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International War Crimes &(and) Other Criminal Courts: Ten Recommendations for Where We Go from Here and How to Get There - Looking to a Permanent International Criminal Tribunal

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INTERNATIONAL WAR CRIMES & OTHER CRIMINAL COURTS: TEN RECOMMENDATIONS FOR WHERE WE GO FROM HERE AND HOW TO GET THERE—LOOKING TO A PERMANENT INTERNATIONAL CRIMINAL TRIBUNAL

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INTRODUCTION

I am especially pleased to participate in the 2005 Sutton Colloquium, "Protecting Human Rights: A Global Challenge." When Professor Nanda initially contacted me about this opportunity, we discussed what I might contribute and we decided it would be useful for me to review the various international war crimes tribunals which have emerged since the Bosnia and Rwanda atrocities in the early 1990's. I willingly chose this topic because of my long-time intellectual interest in bringing international war criminals and other international human rights violators to justice.

Every year I show my University of Montana Public International Law students the film *Judgment at Nuremberg*[2] to illustrate why we must never again allow a country's judicial system to help destroy the legal rights of people the system is supposed to protect. This depiction of the Nuremberg Tribunal's trial of Nazi Germany judges and prosecutors who used the law to facilitate the Holocaust is a "must-see" for everyone interested in meting out justice to those who themselves forgot they were required to do so. I am always amazed by how American law students react when they learn what judges who become part of a savage regime are capable of doing from the bench.

I have also shown Court Television's outstanding video of the International Criminal Tribunal for the Former Yugoslavia (ICTY) trial of Dusko Tadic to not only my University of Montana law students, but also to Russian military academy students from Central Asia who come to Montana for rule of law education and training. These young cadets readily grasp the significance of what the ICTY was created to do, namely subject military and paramilitary officials to international law and justice principles. The Tadic video requires these young future military leaders to think about how far they might be willing to go in straying from, or alternatively, adhering to, well-established Geneva Convention rules and principles applicable to their careers as professional soldiers. Our class discussions always seem to generate multiple "teaching moments," or perhaps better stated, "learning

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2. Judgment at Nuremberg (MGM 1961).

moments," as these young people from countries with few modern law and justice traditions grapple with what the video portrays.

My own intellectual curiosity regarding these tribunals became permanently whetted when, during a visit to the ICTY a number of years ago, a senior ICTY official asked my opinion on whether the ICTY endeavor was worth the effort and cost. This was long before Slobodan Milosevic was hauled before the ICTY, and the mood at The Hague seemed one of doubt. I thought about this question and responded that it might well be worth the effort if even one war criminal were tried and convicted, because this would set the stage for others to be tried either in The Hague, or in some other court created to hear these cases. I further stated that the Tadic case was probably only the beginning, with others surely to come. My oldest daughter, a high school student who accompanied me on this ICTY visit, asked me after we left why the world community would not try war criminals who committed the Bosnian and Rwandan atrocities. Let me suggest that answering such a question from a smart, idealistic adolescent is a difficult task.

In preparing for this year's Sutton Colloquium program, I reflected on all the above experiences, as well as my own thinking about the state of international criminal tribunals to date. Upon such reflection, I have reached a number of conclusions, surprising even to myself, about where we go from here. I start with the proposition that what we have seen thus far, beginning with the Nuremberg and Tokyo War Crimes Tribunals, may reflect a well-meaning effort, but the world can and must do better. I consider the International Criminal Court (ICC) a noble idea which cannot achieve its purposes in any meaningful way as long as so many key nations in the world refuse to participate, and more importantly, as long as cooperation with ICC jurisdiction remains essentially voluntary and discretionary. Instead, only the UN Security Council has the stature, and more importantly, the power, to compel adjudication of all major international criminals in a manner likely to inspire world confidence. I have set forth below 10 specific recommendations intended to provoke debate, and perhaps ultimately to provoke changes, concerning, using a new UN Security Council Permanent International Criminal Tribunal (PICT)[3] to bring major perpetrators of international atrocities to justice.

I. RECOMMENDATION ONE: RECOGNIZE THE NEED TO DO BETTER IN BRINGING MAJOR INTERNATIONAL CRIMINALS TO JUSTICE IN A TRIBUNAL OFFERING GREATER PROTECTIONS FOR VICTIMS AND DEFENDANTS ALIKE

The world's nations, acting through the United Nations, must do a better job than we have seen to date of bringing justice to perpetrators of war crimes, genocide, crimes against humanity and other international criminal atrocities. Too many known perpetrators of horrible international crimes remain at large and may

3. I apologize to the Project on International Criminal Courts and Tribunals for selecting the PICT acronym. It is the best I can come up with for now. Those interested in the Project's invaluable international law contributions to the study of international criminal courts should access the www.pict-pcti.org web site.

never be tried unless drastic steps are taken.[4] If this situation continues, confidence in rule of law and justice principles will wane with time and other, more drastic, means to achieve justice for the victims of such crimes could well be attempted to the detriment of world peace and stability.[5]

I therefore recommend first that we accept the notion that the world must bring the leaders of international criminal atrocities to justice promptly and fairly. Starting with Nuremberg and Tokyo, creation of special international courts in response to specific global tragedies has been controversial among scholars.[6] All too often, a Victor's Justice cry has arisen.

The principal U.S. architect of the Nuremberg Tribunal, Justice Robert Jackson, noted: "This is the first case I have ever tried when I had first to persuade others that a Court should be established, help negotiate its establishment, and when it was done not only prepare my case but find myself a courtroom in which to try it."[7]

Justice Jackson undoubtedly did not see the troubling implications of his remarks because when he made them the need for Nuremberg's trials was all but unquestioned.[8] Nevertheless, with the benefit of historical hindsight Justice Jackson's description of creating a legal scheme to try war criminals as he went along is particularly apt. Even Professor Meltzer, who collaborated with Justice Jackson at the Nuremberg trials, has suggested that Nuremberg may have operated on problematic ex post facto legal principles characteristic of what military victors often espouse.[9] The "Victor's Justice" problem seems especially applicable to the Tokyo trials, based on scholarly opinion.[10]

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4. *See generally* U.K. FOREIGN AND COMMONWEALTH OFFICE & THE DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, Annual Report on Human Rights (2005), *available at* http://www.fco.gov.uk/Files/kfile/HumanRights2005.pdf (discussing the current status of international law as applied to violators of human rights) (last visited Nov. 29, 2005).

5. Gerald E. O'Conner, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927, 941 (1999).

6. James Crawford, *Current Developments: The ILC's Draft Statute for an International Criminal Tribunal*, 88 A.J.I.L. 140, 141 (1994).

7. Bernard D. Meltzer, *Robert H. Jackson: Nuremberg's Architect and Advocate*, 68 ALB. L. REV. 55, 56 (2004) (quoting Robert Jackson, Chief Prosecutor, Nuremberg Military High Criminal Trials).

8. *Id.* at 60. At least one Jackson contemporary, prominent Republican political figure Robert Taft, did scathingly attack Nuremberg on ex post facto grounds but his attack was seemingly ignored at the time. Henry T. King, *Robert Jackson's Transcendant Influence Over Today's World*, 68 ALB. L. REV. 23, 29 (2004); M Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying international Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 290–91 (1993). Professor Bassiouni noted years ago the protection against ex post facto laws and punishment as one of the most fundamental international law rights recognized by most nations.

9 Meltzer, *supra* note 7, at 60–62.

10. Frances Olsen, Keynote Address, 67 ALB. L. REV. 555, 555-56 (2003); Timothy L.H. McCormack, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudication Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Selective Reaction to Atrocity: War Crimes and the Development of*

The ICTY and the International Criminal Tribunal for Rwanda (ICTR) were ad hoc tribunals created by the UN Security Council in response to horrible, wholesale atrocities in Bosnia and Rwanda.[11] They were not supposed to connote Victor's Justice; the Security Council created them on behalf of all world nations.[12] The ICTY in particular acknowledged fairness problems with the Nuremberg and Tokyo Tribunals, adopting in its initial phase evidentiary and procedural rules designed to prevent their recurrence.[13]

Recent reassessments, however, have begun to raise substantial Victor's Justice perceptions about the Rwanda Tribunal, which was created to address some of the greatest atrocities in Rwanda and where victims have the greatest need of justice.[14] This in turn raises the question of whether any ad hoc tribunal created to hear significant international law cases in one particularized context can fully assuage reservations about possible Victor's Justice problems.

Moreover, even the ICTY is not free from Victor's Justice stigma; many Serbs now view Slobodan Milosevic as a victim of justice-run-amok over the ineffective ICTY handling of his televised trial.[15] It is also difficult to understand why many Serbs would not view ICTY as the result of Victor's Justice when the ICTY was created solely to address acts committed in what many Serbs believe was rightfully Serbian territory.[16] At a minimum, a permanent tribunal such as the proposed PITC, with global jurisdiction, undermines, if not eliminates, the basis for such perceptions. Indeed, one must question whether the Security Council demonstrated too much selectivity in not creating similar tribunals to address these kinds of atrocities everywhere they occurred, such as Kuwait. Instead the Security

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International Law, 60 ALB. L. REV. 681, 717–18 (1997); Arthur Thomas O'Reilly, *Command Responsibility: A Call to Realign Doctrine with Principles*, 20 AM. U. INT'L L. REV. 71, 75–77 (2004).

11. *See generally* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law,* 15 AM. U. INT'L L. REV. 321 (2000) (addressing the importance of enforcement issues of international criminal through the development of the two current ad hoc Tribunals in the Hague and Arusha).

12. Timothy L.H. McCormack, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudication Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Selective Reaction to Atrocity: War Crimes and the Development of International Law*, 60 ALB. L. REV. 681, 728-29 (1997); KARINE LESCURE & FLORENCE TRINTIGNAC, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA: THE WORKINGS OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE HAGUE 3–4 (Kluwer International) (1996); M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 201(Transnational Publishers) (1996); Sherrie L. Russell- Brown, *Stefan A. Riesenfeld Symposium 2002: Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350, 366–67 (2003).

13. *See generally* Megan A. Fairlie, *Due Process Crisis: The Diminution of Live Testimony at the ICTY*, 34 CAL. W. INT'L. L.J. 47 (2003) (describing this process).

14. Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N. U. L. REV. 41, 49 (2005); Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 395–97 (2004).

15. Michael P. Scharf, *Is It International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice*, 2 J. INT'L CRIM. JUSTICE 330, 334–36 (2004).

16. Richard D. Bilder, *Kosovo and the New Interventionism: Promise or Peril?*, 9 J. TRANSNAT'L LAW & POL'Y 153, 174–75 (1999).

Council only created them for situations where the Security Council had the power to make such tribunals work without resort to significant military force.[17]

II. RECOMMENDATION TWO: RECOGNIZE AND UTILIZE SECURITY COUNCIL POWER TO REQUIRE COOPERATION WITH THE PICT

The Security Council should assume the role of creating a single PICT with jurisdiction over all international acts of genocide, crimes against humanity, war crimes and such other offenses against the law of nations as the Security Council chooses. Only the Security Council has the legal power to override an individual nation's shielding of international criminals and require the national cooperation necessary for the tribunal to exercise its powers effectively, and most commentators consider such cooperation crucial for prosecuting (as well as defending) the cases.[18] Even the ICTY and ICTR have faced difficulties in obtaining such cooperation from individual states; this may well be attributable in part to the somewhat limited geographical jurisdiction of these two Tribunals.[19]

The atrocities committed in East Timor and Sierra Leone provide two examples of why there should be a stronger and more direct Security Council approach to mandating cooperation. In Indonesia the failure to prosecute high-ranking generals and others who planned the East Timor slaughters may never be tried in their own country.[20] Charles Taylor, wanted by the Sierra Leone Tribunal, received safe haven in Nigeria with few current prospects of being turned over to the tribunals so long as he behaves himself where he is.[21] As long as these international criminals can thumb their noses at those who wish to try them, the world itself becomes a victim of their atrocities. In addition, it has been suggested that under the current legal regime individual states, and even international bodies, can and arguably do conceal evidence for the purpose of ensuring pre-ordained

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17. Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411, 415 (1997).

18. Marieke L. Wierda, *What Lessons Can Be Learned From the Ad Hoc Criminal Tribunals?*, 94 U.C. DAVIS J. INT'L L. & POL'Y 13, 17–18 (2002); Jacob Katz Cogan, *International Criminal Courts: Difficulties and Prospects*, 27 YALE J.INT'L L. 111, 120 (2002); Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 180–81 (2000).

19. Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 12 (2005).

20. *See* Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 401–18 (2003) (noting Indonesian judicial unwillingness and inability to pursue prosecution); *See* Suzanne Katzenstein, Note, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 259, 271–75 (2003).

21. Tom Briody, *Defending War Crimes in Africa: The Special Court for Sierra Leone*, THE CHAMPION, Jan./Feb. 34 (2005, *available at* http://www.criminaljustice.org/public.nsf/PrinterFriendly/A0502p34?openDocument (last visited Nov. 29, 2005); James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 635-36 (2005); *See generally* Micaela Frulli, *The Question of Charles Taylor's Immunity – Still in Search of a Balanced Application of Personal Immunities?*, 2 J. INT'L CRIM. JUST. 1118 (2004) (pointing out that Taylor may never be transferred to the Sierra Leone Court based on his status as Liberia's head of state and the immunity this status may have given him when he allegedly committed or ordered commission of the atrocities in Sierra Leone he has been charged with).

international tribunal case outcomes.[22] Only the Security Council could effectively address this problem.

III. RECOMMENDATION THREE: TRY THE CASES WHERE THE ATROCITIES OCCURRED

The proposed PICT should adjudicate cases and otherwise function as a complete criminal court for both trial and appellate purposes entirely within the countries where the criminal atrocities occurred, absent very extraordinary circumstances (limited to cataclysmic acts of nature or war which destroy a country's infrastructure). In other words, the PICT would have mandatory local venues to bring the machinery of law and justice to the victims, evidence and perpetrators, so those involved in and affected by these criminal acts can see for themselves that these international courts are not remote, impersonal entities. There is probably no other way to bring credible justice directly to the people who deserve it.

As former ICTY prosecutor Louise Arbour has commented, "Only in extraordinary circumstances would courts grant a change of venue for a criminal trial to be held in a different jurisdiction."[23] She aptly describes the problem of having international criminal courts located in venues remote from where the crimes are committed and stresses the necessity of bringing criminal justice locally.[24] Perhaps most significantly, the failure to localize these trials severely compromises the ability of the prosecutor to help shape local perceptions of how the machinery of justice is actually functioning in these cases.[25] Louise Arbour emphatically urges that "we have to be able to bring criminal justice locally."[26] Professor Jose E. Alvarez further notes, "The lesson we should be drawing from Rwanda is that attention to domestic processes . . . [is] vital to the prospects for restoring the rule of law when it matters most: that is within the communities and nations devastated by mass atrocities."[27]

Perhaps most tellingly, Professor Alvarez points out that "trials are undermined and not merely rendered more difficult the greater the distance between their venue and the location of witnesses and evidence."[28] Localizing

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22. Jacob Katz Cogan, *International Criminal Courts: Difficulties and Prospects*, 27 YALE J.INT'L L. 111, 121-27 (2002) (discussing various ICTY cases); *See also* Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, 929 (2003) (discussing ICTY witness subpoena limitations).

23. Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results*, 3 HOFSTRA L. & POL'Y SYMP. 37, 45 (1999); *See also* Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 398-99 (2003) (suggesting ICTR is too remote from the Rwandan people to have meaningful impact in the country).

24. Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results*, 3 HOFSTRA L. & POL'Y SYMP. 37, 44-6 (1999).

25. *Id.* at 45–6.

26. *Id.* at 45.

27. Jose E. Alvarez, *Lessons From the Akayesu Judgment*, 5 ILSA J. INT'L & COMP. L. 359, 366 (1999).

28. Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L.

these trials and their appeals appears to be essential for serving the ends of justice to the benefit of all concerned.

IV. RECOMMENDATION FOUR: CREATE A STRONG PICT SECURITY AND PROTECTION FORCE

The Security Council should approve the creation of, and oversee, a well-trained international judicial security and protection force able to ensure judge, prosecutor, defendant, defense counsel, victim and witness safety. As an international security force controlled by the PICT directly, this new body would have the authority to cross national borders and perform duties as set forth in its stated powers. Individual nations would be required to cooperate with this body, and discretion not to do so would be limited. Witness protection has been a particularly difficult problem in international tribunal cases to date because this requires cooperation of national governments prone to citing national security concerns as a basis for imposing barriers to performing this core function.[29] This must be corrected for the benefit of defendants and victims alike.[30]

V. RECOMMENDATION FIVE: OFFER MORE AND BETTER PROTECTION OF DEFENDANTS' RIGHTS

The new PICT must reverse the all-too-marked trend of other international criminal tribunals to gravitate towards the lowest common denominator in the rules and procedures applicable to protecting defendant rights. I share the view of the late Monroe Leigh that any international or national court created to try war criminals and other international human rights violators must "establish itself as the preeminent defender of . . . the right of every accused to a fair trial according to the most exacting standards of due process required by contemporary international law."[31] Instead of adhering to the "most exacting" standards of defendant rights, however, serious problems seem to afflict all of the international and national tribunals to date on fundamental defendant rights. As one commentator has noted, "[t]here has been relatively little interest in the rights of the accused before

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365, 404 (1999).

29. Jacob Katz Cogan, *International Criminal Courts: Difficulties and Prospects*, 27 YALE J.INT'L L. 111, 118021 (2002).

30. *See generally* Fatema E. Fallahnejad Burkey, *Recent Development: The Prosecutor V. Aleksovski, 30 May 2001, Judgment on Appeal by Anto Nobilo Against Finding of Contempt: A Critical Analysis of the ICTY Appeals Chamber's Abandonment of Witness Protection Measures*, 82 WASH. U. L.Q. 297 (2004 (discussing the public policy supporting witness protection measures). For a different kind of witness protection problem involving vulnerable populations such as children, see Stuart Beresford, *Child Witnesses and the International Criminal Justice System Does the International Criminal Court Protects the Most Vulnerable?*, 3 J. INT'L CRIM. JUST. 721 (2005).

31. Monroe Leigh, Comment, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235, 237 (1996); *See generally* Fairlie, *supra* note 12 (discussing the Tribunal's rules of procedure and evidence and their effect on trials); *See also* Andrew J. Walker, *When a Good Idea Is Poorly Implemented: How the International Criminal Court Fails to be Insulated From International Politics and to Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245, 259–62 (2004).

international criminal courts," and fair trials are often all but impossible because of serious evidentiary problems in these cases.[32]

For example, despite endemic problems with evidentiary hearsay use in almost all these cases, the widespread use of hearsay continues.[33] In addition, ready access to release on bail has proved elusive for many defendants in contravention of well-established international human rights law obligations. The notion of speedy trials is also a fiction in many of these cases, as is the right to competent defense counsel.[34] The use of anonymous witnesses must cease and can do so with the creation of a viable witness protection security force. The need for these reforms is evident based on norms of international human rights. Often overlooked is the international law obligation for courts to apply international law principles in protection of the rights of criminal defendants, as discussed below.[35]

A. The Right To Confront Witnesses & The Hearsay Problem

One of the most polemic themes involving international criminal tribunals to date has involved the use of anonymous witnesses, which involves hearsay problems that call into question the fairness of the underlying trials.[36] That this has been an issue at all seems surprising, given the international human rights obligations appearing to require that defendants have access to witnesses at trial.[37] Nonetheless, hearsay evidence derived from anonymous witnesses appears to have become the norm rather than the exception in important international cases to date.[38] The creators of the ICTY and ICTR relied upon different sources of international law.[39] This in turn resulted in a belief among the tribunal judges

32. Cogan, *supra* note 29, at 112.

33. Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha* 37 COLUM. J. TRANSNAT'L L. 725, 745–47 (1999).

34. Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia* 10 INT'L LEGAL PERSP. 111, 117–18 (1998).

35. *See* Draft Articles on Responsibility of States for International Wrongful Acts, *Report of the International Law Commission on the work of its Fifty-Third Session*, U.N. GAOR, 6th Comm., 56th Sess., Supp. No. 10, at 43–44, U.N. Doc. A/56/10 (2001) (defining wrongful state acts according to international law and imposing this obligation on the courts).

36. *See* Monroe Leigh, Comment, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235, 235-38 (1996); *See, e.g.*, David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 413–20 (2002); *See also* Kellye L. Fabian, Note and Comment, *Proof and Consequences: An Analysis of the Tadic and Akayesu Trials*, 49 DEPAUL L. REV. 981 (2000) (analyzing problems of anonymous witnesses).

37. *See, e.g.*, Universal Declaration of Human Rights, art. 10, G.A. Res. 217, U.N. GAOR, 3rd Sess., at 71, U.N. Doc A/810 (1948) (requiring fair and public hearings for all defendants) [hereinafter UDHR]; *See also* International Covenant of Civil and Political Rights, Dec. 16, 1966, art. 14, 999 U.N.T.S. 171 (requiring fair and public hearings and guaranteeing the right of defendants to examine all witnesses) [hereinafter ICCPR].

38. *See, e.g.*, David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361 (2002); *See generally* Theodor Meron, Editorial Comment, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996) (examining the creation of customary law in international humanitarian law).

39. *See* Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal*

themselves that there was a rationale for their decisions somewhere in international law.[40] Judge Wald explains the history of the use of hearsay evidence in the ICTY quite clearly: "There has never been a bar against hearsay in ICTY trials."[41] The ICC likewise has no hearsay bar.[42] These legal realities, however, do not justify their application.

In his majority opinion, U.S. Supreme Court Justice Scalia provides a detailed history of hearsay evidence and the U.S. Constitution's witness confrontation clause in *Crawford v. Washington*.[43] He demonstrates that the ban against most hearsay and a criminal defendant's right to confront all witnesses whose testimony will be used by the prosecution reflects not merely a U.S. - British common law principle, but also a civil law rule dating back to the Romans.[44] A primary purpose of this rule appears to be an inherent distrust of granting judges too much discretion in admitting criminal case evidence:

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers [of the U.S. Constitution], however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people . . . . They were loath to leave too much discretion in judicial hands.[45]

One international commentator has observed:

> Two thousand years ago witness anonymity was rejected by the ancient Romans, founders of the adversarial system of criminal trial, as a matter of basic principle. Informing the accused of the identity of his or her accusers was recognised as an elementary requirement of fairness and indispensable safeguard against wrongful conviction. At various times and places throughout history it has been argued that countervailing considerations may justify depriving the accused of this rudimentary right. On occasion, these arguments have succeeded, yet

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Declaration and the Search for Accountability, 26 DENV. J. INT'L L. & POL'Y 591, 599–601 (1998); *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1–2, U.N. Doc. S/RES/827 (1993); *See also* S.C. Res. 955, U.N. SCOR, 50th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

40. Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L. J. 237, 238–39 (2002).

41. Patricia M. Wald, *Rules of Evidence in the Yugoslav War Tribunal*, 21 QUINNIPIAC L. REV. 761,768 (2003); *See generally* Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535 (2001) (discussing how the ICTY moves further away from the Anglo-American model which permits very limited use of written substitutes for live testimony).

42. Andrew J. Walker, *When a Good Idea Is Poorly Implemented: How the International Criminal Court Fails to be Insulated From International Politics and to Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245, 278 (2004)..

43. Crawford v. Washington, 541 U.S. 36 (2004).

44. *Id.* at 43.

45. *Id.* at 67 (other citations omitted).

> history's judgment of such occasions has been damning. A key lesson from the past is that witness anonymity is an open invitation to perjury, injustice and oppression.[46]

I share this commentator's view that whatever the virtue of hearsay evidence and witness anonymity, including the expedition of trials and witness protections, this approach reflects "a cure worse than the disease."[47] The PICT should heed these warnings and concerns by adopting rules against such practices.

B. The Right to Bail and Prompt Bail Hearings

One of the great travesties characterizing international criminal cases to date, has been disregard for the right to bail, accompanied by the parallel right to a quick bail hearing.[48] As one commentator correctly notes, "Internationally accepted standards of human rights require that persons accused of a crime should be released from detention pending their trial and the . . . adjudication by a court of law of their guilt or innocence wherever possible."[49] It is thus inexplicable that international defendants who can afford bail and have nowhere to flee are nonetheless not allowed bail while on trial. The ICTY and the ICTR have rendered various decisions to the effect that pre-trial release on bail should be the exception rather than the rule.[50] The PICT should generally require reasonable bail as a condition for all defendants, with only evidence of likely flight as the most applicable exception.[51]

C. The Right to Prompt Trials

Even more problematic than the lack of bail opportunities is the inability of international criminal tribunals to date, especially the ICTR, to bring defendants to trial rapidly, in contravention of international law obligations to do so.[52] Although

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46. David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 423 (2002).

47. *Id.* at 424.

48. Universal Declaration of Human Rights, art. 3, G.A. Res. 217, U.N. GAOR, 3rd Sess., at 71, U.N. Doc A/810 (1948) (guaranteeing right to liberty); International Covenant of Civil and Political Rights, Dec. 16, 1966, arts. 9.1, 9.3, 999 U.N.T.S. 171 (guaranteeing defendants the rights to liberty, to be brought promptly before the court to be charged, and generally to release on bail). For a discussion of an international legal right to bail, see Kurt X. Metzmeier, *Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT'L L. REV. 399 (1996).

49. Christopher Lehmann, *Bail Reform in Ukraine: Transplanting Western Legal Concepts-to Post Soviet Legal Systems*, 13 HARV. HUM. RTS. J. 191, 193 (2000).

50. Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 77–78 (1999); Daniel J. Rearick, *Innocent Until Alleged Guilty: Provisional Release at the ICTR*, 44 HARV. INT'L L. J. 577, 577–79 (2003); Matthew M. DeFrank, Student Commentary, *ICTY + Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change*, 80 TEX. L. REV. 1429, 1430–31 (2002).

51. Conditioning bail denial on flight risk seems to be a reasonably well-established international law principle. *See* Jeffery A. Hall, Note, *A Recommended Approach to Bail in International Extradition Cases*, 86 MICH. L. REV. 599, 599–600 (1987).

52. International Covenant of Civil and Political Rights, Dec. 16, 1966, arts. 9.3, 14.3, 999 U.N.T.S. 171 (guaranteeing the right to be brought to trial within a reasonable time); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying international Procedural*

recognizing the often extreme difficulties in gathering forensic evidence needed to bring such cases to trial,[53] one must nonetheless wonder why defendants often wait for years before their trials begin; all too often they wait for years while incarcerated. Even the ICTR Appellate Chamber has recognized this problem on occasion and ordered release of a defendant because of excessive detention and trial delay, but again, this appears to be the exception instead of the rule.[54] This state of affairs is not acceptable, and the PICT should impose rigorous trial deadlines for all cases brought before it.

D. The Right to Competent Defense Counsel

Access to competent defense counsel for international tribunal defendants, a fundamental right in international law, has been problematic and subject to concern by commentators.[55] It can only be hoped that by having one international tribunal linked to the Security Council, a standardized approach to setting quality, competency and resource criteria available to defense counsel and prosecutors on an even-handed basis can result.

VI. RECOMMENDATION SIX: CREATE A GREATER IMPACT BY PROSECUTING ONLY MAJOR INTERNATIONAL CRIMINALS, BUT DO SO PROMPTLY AND VIGOROUSLY

In assessing all the current international tribunals' productivity to date, it appears that too much money has been spent on too few results, despite my own initial views while visiting the ICTY that the expense was going to be worth it. As of 2004 more than $1 billion had been spent by the ICTY and ICTR together on several dozen cases involving well under 100 defendants.[56] Adding to this figure

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Protections and Equivalent Protections in National Constitutions, 3 DUKE J. COMP. & INT'L L. 235, 285–86 (1993) (recognizing international right to a speedy trial); *See also* Eric Husketh, Note and Comment, *Pole Pole: Hastening Justice at UNICTR*, 3 NW. U. J. INT'L HUM. RTS. 8, 1–2 (2005); Daniel J. Rearick, *Innocent Until Alleged Guilty: Provisional Release at the ICTR*, 44 HARV. INT'L L. J. 577, 577–78 (2003); Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 181-84 (2000) (all discussing ICTR backlogs).

53. Some of my former students who conducted forensic investigations in Bosnia as UN law enforcement experts have done riveting class presentations on this topic in my Public International Law course. Data on file with author.

54. Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 180–81 (2000) (discussing Barayagurza appeal); *But see* Jacob Katz Cogan, *International Criminal Courts: Difficulties and Prospects*, 27 YALE J.INT'L L. 111, 134-35 (2002) at 134–35 (describing reversal of the initial appellate decision in the same case).

55. ICCPR Article 14 appears to guarantee all defendants a right to counsel, presumptively competent, and at no expense to indigent defendants. For a discussion of Article 14 counsel rights, see Joshua E. Kastenberg, *Universal Jurisdiction and the Concept of a Fair Trial Prosecutor v. Fulgence Niyonteze: A Swiss Military Tribunal Case Study*, 12 U. MIAMI INT'L & COMP. L. REV. 1, 27–32 (2004). For discussions of defense counsel competency problems in international tribunals, see David Tolbert, *The ICTY and Defense Counsel: A Troubled Relationship*, 37 NEW ENG. L. REV. 975 (2003); Developments in the Law – International Criminal Law, Note, *Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982, 1983 (2001).

56. Daryl A. Mundis, *Note and Comment, The Judicial Effects of the "Completion Strategies" of the Ad Hoc International Criminal Tribunals*, 99 AM .J. INT'L L. 142, 142 (2005); *See also* Eric Husketh, Note and Comment, *Pole Pole: Hastening Justice at UNICTR*, 3 NW. U. J. INT'L HUM. RTS.

the costs of other international criminal tribunals (such as the Sierra Leone Special Court, the ICC, East Timor, etc.), which have yielded few tangible results to date, and the numbers become even more stark.[57] It is perhaps time to admit this and assess objectively how the PICT, backed up by a well-trained security force, can begin bringing major perpetrators of international crimes to justice rapidly and less expensively. There is no reason why a properly constituted tribunal security force, backed by Security Council legal powers, cannot find and bring all major international criminals to justice, because no nation could lawfully shield them. Assuming that the primary ICTY fugitives or others, such as Charles Taylor hiding in Nigeria, would qualify for major offender status before the new tribunal, the Security Council could effectively order all nations harboring such individuals to turn them over to the tribunal security force, which would have entry and arrest powers in these states.

VII. RECOMMENDATION SEVEN: APPLY ALL SECURITY COUNCIL POWERS NEEDED FOR THE TRIBUNAL TO FUNCTION

Simply stated, a state's failure to cooperate could trigger up to the full range of sanctions authorized by the UN Charter.[58] The Security Council must be prepared to take all measures needed to bring those formally charged to justice in the interest of addressing bona fide threats to international peace and security. These measures must necessarily include sanctions and even limited use of force, as needed. Permitting war criminals to live safely beyond legal reach may well constitute one of the world's greatest non-armed conflict threats to peace and security, by sending the message that those who commit egregious war crimes and other atrocities need not fear the consequences as long as they burrow into the right safe holes. For example, an aggressive approach in Indonesia would almost certainly achieve meaningful results in isolating the ringleaders of East Timor atrocities from the Indonesian people. It would also likely bring Charles Taylor to justice before the tribunal, if being before the tribunal is where he belonged. Moreover, even the fugitives currently evading ICTY reach would likely find their protection evaporated in the face of a professional, committed PICT security force backed by truly sharp Security Council teeth.[59]

8, 17-18 (2005), at 17–18 (discussing ICTR costs).

57. For an excellent analysis of international criminal justice cost issues, see James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 635-36 (2005).

58. The UN Charter, Chapter VII, Articles 39-42, authorizes imposition of a full range of economic, military and other measures; Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542 (2005); Christopher Joyner, *Reconciling Political Sanctions with Globalization and Free Trade: United Nations Sanctions After Iraq: Looking Back to See Ahead*, 4 CHI. J. INT'L L. 329, 330–32 (2003).

59. Interestingly, now that both the ICTY and the ICTR are under Security Council mandates to complete their work and go out of existence by December 31, 2008 and 2010, respectively, the pressure is on to get these major fugitives apprehended and tried, with the Security Council identifying full cooperation by all states as essential to its accomplishment; See also Daryl A. Mundis, *Note and Comment, The Judicial Effects of the "Completion Strategies" of the Ad Hoc International Criminal Tribunals*, 99 AM .J. INT'L L. 142, 143-45 (2005) for wind-down discussion.

VIII. RECOMMENDATION EIGHT: DEFINE ALL PICT OFFENSES CAREFULLY TO LEAVE NO DOUBT ABOUT WHICH OFFENSES AND WHICH INDIVIDUALS MAY BE TRIED

The Security Council should define the offenses within PICT jurisdiction carefully to include genocide, war crimes and crimes against humanity, because these international offenses, along with their judicial applications, are by now reasonably well-established under international law. By moving quickly to do so, the Security Council can perhaps head off charges of ex post facto justice which have plagued almost every one of the international criminal tribunals created since Nuremberg and Tokyo.[60] One argument espoused by commentators and the ICTY itself confronts the ex post facto critics by pointing out that a new international tribunal may validly apply customary international laws existing at the time of the tribunal's creation; furthermore, application of well-established customary international law offenses such as war crimes, genocide and crimes against humanity would not seem to offend too many due process notions.[61] On the other hand, the Security Council can decide this issue directly when it establishes the PICT and defines PICT jurisdiction by determining whether to apply only prospective jurisdiction to offenses committed after PICT creation.

IX. RECOMMENDATION NINE: RECONCILE PICT POWERS AND ACTIVITIES WITH THOSE OF THE NATIONAL COURTS, NATIONAL TRUTH & RECONCILIATION COMMISSIONS, AND THE ICC.

PICT powers and activities should be reconciled with those of national courts, national truth and reconciliation commissions, and the ICC. Because I propose having the PICT try only major criminals, it must be assumed that national courts or the handful of remaining hybrid multinational courts such as the one for Sierra Leone would try most of the rest.[62] One of the more justifiable criticisms of both the ICTY and the ICTR, as well as the Sierra Leone Special Court, is their collective incompatibility with national justice systems and inability to help those systems in emerging nations develop more effectively.[63] Although lip service has

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60. *See supra* note 4 and accompanying text.

61. *See generally* L. Elizabeth Chamblee, *Post-War Iraq: Prosecuting Saddam Hussein*, 7 CAL. CRIM. L.REV. 1 (2004) (suggesting that subjecting Saddam Hussein to trial by a UN-created international tribunal would not be ex post facto justice because he would be tried for offenses well-established under customary international law); Carol T. Fox, Note, *Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offenses*, 55 CASE W. RES. L. REV. 443, 463–68 (2004);*Prosecutor v. Dusko Tadic*, Case No. IT-94-I-AR72, Decision of Appeals Chamber on the Defense Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber.

62. Professor Ellis estimated about a year ago that at least 30 national courts with international war crimes and related offense jurisdiction had been created. Mark S. Ellis, *Coming to Terms with Its Past – Serbia's New Court for the Prosecution of War Crimes*, 22 BERKELEY J. INT'L L. 165 (2004). For a review of hybrid tribunals, see Laura A. Dickinson, Note and Comment, *The Promise of Hybrid Courts*, 97 A.J.I.L. 295 (2003).

63. James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 650-54 (2005); Varda Hussain, Note, *Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts and War Crimes Tribunals*, 45 VA. J. INT'L L. 547 (2005); David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes*

been paid to this issue, at least occasionally, the PICT should receive both the mandate and the resources to perform this vital function.

Another issue requiring careful consideration is that of complimentarity. Because the PICT would only have jurisdiction over those defendants deemed to be major international criminals, national courts would have plenty of defendants to try. I am inclined to grant primacy to the PICT over national courts in deciding who should try which defendants. As discussed below, I also recommend allowing the Security Council itself to be the sole PICT case referral source, and this would necessarily effectuate case-by-case complementarity review as a practical matter.

I also propose codifying the legitimacy of national truth and reconciliation commissions in the PICT's governance powers, at least for the purpose of authorizing PICT cooperation with them, in order to end the incessant debate over whether these commissions should exist.[64] Although it must be left up to each country to decide for itself whether to have such a commission following a national catastrophe of human rights abuses, South Africa's experience plus other historical examples such as Chile's experience demonstrate the value of these commissions in ending strife. Rather than ignore them, the PICT should be required to work closely with these commissions to make them more effective, and then be given the resources to do this effectively.

The PICT's relationship with the ICC will require careful attention. Although many may argue that the ICC should be the new tribunal, it is increasingly improbable that major powers such as the United States, China and Russia, as well as India and Japan, will become part of the ICC.[65] The United States has made clear its position that it will not support the ICC for numerous reasons that are unlikely to change.[66] As long as the United States maintains this position, other permanent Security Council members are likewise free to do so and probably will. Accepting this as a reality, the PICT eliminates the basis for such objections because the Security Council members themselves would control it as a Security

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and Foreseeable Shortcomings, 26 FLETCHER F. WORLD AFF. 7 (2002); *But see* David Tolbert, *Reflections on the ICTY Registry*, 2 J. INT'L CRIM. JUST. 480, 484 (2004) (discussing subsequent ICTY outreach successes).

64. Cockayne, *supra* note 20 at 540-44, nn. 533–50 (discussing problems between the Sierra Leone Special Court and the Sierra Leone Truth & Reconciliation Commission); Laurie King-Irani, *To Reconcile, or Be Reconciled?: Agency, Accountability, and Law in Middle Eastern Conflicts*, 28 HASTINGS INT'L & COMP. L. REV. 369 (2005); Julissa Mantilla Falcon, *The Peruvian Truth and Reconciliation Commission's Treatment of Sexual Violence Against Women*, 12 HUM. RTS. BR. 1 (2005); Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1451–54 (2005) (noting the creation and functioning of at least 21 commissions to date).

65. Talitha Gray, Note: *To Keep You is no Gain, to Kill You is no Loss: Securing Justice through the International Criminal Court*, 20 ARIZ. J. INT'L & COMP. LAW 645, 651–58 (2003).

66. William H. Taft, IV, *The Eighteenth Waldemar A. Solf Lecture in International Law*, 184 MIL. L. REV. 174, 182-84 (2005). For U.S. Congressional Committee Reports describing U.S. opposition, see H.R. REP. NO. 593, 107th Cong., 2d Sess., Secs. 2001-2015 (2002); H.R. REP. NO. 62, 107th Cong., 1st Sess., Secs. 632-642 (2001). For a detailed analysis of U.S. objections, see John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85 (2000).

Council organ. There is reason to believe the United States would support such a measure[67] and if it does, other major countries presently unwilling to become part of the ICC might well follow suit. This is not to say that the ICC would have no role or existence. Statute of Rome parties are always free, if they wish, to cooperate with the ICC, and the new PICT should also be expressly empowered to do so in its governing instruments. On the other hand, as with national courts and major criminals, the PICT should have primacy over the ICC because the former would be created as the world's supreme criminal judicial body.

X. RECOMMENDATION TEN: FUND THE PICT AND PUT IT TO WORK NOW

The PICT should be funded and get started immediately by targeting ten to twelve at-large persons deemed the most egregious international criminal law violators. There will, of course, be a number of substantive and procedural legal issues to resolve in creating the PICT: judges and staff selection; defining the powers of the PICT security and protection force; deciding on a PICT headquarters location; defining major criminals for PICT jurisdictional purposes; debating the Security Council case referral process in establishing the Security Council as the sole referring body for submitting persons to be investigated and tried; and, determining where sentences are to be served. These decisions need not take too much time, however, because the groundwork for many of them has already been laid out in the ICTY and ICTR governing instruments, as well as in the ICC offense definitions.[68] Moreover, the Security Council is more than capable of setting appropriate parameters for its own international criminal tribunal in a manner which balances the need for international justice with sensitivity to international political realities. The Security Council has already demonstrated its ability and willingness to do so in connection with the ICC, by referring the Sudan Darfur matter to that body.[69]

CONCLUSION

Not all would agree that the Security Council should have the role of determining PICT cases.[70] The countervailing argument, however, is that three Security Council permanent member states outside the ICC would immediately

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67. William H. Taft, IV, *The Eighteenth Waldemar A. Solf Lecture in International Law*, 184 MIL. L. REV. 174, 182-84 (2005) (citing lack of Security Council control as a main U.S. objection to the ICC); Seguin, *supra* note 66, at 92-97 (discussing Security Council issues in context of U.S. objections).

68. Jonathan I. Charney, *Progress in International Criminal Law?*, 93 A.J.I.L. 452, 453–54 (1999).

69. For sources regarding both the ICC case referral and the Darfur situation generally, see Hans-Peter Kaul, *Developments at the International Criminal Court: Construction Site for More Justice: The International Criminal Court After Two Years*, 99 A.J.I.L. 370, 380–83 (2005); Mario Cava et al, *Updates for the International Criminal Courts*, 12 HUM. RTS. BR. 37 (2005); Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101 (2005); Linnea D. Manashaw, Comment, *Genocide and Ethnic Cleansing: Why the Distinction?: A Discussion in the Context of Atrocities Occurring in Sudan*, 35 CAL. W. INT'L L. J. 303 (2005); Jamal Jafari, *"Never Again" Again: Darfur, the Genocide Convention and the Duty to Prevent Genocide* , 12 HUM. RTS. BR. 8 (2004).

70. Richard J. Goldstone, *The Failure of International Justice*, 57 ME. L. REV. 553 (2005) (rejecting Security Council judicial gatekeeper role).

start participating in the international criminal justice system in an ongoing, permanent process. Perhaps more importantly, the votes of the Security Council on what to do with the cases would establish for the record each member's commitment, or lack thereof, to bringing the world's worst villains to justice. By creating a permanent tribunal with real legal teeth and power, the Security Council will demonstrate once and for all its views towards permanent international law, justice and common sense.