areas that we think are raising serious human rights problems. We do do that. We can freeze foreign assets of human rights violators, we can impose sanctions. We can issue arms embargoes, we can withdraw aid, we can expel ambassadors, we can do many, many things short of actual military intervention.

Fourth, when prevention fails we need to be able and prepared to join with other countries to intervene, as a last resort, militarily. This is a tricky area, to be sure, especially after what I've said about my concerns on Iraq, and I will get a little bit into that too. There is now an evolving doctrine of humanitarian intervention. We will be talking about that later in this conference, I know. It comes out of the interventions in human rights wars in Haiti, in Bosnia, in Kosovo, in East Timor, but we

need to be very careful about the criteria that are used for intervention in the context of a human rights crisis of the kind that President Bush has in some ways, correct in many ways, properly characterised Iraq to be.

There are four criteria that I would set forth. First, genocide and crimes against humanity should be very much the cause of the intervention; that is, they are being committed. Second, it should be multilateral. There should be some involvement of other countries in a significant way, the UN being the forum in which that involvement should occur. Third and fourth are the most important. There should be no risk of a wider war. There should be regional support. You should be sure that those countries in the region where intervention is going to occur were not themselves going to intervene in a way that may cause a wider war. And fourth, there should be no risk that more lives will be lost than will be saved in the context of such an intervention.

In my view the Iraq intervention doesn't meet three out of four of the criteria. It's not likely to be broadly multilateral and clearly there is a risk of a wider war because there is very little regional support and it's certainly very likely that more lives will be lost than one might say will be saved. We may trigger the very things that we are trying to stop, the use of weapons of mass destruction and more terror, certainly in Iraq where there are chemical and biological weapons, in Turkey and northern Iraq and the tensions with Kurdistan and that regional crisis, the nuclear weapons existence in Iran and the terrorist attacks that might result in the United States and Europe. All of these, I think, are especially high if the goal, as we are now hearing, is to occupy and transform the entire Middle East by military force.

Now fifth, and then let me stop very shortly because this gets into the very specific topic of the International Criminal Court, there can be no peace without justice. This needs to be an element of the strategy. There are three basic reasons why it is essential to hold accountable those who commit massive human rights crimes like genocide. We need to stop the spiral of revenge that goes on and we saw go on in the Balkans, for otherwise it will never stop. We need to lift the cloud of collective guilt so that a whole society isn't accused of the crimes that the leaders were instigating, and we need to create a deterrent against future crimes because, without the rule of law, terrorism inevitably becomes acceptable.

I think over the last decade we've made great progress in this direction, the establishment of the two International Criminal Tribunals, the one for Bosnia, and now the International Criminal Court, controversial as it is. The issues that are keeping the United States on the sidelines and in some respects very hostile with respect to the International Court are the issues of this overall conference, they are issues of sovereignty. They are also issues of international hegemony, which I think is something that we are very actively pursuing, and indeed reflecting in many respects in our foreign policy. The fact of the matter is that the administration does not want an international institution to have any authority to judge the actions of the United States.

Now, a close reading, and I am sure our panel will give this, of the statute of the International Criminal Court will show that the primary jurisdiction is in the nation-state, it's not in the International Criminal Court, and that if the nation-state is investigating human rights crimes it will not be brought, nor any of its citizens, before the International Criminal Court.

The only point I want to make here is that I'm afraid what we see is a wholesale assault on international law and treaty wherever it seems to impede the freedom of unilateral action, that is, the large theme that we're seeing in the justice area. There's

a huge cost to this. It costs the U.S. interests, it sends a signal that any other country can do this, and I think it weakens the fifty-year structure of international treaties and laws that have been built up that assured some degree of stability and conflict resolution in the world.

There are two other broad topics that I will just mention and then conclude. We need to commit ourselves to nation building, peace building, after a war has ended. We need to be prepared to stay for the long term, not militarily but we need to engage much more with development assistance. We need to be prepared to meet the humanitarian crises that are going to unfold after that and all too often we have focused on our exit strategy, speaking of the United States, rather than our long-term commitment and the fear is that will continue to do that.

Finally, we must work with other countries to find new ways of challenging the forces of repression that block political expression and turn people often into terrorists. That is a very broad topic and it's not one that I will explore in any depth here. So let me conclude with a sense that this is a strategy that I think comes out of human rights background but it does address issues of terrorism. Above all it looks to address the conditions in which terrorism emerges.

And let me end with a message by an Egyptian democracy activist, Saad Eddin Ibrahim, who said to the world when he was sentenced last year for challenging the authorities in his country, and I quote, "Civil society as a space for liberty is an essential condition for sustained development. Perhaps we are being persecuted today because we have dared to speak openly what millions of others think privately." Now I think Egyptian democracy activists like Saad Ibrahim are sending us a message of hope and a message related to human rights, but frankly it is also a warning. It is a warning that if we allow the sacrifice of human rights in the name of fighting terror, in the long run we will only reap more terror and that, I fear, is exactly what will happen if we storm into Iraq without broad international support and try to transform the Islamic world by military force alone.

Valerie Epps is professor of law at Suffolk University Law School:

Ambassador Shattuck touched on two themes relating most directly to the issue surrounding the International Criminal Court; the importance of human rights generally and more specifically the importance of democracy in ensuring and fostering human rights. This duo of human rights and democracy arises in quite a problematic context in relationship to the International Criminal Court, or ICC. Specifically, I think that the ICC poses a tension between two different sorts of accountability, the legal accountability of perpetrators of grave human rights abuses on the one hand, and the democratic accountability of the ICC itself, on the other hand.

The other panellists will focus largely on the need for the accountability of perpetrators of human rights abuses. I am going to go directly to the second question concerning the accountability of the ICC itself in terms of its democratic credentials and legitimacy. In effect, I find a tension embodied within the ICC treaty between the human rights to freedom from violent abuse, on the one hand, and a human rights representative government.

The relationship between the ICC and national courts is to be governed by the so-called complementarity regime embodied in their own treaty. Under the system of complementarity, the ICC may exercise jurisdiction only if states are unable or unwilling to do so. As Article 17 of the treaty states, a case shall not be admissible before the ICC if the case is being investigated or prosecuted by a state with

jurisdiction over it unless that state is unable or unwilling genuinely to prosecute or investigate. So in this way, complementarity gives priority to states rather than to the ICC in the development and enforcement of humanitarian law. But the system embodied in the treaty also provides the ICC with the authority to conduct prosecutions when states are unable or unwilling to do so. If the state where the crime is alleged to have occurred, the territorial state, is a party to the treaty then the ICC would have authority to prosecute even if the defendant's state of nationality were not a treaty party and had not consented to jurisdiction of the ICC. This is the ICC's so-called jurisdiction over non-party nationals.

This jurisdiction over non-party nationals has been central to the controversy concerning the ICC's jurisdiction particularly within the United States. I don't want to rehearse the whole legal debate about non-party jurisdiction here but I would like to discuss what I think is the underlying meaning of that controversy. What I think is ultimately at stake, is the tension that I've alluded to between the human rights embodied in humanitarian law and the human rights of democratic governance. The ICC may in some circumstances prosecute an individual even without the consent of that defendant's state of nationality.

Now the very clear advantage of this ICC power to prosecute is that all too often the state is the problem. States often collude in genocide, war crimes, and crimes against humanity and then tend to shield the perpetrators of those crimes. If the ICC requires the consent of the defendant's state of nationality before it can prosecute then the court's purpose would be largely defeated. An international court is needed most when the perpetrator acted for or is shielded by a government. For that reason the ICC needs and has genuinely super-national powers, powers that are to be used in those particular cases where a state is unable or unwilling to render accountability. So where the territorial state consents to ICC jurisdiction, the ICC has the authority under the treaty to prosecute a defendant without the consent of his state of nationality. In essence it's a super-national solution to the problem of national transgressors.

This kind of super-national authority is a new departure, a new step. Even while complementarity comports with and supports the authority of the state in a state-based international system, it also goes beyond state authority and makes an exception. Where crimes of genocide, war crimes, or crimes against humanity have been committed or are alleged there is now to be an authority higher than the state and this is a genuine innovation.

There is a feature of this innovation, however, that's gone seriously unexamined. We've created a super-national judicial authority but have not really carefully examined its democratic legitimacy. This stands in stark contrast to our experience with, for instance, the World Trade Organization where the debate had very much focused on the so-called democratic deficit of that international organisation. By contrast with the ICC, we've created a powerful new international institution but oddly we have had virtually no discussion of the democratic features of this new power.

The ICC will wield governmental authority as a judicial body to prosecute or punish individuals. What is the democratic linkage then between this organ of governance and the government? Well for national states that are party to the treaty, their representation comes through their own state's consent to become a party to the treaty and it continues through participation in the Assembly of State parties, the governing body overseeing the court.

But what then about non-party nationals? What's the democratic basis for the ICC's power as applied to populations whose states have not consented on their behalf and are not represented in the Assembly of States parties. Here it would be hard

to claim democratic legitimacy for the ICC. If that's the case or if that's even arguable it raises the question – why have we heard no clamour about it or even discussion of the democratic credentials of the ICC? I think that we can identify the reason.

The mandate of the ICC is due to it being very thin and very important. The implicit unarticulated assumption seems to be that if there is any democratic loss at all it's negligible because the court's mandate is so thin and circumscribed. The implicit reasoning seems to be that first of all the ICC's jurisdiction over non-party nationals is an exception that gives the ICC authority to act only when states fail to do so and, second, that exception to state prerogative is thin because, unlike the WTO, the ICC is not intended to make law and policy, rather the ICC mandate is to apply clear, uncontroversial standards exist in international law. Genocide, war crimes and crimes against humanity are crimes, nobody debates that, and so the argument goes, there is no democratic or undemocratic decision-making to discuss.

But here the reasoning breaks down. It's true that the prohibitions of genocide, war crimes, and crimes against humanity are unquestionable, but applying that law will inevitably turn out to be far more complex and politically fraught than are the court's prohibitions. There will be questions large and small about the content and interpretation of the law even with the element of crime in place relative to the ICC statute. For example, relative to the war crime of causing excessive death, injury, or damage, are countries with the resources to use precision guided munitions obliged to use those weapons in order to minimize collateral damage rather than using much less expensive ordinary kinetic weapons? Or relative to that same war crime of causing excessive death, injury or damage, are belligerents who have not invested in or cannot afford night vision goggles prohibited from fighting at night because excessive collateral damage could be avoided with the goggles? Or relative to the crime of genocide, what's the intent requirement for command responsibility for genocide? Where the commander knows of the subordinate's genocidal intent but does not entertain that intention himself, does he have the necessary mental element for conviction for genocide? Relative to the war crime of attacking civilian objects, what is the status of dual use targeting where the targets are objects like a bridge, television station, or electrical grid that's partially in military use and partially in civilian use.

These thin questions are not answered, and they entail enormous political and even moral issues and controversies. They go to how much needs to be spent for a given degree of military strength, to basic issues of North/South politics, to issues of which countries can afford to fight with which allies and coalitions and what would be the cost of warfare including humanitarian intervention. Each of these questions involves areas where the law is indeterminate and the politics are complex and don't require anything like the mere application of the law to the fact.

So inevitably the ICC will be a feature and an organ of global governance as it makes and applies international law and policy. As a consequence we can't avoid the question of the democratic legitimacy of the ICC by supposing that there's no policy-making or law making that will be done there.

It's also no answer to the problem of democratic governance to say that the solution is for each state to become a party to the ICC treaty and thereby to again avoid the Assembly of States parties. Insofar as the states parties will govern the court through voting in the Assembly of States parties, the Assembly system involves the form of governance by majority rule and states cannot and should not be forced into a majority rule system. A system based on the consent of the government requires that that consent be meaningful, that it be optional, that there will be the option of

alternatively not consenting. The question of majority rule in any form at the international level is, as you well know, notoriously complex. The related issues concerning global democracy within or outside the UN system are enormous.

Obviously these questions go well beyond the scope of our session today but what is clear is that as we move forward in constructing international institutions that will wield governmental power we ought to be paying very careful attention to democratic control. I don't trust governments, I presume that you don't either. Indeed, if we did we wouldn't have any need for human rights safeguards. As we construct organs of international governance we need to be every bit as attentive to the needs for checks on power and mechanisms for accountability to the government as we would be at the national level. In fact, we may need to be more careful because, while states may provide checks on each other, a global government would have no such natural checks and balances.

There are two different things that we want here, the human right to freedom from violent abuse and a way to representative government. Neither can be sacrificed. Quite obviously we can't countenance the abuse the innocent, nor can we acquiesce in the erosion of democratic governance. In fact, the two ultimately are linked; the erosion of democracy leads eventually to violent abuse.

Hurst Hannum, professor of International Law, Fletcher School of Law and Diplomacy:

When I saw that the topic of this particular panel would be the International Criminal Court, I thought there are a number of different things that would be really interesting to talk about. But I just think it will have to be jurisdiction because there are differences of opinion about what crimes should come under the jurisdiction of the court, differences that will surely arise, once the court becomes operational, about where the national system should deal with a case and where the ICC should deal with a case. It actually makes me sad that what I felt I had to talk about (and particularly because it's most relevant to the overall topic of this symposium, sovereignty and intervention) is this other area where there is disagreement of the ICC. Although I'm going to argue that there might not be as much disagreement as you might think, certainly not from the political perspective of the rest of the world. That is, if you go to the core of the ICC regime, should this court be able to indict anybody wherever they're from or should its jurisdiction over a particular suspect be dependent on whether that suspect's state has accepted the jurisdiction of the court. Again this is not just an academic discussion but something that is continuing to affect very much this new institution as it's getting going and to be very damaging.

There are very different views. There are a few states, and of course the United States among them, that are of the view that the ICC's jurisdiction is exorbitant, it's an unacceptable challenge to their sovereignty. But I should say that the vast majority of other states do not view the ICC in that way and I would argue that is the different world view that is a reality now despite what the United States thinks.

So just to put some detail onto that, there are now a total of 140 states that have either signed or ratified the Rome statute, the treaty. The last one to join was Afghanistan. That's really quite extraordinary given the fact that this treaty was only agreed less than four years ago. If you look at any case of treaty ratification in other contexts it's extraordinary. I think it's also significant that even states that haven't yet become party to the treaty, many of these states are not opposed in principle to

this particular aspect of the court and the jurisdictional regime, including Russia and China. You might be surprised to hear that but even I believe in the last two weeks there have been serious meetings in Russia in the Duma about the ICC and China has certainly expressed concerns about the ICC but not the kind of concerns about the jurisdictional regime that has just been talked about.

During the negotiation of the Rome statute the United States was one of the states that was pressing very strongly for a jurisdictional regime for the court that was based on consent. They wanted a kind of locked-in system where a state would have to not just ratify the treaty but agree to be bound by a list of crimes, a sort of menu approach, which has actually been adopted. Also, the United States basically wanted the ICC to be very much an arm of the Security Council, for obvious reasons: it would be able to have a lot more control. There were other states that wanted the ICC to have universal jurisdiction, so in other words any individual from any state in the world could essentially be brought before the court. What resulted was a compromise where the court would have jurisdiction automatically where a state ratifies the treaty. There's no extra sense of opting in for certain crimes but the court doesn't have universal jurisdiction; it only has jurisdiction in either the territorial state, the state where the crime took place, or the state of nationality of the accused, those states that are party to the statute, or very significantly have accepted its jurisdiction on an ad hoc basis for that particular case. In addition, the court will have jurisdiction over cases referred to it by the Security Council. So this was the middle way, if you like, that was agreed in Rome.

Sovereignty is number one among the concerns of the United States, and this does leave some margin for the court to have jurisdiction over a national non-state party and that is something which the United States has continued to be unhappy about. Is this such an outrageous idea? Well, if the United States thought so it's surprising that the United States has actually, along with other states, of course, accepted other treaties such as the Geneva Convention and those relating to terrorism that obliges a state to pursue those suspected of committing relevant crimes regardless of whether the suspects are nationals of the states party to the treaty. So it's not as if this is a totally unheard of idea. As I've mentioned, the reality is that most of the rest of the world has reached consensus on this point that it is acceptable for the ICC to have jurisdiction even over individuals who are nationals of a state that has not accepted the jurisdiction of the court.

I do think it's also significant that even though there may be room for disagreement on interpretation of some of the specific crimes that are listed in the Rome statute, broadly speaking even the United States, I should say, accepts the list of crimes that are set out in the Rome statute as representing crimes that are international crimes.

Similarly with the procedure and how the court will operate, the highest due process standards are incorporated within the procedures in the way in which trials will be held. We've just seen eighteen judges elected who are of extremely high quality. So I think that we can have a lot of confidence in this court. Obviously it's now at a crucial juncture as it sets out and it's got a long way to go but it has a very strong base.

I'm not going to detail all the United States's strong efforts that are going on but just to say that the United States didn't stop raising its concerns at the end of the Rome conference after the ICC treaty was adopted but has continued extraordinary efforts to try to make sure that no U.S. citizens will ever come before the ICC and those words have been used by the U.S. Ambassador to the UN. Some of you may

already be aware, it's even become something of a joke in Europe — the “American Serviceman Protection Act,” which is the act aimed at ensuring that the U.S. government isn't going to co-operate with the ICC and may even take measures to rescue people that might come within its grasp. This Act has been nicknamed the Hague Invasion Act in Europe and there are actually symbolic plans during the inauguration of the court to have defenses put up on the beaches in the Netherlands against an American invasion, just to show up how ridiculous this approach is. The U.S. government is still flying around the world trying to reach these bilateral agreements with a number of different states to ensure that U.S. nationals can't be brought to the court.

These American efforts are not only very much the prevailing view among other states but are actually extremely damaging to the court and to the whole concept of the court as it is trying to establish itself now as a universal institution. Of course, it's creating enormous resentment and in attending the negotiations of the various documents that needed to be drafted after the Rome statute on procedure and the crimes and things, almost every negotiating section would be dominated by concerns about what the United States government was trying to do. While this very difficult and serious business of trying to build the court was going forward people would find themselves having to resist the latest attempts by the United States to undermine the institution. It really is quite extraordinary the lengths to which the government has been willing to go.

Another reason why I would say that I'm sad to have to address this particular question, is that the United States has played an enormously positive role in bringing about and supporting other international accountability mechanisms. So that's why it's particularly sad to have to address this particular question. Of course, this is not only a legal but also a moral issue and it makes it very difficult for the United States to be working enthusiastically for accountability, whether it's Saddam Hussein or the Bosnias or Rwandas, when it refuses to even contemplate the possibility that U.S. nationals might ever be brought before this court. Z