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International Courts: Are They Working?

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*Peace is a coin that has two sides – one is the avoidance of the use of force and the other is the creation of conditions of justice. In the long run you cannot expect one without the other.*¹

John Foster Dulles

Introduction

The question as to whether international courts are actually working is a highly relevant one during this particularly troubled time in history. It is also a question with which government officials around the globe (as well as millions of ordinary people) are constantly concerned as they search for viable alternatives to war, violence, enslavement and political persecution. This same question might be more precisely couched however first in terms of considering whether (and to what degree) these same international tribunals possess a basic efficacy in terms of first obtaining meaningful jurisdictional authority. Secondly, it is essential for one to ask as to what degree international tribunals are able to impartially adjudicate the international disputes that are brought before them, on the basis of principle and law (as opposed to arbitrariness or political expediency). Finally, it is argued that it is equally important to bear in mind that this question relating to the efficacy of international dispute resolution goes to the larger question of whether international tribunals can do justice given the present state of the rule of law in a global context.

¹ John Foster Dulles, *United Nations Bulletin*, December 1956, p. 93. Taken from, J. L. Brierly, *The Law of Nations*, 6th edition Oxford Clarendon Press (1967) p. 432.

As humankind emerges from some of the worst horrors that have been perpetrated during the twentieth century (a century where some 160 million people died in two catastrophic world wars, a depressing succession of bloody regional conflicts and the emergence of the phenomenon of genocide) many right-thinking people around the world have increasingly been demanding peaceful alternatives to the predatory behavior of state sponsored violence, terror and political domination. Just as during the mid seventeenth century, Thomas Hobbes wrote about the use of human reason in order for the individual to emerge from the state of nature where man was “at war with every other man,” increasingly individuals in contemporary times are looking to more enlightened means of resolving the conflicts that arise among nations.²

In this regard, many officials, leading practitioners, scholars (as well as ordinary people around the world) have looked to international tribunals as a peaceful and authoritative means of conflict resolution and justice. As part of this right-minded endeavor, it is also important to reflect on the recent history of international tribunals, their origin and track record as a means of gauging their efficacy in looking to the future. In addition, if the judicial adjudication of international disputes is to remain a viable option (in addition to our ever present optimism) it is also just as necessary to reflect on the existing impediments to, and problems with international dispute settlement.

This paper will address some of these questions by first tracing the establishment of international courts from the end of the Second World War to the most recent developments such as the establishment of the *ad hoc* Balkan and Cambodian Tribunals and the (permanent) International Criminal Court. Here, I will also seek to highlight both the successes and challenges to these diverse international judicial bodies. In the context of this examination, it is hoped that some new light may be shed on the inherent difficulties that international judicial bodies have faced, and on a viable path forward that in some way might contribute to the greater project of realizing a better human destiny.

As a part of this endeavor then, it will be argued that if international tribunals are really to provide for a viable non-violent means of dispute resolution, it is first necessary that a durable rule of law (as opposed to the rule by force or rule by law) at least begin to be established, not only in developed nations, but throughout the international community as a whole. As a part of this process of law building, the notion of national sovereignty and the role that it has played in the formation of national and international dispute resolution will also be considered.

To begin then, international tribunals (like the judicial bodies found in individual states) have (at least since the end of the First World War with the establishment of the Permanent Court of International Justice in 1922) possessed the proper jurisdiction to apply the law and do justice in a range of fact situations. Yet it was only after the end of World War II that courts have been used to try suspected war criminals. And following

² Hobbes, *Leviathan* (1651) Ch. XIII. Hereby it is manifest that during the time men live without common power to keep them all in awe, they are in that condition which is called war; and such a war is of every man against every man.

this trend, in the more recent past they have served as specially established venues for adjudicating specific classes of crimes (such as for example in the establishment of the Balkan Tribunals which was done in 1993 by the Security Council under the authority of Chapter VII of the UN Charter).³ For these *ad hoc* international courts, they are intended look back with the aim of redressing injustices of the past, by adjudicating crimes committed by individuals, usually civilian leaders or military officials of regimes which have perpetrated widespread criminal acts such as war crimes, or other crimes against humanity (such as genocide).

However it is equally important to note that international tribunals can also look forward as it were, by attempting to settle disputes between nations and peoples which may have the potential to cause international conflict in the future. These kinds of disputes might include matters relating to the drawing of international boundaries, or the division of resources such as fisheries or undersea oil resources (such as in the more recent territorial maritime dispute between Nicaragua and Colombia over the San Andreas Archipelago).⁴ This paper will look at both of these approaches and consider as to how they have served the members of the international community as well as hundreds of millions of ordinary people around the world who all too often have been the victims of either foreign aggression or cruel and vicious regimes.

The post-war initiative: creating a new international order

At the end of the Second World War, there was a broadly held consensus among the allied leaders that the horrors of that war that were visited on hundreds of millions of people across the globe should never again be repeated. As a part of this worldview, the United Nations was established in 1945. As another part of this larger historic initiative President Truman (along with others) proposed an “international bill of rights.” This initiative resulted three years later (in 1948) in the Universal Declaration of Human Rights. It was agreed to by a vote of 48 of the existing member states (with no objections and only eight abstentions) and is regarded as a statement of objectives of individual states. The document was established to help to guarantee fundamental rights and serve as a benchmark for recognizing the “inherent dignity and of the equal and inalienable rights of all members of the human family.”⁵

However, despite the noble aspirations of the drafters of the UN Charter, there was put in place at its inception a contradiction that probably made its ratification possible, yet at the same time nullified many of its goals. The United Nation Charter whose primary purpose is to “save succeeding generations from the scourge of war,” and to “reaffirm faith in fundamental human rights of men and women and of nations large and small.” Yet at the same time while Article 2.4 of the UN Charter famously prohibits the threat or use of force, paragraph 7 of that same article also states:

³ See: UN Security Council Resolution no. 808 (1993).

⁴ *Territorial and Maritime Dispute (Nicaragua v Colombia)* <http://www.icj-cij.org/docket/files/124/14303.pdf> (June 1, 2009).

⁵ Universal Declaration of Human Rights, (Preamble)

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement of measures under Chapter VII.⁶

The effect of Article 2.7 then is that apart from acts by states which are understood by the Security Council as being threats to international peace and security or acts of aggression by states, the UN has enshrined within the Charter the principle of non-intervention into the actions taken on the part of states with respect to actions that are taken within its borders. However regrettably, this principle of non-intervention into actions which are within a state's internal affairs have set the tone for many instances of gross human rights violations, as witnessed from the killing fields of Cambodia, the government imposed famines and political oppression found today in North Korea, Zimbabwe and Burma, to the ongoing genocide in Darfur that is being perpetrated by the current Sudanese Government.

So, given both the aspirations and limits set by national sovereignty, have the forums that have been established for international dispute resolution been able to cope with the task that they have been assigned? In large part, since the Second World War, international dispute resolution has been initiated at the behest of member states.

Primary evidence of the apparent consolidation of the formal means of dispute resolution available to the international community was the establishment of the International Court of Justice (ICJ) under Chapter XIV of the United Nations Charter.⁷ The UN Charter provided the authority to establish the ICJ whose founding document, is the Statute of the International Court of Justice. Within the Statute, Article 38 (1) sets out the established sources of international law which are:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidenced of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules or law.⁸

The principle that international conventions or treaties are a source of international obligation is of course, well known. Customary international law then, is generally thought to include the elements of widespread state practice over time, along with the sense of this practice as being obligatory (*opinio juris*) and finally that this practice or rule is actually followed by a significant number of states and is not objected to by a

⁶ Charter of the United Nations, art. 2.7

⁷ See Charter of the United Nations, Chapter XIV, Art. 92-96.

⁸ Statute of the International Court of Justice, Art. 38 (1).

significant number of states. The general principles of law found in Art. 38 (1) (c) includes common legal notions employed in private law such as *pacta sunt servanda* (“agreements serve to bind their parties”), prescription, that is, the acquisition of a right by reason of a lapse in time, or estoppel.⁹

Finally, Article 59 states that the decisions of the ICJ have no binding force except as between the parties in a particular case. This means that there is no principle of *stare decisis* in international law, or in other words precedents are not therefore binding authorities in international law. However, note that paragraph (d) includes international decisions as a subsidiary means of determining the principles of international law. This justifies the practice that courts cite past decisions in order to explain their rationale for a particular case.

However, the issue that has been the most difficult for the ICJ to deal with, has been the aforementioned matter of jurisdiction. Article 36 of the Statute states that the “jurisdiction of the Court comprises all cases which the parties refer to it, and all matters specially provided for in the Charter of the United Nations or in treaties or conventions in force.”¹⁰ This means that if states are unwilling to appear before the ICJ then it is generally difficult for either the other party (or the international community at large) to compel them to do so. However, there have been remarkable exceptions to the stumbling block of jurisdiction.

The Nuremberg and Tokyo war crimes tribunals

It is significant that it was also during that same idealistic post-war period that the Allied leadership established a series of war crimes trials as a demonstrable means of bringing the worst perpetrators of the war to justice. These tribunals were held famously in the cities of Nuremberg and Tokyo. At the outset of the deliberations about the nature of the proposed war crimes trials however, disputes arose among the Allies as to how best to deal with the problem. The initial view, which was taken among British leaders was that the trial of the Nazi leadership was a political not a judicial question.

As such, Churchill had initially expressed the view that some fifty Nazi officials be summarily executed. Stalin in turn expressed a desire to execute as many as 50,000 German officers, as well holding as a series of scripted trials much like the Soviet show trials of the 1930’s. Churchill objected to this proposal because of what he saw as trials and executions staged primarily for “political purposes.” The final decision however reflected the counsel of Secretary of War Henry Stimson who had earlier written in a memo to President Roosevelt that “the punishment of these men in a dignified manner

⁹ *Estoppel*, is that rule of evidence precluding a person from denying the truth of a statement that he has made which he has by words or conduct led another to believe in. For example, a person by his representation or conduct has induced another person to change her conduct, he cannot afterwards deny the truth of that representation. *Osborn’s Concise Law Dictionary*, Eds. Leslie Rutherford and Sheila Bone, 8th Edition, Sweet & Maxwell.

¹⁰ Statute of the International Court of Justice, Art. 36.

consistent with the advance of civilization will have the greater effect on posterity.”¹¹ This pivotal decision taken by the Allied leadership resulted in a series of trials of the German and Japanese High Command. These tribunals were established under the legal rubric of the instrument of surrender and were governed by a legal document setting out the terms of reference, known as the Nuremberg Charter. This fact of the tribunals being established under the instrument of surrender meant that the greatest impediment to international tribunals (that of national sovereignty) had been suspended. So a relevant question to ask at this point is, if this was the case, were the Nuremberg and Tokyo trials merely the show trials that Stalin had originally wanted?

To begin to address this question, the legal classification of “crimes against humanity” is distinguished from mere domestic crimes (such as murder, kidnapping or rape) in that they are perpetrated or ordered not by ordinary criminals, but by state officials or military officers and are carried out in pursuance of some state policy (such as genocide or ethnic cleansing). Crimes against humanity are also distinguished from ordinary crimes by the fact that there has also been a systemic policy of refusing to identify, prosecute or punish the perpetrators.¹² The earliest of these kinds of prosecutions date back to the nineteenth century and involved the universal crimes of piracy on the high seas (or in rarer cases) crimes involving the slave trade.

Although the Nuremberg and Tokyo War Crimes Tribunals are generally regarded as being the most effective of their kind to date (in that they resulted not only in the convictions of a number of the worst perpetrators of the atrocities of the Second World War but just as importantly, a number of acquittals as well) they were at the same time also derided by some, as being “victor’s justice.” It was in fact the military leaders of the defeated side who were facing charges. Conversely, no members of the allied forces were brought to trial at Nuremberg for similar atrocities. Consider for example, Stalin’s role in crimes against the peace including, the Molotov-Ribbentrop agreement of 1939 which gave the green light for Nazi aggression. Neither was Stalin implicated in the murder by Soviet forces in 1940 of some 22,000 Polish officers and troops in the Katyn Forrest, or for that matter, the Soviet invasion of the Baltic States. In addition, one must mention the along with atrocities by the Axis forces, the indiscriminate bombing of civilian targets carried out by British and US forces over Germany and Japan in the final months of the conflict. In addition, the Tokyo war crimes trials have been heavily criticized by both legal experts and historians for their failure to bring Emperor Hirohito of Japan to account for his undoubted role in Japan’s war of aggression in Asia and the Pacific.¹³

¹¹ Henry Stimson, Secretary of War, Memorandum to President Franklin Roosevelt, September 5, 1944. Taken from Davis, Jeffery, *Justice Across Borders: The Struggle for Human Rights in US Courts*, Cambridge UP (2008) p. 9.

¹² See, *United States v. Ohlendorf* (Case 9) (1946-47) IV Trials of War Criminals before the Nuremberg Military Tribunals.

¹³ Robertson, Geoffrey, *Crimes Against Humanity: The Struggle for Global Justice*, Penguin Books (1999) pp. 223-4

And yet at the same time, it is also acknowledged by many of these scholars that that the Nuremberg and Tokyo Tribunals were in fact effective in that however flawed they may have been they allowed the open administration of justice to be done as opposed to the mere revenge seeking of summary executions. That is to say, despite all of the procedural difficulties with the trials, and despite the fact that crimes and atrocities were committed on both sides, the weight of the evidence demonstrated to the world beyond doubt, the guilt of the Nazi and Japanese military leadership. More importantly, the tribunals were able to stand in the way of subsequent revisionist histories intent on expunging Nazi or Japanese crimes.

The main outcome of the Nuremberg and Tokyo Tribunals however was that they established a precedent for the legal principle that no one from the foot soldier to the head of state could escape accountability for crimes committed during war time either by claiming duress of superior orders on the one hand or sovereign immunity on the other.¹⁴ And despite the attacks of *tu quoque*, (you did it too) the Nazi High Command really did deserve to be prosecuted and punished for their crimes. But in a wider sense, these post-war war crimes tribunals were the start of a trend in history where the perpetrators of the worst atrocities would be tried according to a body of law, thus setting down objective legal standards for the enforcements of human rights claims.

The role of international tribunals in the post-war era

However, despite the brave proclamations by some, the liberal dream of a world where nations and their leaders are held accountable to international tribunals for human right abuses has not materialized in the manner that any of these sources had predicted. A universal respect for human rights and the rule of law has not been the unstoppable force that it was once described as being. In fact it could be argued that the latter half of the twentieth century has witnessed some of the most horrific human rights abuses that have occurred during the entire history of humanity. In the six decades since World War II, the United Nations was established in the words of the Charter's preamble, to "save mankind from the scourge of war, which twice in our lifetime has brought untold suffering to mankind, and to affirm faith in fundamental human rights."¹⁵

However, despite the formation of the United Nations, and the universal commitment that nation states around the world solemnly made to work toward its goals, in the years following World War II, there have been further, more widespread and brutally indiscriminate killing enslavement and mutilation of innocents in places as diverse as Cambodia, North Korea, Rwanda, Congo, Nigeria, East Timor, Sudan, Iraq, Yugoslavia and Afghanistan. The forced mass expulsion of peoples based on their race, religion or ethnicity has also been widely evidenced throughout the world during the past several

¹⁴ Nevertheless, during the trial process, the defense of duress or superior orders did in fact serve to mitigate in the determination of the extent of guilt in terms of meting out punishment.

¹⁵ Preamble, United Nations Charter, found in, *Basic Documents in International Law*, Ian Brownlie Ed., Oxford UP (1984) p. 2.

decades. As if to underscore the regularity of such barbaric acts, the term, “ethnic cleansing” has now become a part of the common vocabulary. And after more than a decade of its initial usage amid widespread civil conflict in the former Yugoslavia, this term leaves many people with nothing more than a sense of apathy. This same indifference to the destruction and displacement of ethnic groups is manifestly a disgrace, both to those who coined the term as well as those, whose callousness has only served to further trivialize it.

During this era, international tribunals (of the kind first seen at Nuremberg and Tokyo) have unfortunately played a lesser role, at least until the end of the cold war. One of the major impediments to this diminished role of international courts has undoubtedly been the ongoing reality of state sovereignty. The simple fact is that states have traditionally been highly jealous of their sovereignty and are loath to relinquish it even for noble causes or institutions. In all too many instances however, states have evoked the legalist claim found in Article 2.7 (that of noninterference in the internal affairs of states) thus trumping the underlying moral claims of those that seek remedies for serious human rights violations.

International human rights lawyer Geoffrey Robertson raises the legal and philosophical point regarding this matter when he raises the legal and philosophical question, “If the rule against torture, or in favor of freedom of speech, is regularly flouted by many states, can the [same] rule meaningfully be described as law?” His answer then is that, “[it] must depend on whether the possibility exists (however rarely it is taken) of calling the government which disobeys it to account.”¹⁶ It is precisely this question of calling governments (and individuals) to account that gets to the significance of the role that is played by international tribunals.

The Yugoslavia Tribunal

So in 1993 it was with great optimism and apprehension that the Security Council established an international criminal tribunal (the International Criminal Tribunal for the former Yugoslavia) to administer justice to those accused of crimes perpetrated during the Balkan wars that accompanied the break-up of Yugoslavia. This was done at a time when the conflict was still underway. This fact contributed to the obvious difficulty that many of the alleged perpetrators of war crimes were still at large and were being given shelter by their political allies. One of the other key problems with the Balkan Tribunal was that there was a near total lack of political will to deal decisively with the human rights violations. This fact can be seen most shamefully in the siege of Sarajevo (which lasted from 1992 to 1996 and resulted in the deaths of over 10,000 people and wounding some 56,000 others) and the massacre of over 7,000 Moslem men and boys in the town of Srebrenica in July 1995.

Perhaps most frustrating of all for the tribunal, was the trial of former President, Slobodan Milosovic which began in early 2002 and only ended at the time of his death

¹⁶ Robertson, Geoffrey, *Crimes Against Humanity*, p. 81.

(due to a heart attack) in March 2006 without the court having reached a verdict.¹⁷ By 2009 however, it was clear that the court had made substantive progress, in bring many of the perpetrators of the crimes carries out during the Yugoslav conflict. Over 100 defendants had been charged. Of these 48 had been convicted and sentenced, five had been acquitted, with the rest having served their sentences, been transferred to other jurisdictions or died in custody.¹⁸ The most recent high-profile defendant to appear before the Hague Tribunal is Radovan Karadzic. The former Bosnian Serb leader who stands accused by the International Criminal Tribunal for the former Yugoslavia of genocide and crimes against humanity and specifically of ordering the Srebrenica massacre. As of June 2009 he was in detention and his trial was ongoing.

However beyond the undisputed significance of bringing the authors of crimes against humanity to justice, perhaps the more enduring accomplishments of the Tribunal has been to strengthen the rule of law not only in the Balkans but throughout the world. This process of law building further suggests that another positive result of the Tribunal has also been its attempt at establishing a factual account of the events following the dissolution of the former Yugoslavia. But perhaps the most significant outcome of the Balkan Tribunal to date has been to make a start at replacing a culture found (in all too many parts of the world) of soldiers and leaders alike, being able to commit crimes with impunity, with a one of having to be accountable for one's actions to an impartial institution governed by established rules.

The unfinished work of the Cambodia genocide tribunal

One of the less successful of the post-cold war international tribunals has been the Cambodia Tribunal (known formally as the Extraordinary Chambers in the Courts of Cambodia for the Prosecution for Crimes Committed During the Period of Democratic Kampuchea). The impetus for the trials came about in 1997 when funding was made available from the UN as well as India, Canada and Japan. The idea was to put on trial former members of the Khmer Rouge for crimes related to the genocide of some 1.7 million Cambodians in the years following the end of the Vietnam War.

By 2007 however, only five persons had been named as possible defendants and as of 2009, only Khang Kek leu (also known as Dutch) has actually been indicted for his roll in the Cambodian genocide. During the Khmer Rouge's reign of terror, Khang had been the governor of a prison where it is believed that some 16,000 people were tortured. He has since admitted his guilt and has asked for forgiveness for his crimes. Other suspects that

¹⁷ Boas, Gideon, *The Milosovic Trial: Lessons for the Conduct of Complex International Proceedings*, Cambridge UP (2006) p.

¹⁸ List of indictees of the International Criminal Tribunal for the former Yugoslavia. (2009, May 19). In *Wikipedia, The Free Encyclopedia*. Retrieved 14:15, May 19, 2009, from http://en.wikipedia.org/w/index.php?title=List_of_indictees_of_the_International_Criminal_Tribunal_for_the_former_Yugoslavia&oldid=290948148

have been detained include Nuon Chea, (the Khmer Rouges' chief political ideologist) Ieng Sary and Ieng Thirith (the former Deputy Prime Minister and his wife) and Khieu San Phan (the former Chief of State of Democratic Kampuchea). However, the architect of the genocide, responsible for the deaths of over a quarter of the entire population of Cambodia Sarath Sar (or Pol Pot as he is generally known) died, in 1998 before he could be brought to justice. In addition the court itself has been the victim of a lack of support from the Cambodian government as well as several allegations of corruption and bribery.¹⁹ As a result, the prospect for substantive justice being done in relation to this awful period of modern history appears to be slim.

Where dispute resolution has worked: based on shared values and interests

However, during that same post war era, international dispute resolution based upon mutual agreement by states has had a significant place in the development of international law. One relatively successful example of this kind of peaceful settlement of disputes is the *North Sea Continental Shelf Case* decided by the International Court of Justice in 1969.²⁰ In this highly complex case, involving a dispute over the resources in and under the North Sea Continental Shelf, the ICJ was called upon by the parties to set out “the principles and rules of international law applicable and under took to carry out the delineations on that basis.”²¹ In this regard then the court was able to assist the parties in reaching a decision *not* in terms of an adversarial decision, but in terms of providing an authoritative basis for their own negotiations in the matter. It is thought that practical lessons might well be taken from this model of prospective international settlement which seeks to be sensitive to sovereignty issues while at the same time, offering a basis for concrete negotiations.

The fundamental need for an international rule of law

In an article published in 1993, political theorist Robert Goodin has presented the following argument surrounding the necessary constituent ingredients for civil society:

In order to govern any moderately diverse plural community at all, there must be agreement of a certain sort across all the disparate subgroups constituting that society. What is needed is agreement, not necessarily on substantive issues, but at least on the basic procedures by which substantive disagreements are to be resolved. In a democracy, that agreement must be on the basic procedures of democracy itself.²²

¹⁹ “Cambodian War Crimes Court in Corruption Probe” Dan Rivers, <http://edition.cnn.com/2009/WORLD/asiapcf/03/30/cambodia.court/index.html> (June 5, 2009)

²⁰ *North Sea Continental Shelf Cases: Federal Republic of Germany V. Denmark; Federal Republic of Germany v. The Netherlands* ICJ Reports 1969, p. 3.

²¹ *North Sea Continental Shelf Cases*, Judgment of 20 February 1969; p. 1. <http://www.icj-cij.org/docket/files/52/5563.pdf> (June 3, 2009).

²² Goodin, Robert, “The Contribution of Political Science,” Found in, Robert E. Goodin & Philip Pettit, *A Companion to Contemporary Political Philosophy*, Blackwell (1993) p. 174.

This same idea has also been reflected in the writings of another notable liberal philosopher, John Rawls, while nearing the end of his life, presciently expressed an argument regarding the need in civil society for a consensus of values. This social consensus is made up of a “reasonably just” constitutional government, citizens who are related by “common sympathies” and a “moral nature.”²³ With this same regard to constitutional government, John Rawls writing in his last major work seems to have borrowed some of the central political ideas of J. S. Mill in arguing that such a requirement for such values is ultimately institutional in nature. In other words, he argues that there must be viable institutions in existence that are both democratic in nature and capable of upholding the rule of law and providing workable remedies to individuals and groups.

This idea of “common sympathies” as he expresses it, is one that (according to Mill and subsequently to contemporary liberals such as Rawls) pertains to a particular culture. One major difficulty for any future prospects of this view however, is that this notion of shared values within a given culture is increasingly less likely to occur in the modern world, in which populations have long ceased to be homogenous, either in terms of religious belief, race or ethnicity. The more daunting prospect is that such a set of values common throughout the world is perhaps even more illusive in the years following 2001.

Yet at the same time, and despite all of these fundamental differences that there may be over the make-up of society however, such a values consensus Rawls argues, is nonetheless possible within a “reasonably just (i.e., liberal) polity.”²⁴ Finally, regarding the question of the prerequisite “moral nature,” Rawls understands this to be related to a people in terms of having “a firm attachment to a political (moral) conception of right and justice.”²⁵

The philosophical basis for a rule of law

In the *Second Treatise*, Locke wrote of the common basis for entering into the social contract with the state:

The reason why men enter into society, is the preservation of their property; and the end why they choose and authorize a legislative, is that there may be laws made and rules set as guards and fences to the properties of all of the members of the society, to limit the power and moderate the dominion of every part and member of society.²⁶

²³ Rawls, John, *The Law of Peoples*, Harvard UP (1999) pp. 23-4.

²⁴ Rawls, p. 25.

²⁵ Rawls, p. 24.

²⁶ Locke, John, *Two Treatises of Civil Government*, Ed., Mark Goldie, Everyman (1993), II, 222, pp. 226-7.

As part of these rules that as Locke suggests act as fences, serve both to regulate the actions of members of society but also to restrain the potential excesses of the state. This framework of a rule of law has many elements, but is founded on the principle of equality under the law. Equally important, state power must be exercised legitimately exclusively according to existing laws, which may only be changed by a previously established procedure. Second, the law must uphold a minimum standard of justice, both in terms of substance and procedure. Third, laws must be predictable by those who are subject to them. Fourth, discretionary powers that are held by officials must be checked by safeguards, in order to prevent their abuse. Fifth, the law must provide viable safeguards against discrimination on the basis of race, gender, ethnicity or religion. Sixth, no person ought not to be deprived of her liberty unless she has been provided with due process of law. Finally, is the principle that there ought to be the separation of powers, with a judiciary that is independent of control or intervention on the part of the other branches of government (subject to amendment of the constitution through legal procedures).

In *Perpetual Peace*, Kant expressed his hope that in future, all of the nations of the world would be established as republics according to the principle of government by consent of the people under the rule of law. His aspiration was that that these republics would allow all of the people of the earth to freely live each according to their own conscience. Kant's idea of what such a perpetual peace would be was that beyond any regime of the law of nations would finally emerge, "a proper appreciation of the shared humanity between citizens rather than merely nations."²⁷ As Kant argues, it is a republican basis for the foundation of states that makes possible a commonly held respect for human rights.

The only constitution which has its origin in the idea of the original contract on which the lawful legislation of every nation must be based is the republican. It is a constitution in the first place founded in accordance with the principle of freedom of the members of society as human beings; secondly in accordance with the principle of the dependence of all as subjects in a common legislation; and thirdly, in accordance of the law of equality of the members as citizens.²⁸

Inspired out of a priority that was placed upon human rationality during the Enlightenment as well as a keen sensitivity toward the necessity for a tolerance of others, Kant's contribution to the corpus of human rights literature is perhaps unmatched in the history of philosophy. Perhaps the most remarkable of these contributions is this; that his doctrine which is based upon the vocabulary of duty, delivers in the end, a truly profound basis for human rights.

Looking to the future: The prospects for the International Criminal Court

²⁷ Ward, Ian, "Imagining Human Rights," *Studies in Law, Politics and Society* (2002) Vol. 14, pp. 86-7.

²⁸ Kant, Immanuel, *Perpetual Peace*, Mary Campbell Smith ed. Cosimo Inc. (2005) p. 9.

The ICC came into being in 2002 and was intended to serve as a permanent forum for the purpose of trying those who have been accused of crimes against humanity, genocide and war crimes. The most notable accomplishment of the ICC to date has been issuing an international arrest warrant for Omar al Bashir, the President of Sudan for crimes against humanity and genocide in Darfur.²⁹

Presently there are some 108 states parties to the Rome Statute of the International Criminal Court. However, the states who have not yet ratified the agreement or who have voiced objections to it include The United States, China and Russia. Furthermore, other states that have reservations about the ICC include most of the nations of the Middle East and Asia. The absence of these key players from the Rome agreement means that much work remains to be done in order for the ICC to emerge as a truly efficacious means of doing justice on the international stage.

Dispute resolution in the context of international law (unlike in domestic law) faces the sobering reality of state sovereignty which serves to render the remedies available to institutions like international tribunals, difficult in principle. As such, in an international tribunal there is no central source of authority (and an enforcement mechanism) which can serve to provide concrete remedies to the legal claims that are brought before it. Therefore, given this reality, (not only states, but individuals as well) must come together in the Rawlsian sense out of a shared need for not only peaceful relations among nations but also the respect for human dignity. In this regard then, there must be a social contract of states in order to ensure our own peace and tranquility. It is suggested that this need not be a utopian vision, but a realistic one. To this effect, it is argued that the following practical steps can be taken in order for this social contract to take shape.

First of all, if the ICC is to realize the intent of its founding treaty, the Rome Statute and be viable as a means of both bringing those accused of genocide and other crimes against humanity to account (as well as serving as a deterrent to such crimes) then it must first attempt to be more sensitive to its critics and recognize the efforts by individual member states to investigate, prosecute and punish the crimes that its own soldiers and/or officials are accused of committing.

Second, as an international judicial body, the ICC must remain immune from politics, in that it never allow itself to be used as a political tool by those intent on advancing a particular agenda. As such it must be sensitive to what lawyers refer to as the justiciability of cases; that is the court must be mindful that any given case that it takes up is in fact capable of being settled by law or by a judicial process.

Third, states previously critical of the ICC (such as the US) must use their influence to become involved in the process of seeking to bring perpetrators of crimes against humanity to justice under internationally recognized laws and principles.

²⁹ *Prosecutor v. Omar Hassan Ahmed al-Bashir*, ICC-02/05-01/09 <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB> (June 9, 2009).

Finally, (and this might seem to go against a politically correct trend of inclusiveness) the make-up of the International Criminal Court ought to include only members those whose nations adhere to the rule of law or more broadly as Kant suggests, “on which the lawful legislation of every nation must be based is the republican.” It is suggested therefore that if Immanuel Kant’s dream of perpetual peace is ever to be realized, then we as members of the human family (determined to improve our own destiny) would do very well to heed this counsel.