THE PERMANENT INTERNATIONAL CRIMINAL COURT

The chapters in this book critically examine some of the fundamental legal and policy issues involved in the establishment and functioning of the Permanent International Criminal Court. Detailed consideration is given to the history of war crimes trials, their place in the system of international law, their legality and legitimacy, the tensions and conflicts involved in negotiating the ICC Statute, questions of admissibility and theories of jurisdiction, the principle of complementarity, the relationship between the ICC and the Security Council, the nature and scope of the offences within the ICC's jurisdiction — aggression, genocide, war crimes, crimes against humanity, the general principles of legality, the scope of defences, evidential dilemmas, the perspective of victims, national implementation of the Statute, legal and political responses to the ICC and, finally, the legal and political significance of a permanent ICC. The expert contributors are drawn from a range of national jurisdictions — UK, Sweden, Canada, and Australia. The chapters blend detailed legal analysis with practical and policy perspectives. This book seeks to provide an authoritative complement to the extensive commentaries on the ICC Statute.

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The Permanent International Criminal Court

Legal And Policy Issues

Edited by
DOMINIC McGOLDRICK
PETER ROWE
and
ERIC DONNELLY

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Introduction

DOMINIC MCGOLDRICK AND PETER ROWE

THE IDEA OF an International Criminal Court (ICC) has captured the international legal imagination for over a century. On 18 July 1998 it became a reality with the adoption of the *Rome Statute of the International Criminal Court*.[1] The ICC is only intended to exercise jurisdiction in relation to the most serious crimes of international concern. In addition, it is specifically designed to be complementary to national criminal justice systems. Essentially, the intention is that the ICC will only be brought into play where the national judicial institutions are unable or unwilling to act.

After attracting the necessary ratifications the Statute entered into force on 1 July 2002.[2] In 2002 and 2003 the Assembly of States Parties held its first two sessions in New York.[3] The Assembly adopted a number of crucial legal documents including the Rules of Procedure and Evidence,[4] the Elements of Crimes,[5] the Agreement on Privileges and Immunities[6] and the Basic Principles Governing a Headquarters Agreement between the ICC and the Netherlands.[7] The 18 judges of the ICC, seven of whom are women, were elected by the Assembly and were sworn in at a ceremony in The Hague in March 2003. In 2003, the Assembly then proceeded to elect Luis Mereno Ocampo from Argentina as the ICC Prosecutor,[8] Serge Brammerz from Belgium as the ICC Deputy Prosecutor, and Oscar Arias Sanchez, Archbishop Desmond Tutu, Tadeusz Mazowiecki, Queen Rana al-Abdullah and Simone Veil to the Board of Directors of the Victims Trust Fund.[9] The judges of the ICC elected Bruno Cathala of France as Registrar.

As of 20 November 2003, 138 States had signed the Statute and 92 had ratified it. By that date the Prosecutor had received over 650 complaints.[10] Fifty of those

[1] Doc A/CONF.183/9 of 17 July 1998, as corrected by *process-verbaux* of 10 Nov 1998, 30 Nov 1998, 17 Jan 2001, and 16 Jan 2002. <http://www.icc-cpi.int/library/basicdocuments/rome_statute(e).pdf>

[2] For the website of the ICC see <http://www.icc-cpi.int>

[3] See 'ASP to Rome Statute of ICC', First Session, 3–10 Sept 2002, 3–7 Feb and 21–23 April; ICC-ASP/1/3 and Corr.1 and Add.1; Second Session, 8–12 Sept 2003, ICC-ASP/2/10. From 2004 onwards it will meet in The Hague.

[4] ICC-ASP/1/3, pp 20–98.

[5] ICC-ASP/1/3, pp 112–55.

[6] See <http://www.iccnow.org/buildingthecourtnew/apic/apic(e).pdf>

[7] See <http://www.icc-cpi.int>

[8] See M Simons, 'Prosecutor Turns Focus To New War Crimes Court', *New York Times*, 29 Sept 2003.

[9] The Assembly also elected the members of the Committee on Budget and Finance and appointed the National Audit Office of the UK as Auditor of the Court.

[10] See 'Communications Received By The Office of the Prosecutor', ICC, Press Release, 16 July 2003. The first 500 communications came from individuals or groups in 66 different states.

contained allegations of acts committed before 1 July 2002. As the ICC's jurisdiction is not retrospective, they are not within the temporal jurisdiction of the court. A number of the communications alleged acts which fall outside the subject matter jurisdiction of the ICC for example, environmental damage, drug trafficking, money laundering, tax evasion, judicial corruption and human rights violations unrelated to the offences in the ICC Statute. Thirty-eight complaints alleged that a crime of aggression had taken place in the context of the war in Iraq in 2003. The ICC cannot exercise jurisdiction over alleged crimes of aggression until the crime is defined and the conditions for the exercise of jurisdiction are set out. The Assembly of States Parties at a Review conference to be convened in 2009 could do this. Until then the alleged crimes do not fall within the ICC's jurisdiction. Two communications referred to the Israeli-Palestinian conflict. Israel is not a party to the Statute and the Palestinian Authority is not yet a state so cannot be a party.

The ICC has already been the subject of two major commentaries, a number of monographs and countless articles. This book does not seek to be a comprehensive account of the history and structure of the Court. Rather, it examines critically some of the fundamental legal and policy issues involved in the establishment and functioning of the Permanent International Criminal Court. The chapters are arranged in seven parts for convenience. Part I is concerned with the origins and development of the permanent ICC. *Dominic McGoldrick* adopts an historical approach to criminal trials before international tribunals in order to assess the legality and the legitimacy of the ICC. He locates the ICC into the history of national and international war crimes trials and institutions. *Gerry Simpson* suggests that histories of the ICC are likely to be ambivalent in light of the fact that it was created at the intersection of a series of tensions. He examines three of these — law and politics; sovereignty and the international; and remembering and forgetting. Each of them is discussed in the context of the ICC negotiations in Rome in June/July 1998. In particular, he considers what is meant when we talk about 'politics' in relation to criminal law.

Part II is concerned with jurisdiction and admissibility. *Iain Cameron* examines the provisions in the Statute dealing with the jurisdiction of the ICC *ratione temporis*, *ratione materiae* and *ratione personae*. After discussion of the territorial and nationality limits he considers the extent to which international law at present permits States to go further, and to try offenders before national courts for international offences under the 'universal principle of jurisdiction'. Looking at the universality principle in turn necessitates a brief discussion of the differing ideologies of jurisdiction existing in the world. He discusses the means by which the Court's jurisdiction can be constituted, the admissibility provisions, and the controversial issue of amnesties. The chapter concludes with some remarks relating to the workability of the system as a whole. The effectiveness of the ICC will likely depend to a large extent on its developing relationship with the Security Council. *Dan Sarooshi* discusses the handling of this complex relationship. He focuses on four main areas: the referral of cases by the Security Council to the ICC,

the problem of the enforcement of ICC decisions, the issue of what happens when there are conflicting decisions of the ICC and the Security Council, and the issue of the crime of aggression which raises the further issues of whether the ICC will be able to judge the legality of Security Council action or Member State action taken pursuant to a Security Council resolution. The various elements contained in these issues are applied to consider the important, and controversial, legal consequences of Security Council Resolution 1422.

Part III is concerned with the crimes provided for in the Rome Statute. *William Schabas* considers whether aggression deserves the title of the supreme crime. He examines the difficulties in reaching a consensus definition of the crime of aggression and on the conditions under which it may be prosecuted. *Christine Byron* seeks to determine the precise legal meaning of genocide within the context of Article 6 of the Rome Statute and the Elements of Crimes. *Tim McCormack* critiques the Article 7 definition of crimes against humanity against international criminal law as it stood prior to the Rome Diplomatic Conference in 1998. It exposes some of the new developments in the law and identifies those aspects of the definition reflecting inevitable political compromise. *Peter Rowe* illustrates some of the structural issues surrounding war crimes charges. He suggests that their application to non-international armed conflict, whilst a great achievement of the Statute, will not be free from practical difficulty. He gives particular consideration to what is new law in the Statute and to the impact of human rights.

Part IV is concerned with liability and defences. *Robert Cryer* examines the general principles of liability in international criminal law. He argues for the importance of those general principles. The general principles of liability tell us a great deal about the justifications for criminalising conduct. The Rome Statute has brought about a set of principles of liability in a treaty drafted by a large and representative group of States. He considers the two different paths that states have taken when dealing with the general principles of liability. Both approaches demonstrate the difficulty of co-ordinating national and international prosecutions within the law. He submits that the question of the wisdom of incorporating the provisions of the Rome Statute on general principles of liability *in toto* is intimately bound up with the quality, from a criminal law, as well as customary law, standpoint, of those principles. His chapter appraises the Rome Statute from the former standpoint. *Ilias Bantekas* assesses defences in international criminal law. He examines the theoretical underpinnings of criminal defences and the concept and nature of defences. He considers in turn the substantive defences in the ICC Statute and other possible defences.

Part V is concerned with evidence and witnesses. *Kevin Gray* explores how the ICC will deal with matters of evidence. The matter of evidence before the ICC is a significant factor in its development as an effective judicial institution. How facts are proven can have a significant bearing on the liberty of the accused. By crafting predictable and fair rules for the ICC to follow, this can impact on the delivery of justice. The development of rules and procedures on evidence demonstrates the sophistication of the tribunal, lending symbolic legitimacy to

the tribunal itself. He submits that both international human rights law and international humanitarian law have rapidly evolved, requiring a much more comprehensive approach to trying individuals accused of committing international crimes. The impact of the former can have a strong bearing on how a trial proceeds with rulings aiming for consistency with international human rights obligations having a determinative value. He assesses the ICC Rules and Procedure of Evidence (RPE), noting the experience gained in the ad hoc tribunals. What emerges in the RPE is a tension between prescriptively limiting the judges in ruling on evidentiary matters and instilling flexibility so that the judges can tailor their rulings to the unique circumstances of the case. Another issue raised is how to reconcile evidence before the ICC with the rights of the accused or even the victims. *Emily Haslam* observes that the Rome Statute has been noted for its innovative provisions regarding the treatment of victims. However, she submits that the dominant account of the position of victims in the Rome Statute is based upon a widespread assumption that victims either do or can benefit from participating in international criminal proceedings. Her chapter seeks to draw upon the experience of victim-witnesses before the United Nations ad hoc War Crimes Tribunals in order to reflect upon the challenges facing victim participation at the ICC. She argues that there are a number of difficulties with victim participation under the Rome Statute. First, its purposes are unclear and, in so far as they can be identified, may be contradictory. Secondly, it may be impossible to fulfil them within a legal framework for there is surely an inescapable tension between the desire to allow victims to use the ICC therapeutically and the demands of due process. Finally, the relationship between victim-witnesses and participating victims is unclear. Of particular concern is that the introduction of victim participation will not ameliorate, and may worsen, the position of victim-witnesses.

Part VI considers national implementation of the Statute and political responses to it. *David Turns* examines the previous and current state of the implementation of international humanitarian law in selected States and the processes by which those States have implemented or are implementing the substantive offences contained in Articles 6–8 of the Rome Statute. While the initial focus is on the position in the United Kingdom, a comparative analysis of the methods adopted in several other States — representing both the common law and civil law traditions — is also presented. He submits that the differences between many States, in terms not just of the methodology of implementation but of the underlying problems that the implementation process has caused to surface, are striking. *Dominic McGoldrick* examines the political and legal responses to the ICC. The responses of states, International Governmental Organisations (IGO's) and Non-Governmental Organisations (NGO's) to the idea of the ICC make for a fascinating case study. It has been a project that has attracted worldwide political interest. The chapter is principally concerned with the political response in terms of support or opposition. However, it also includes reference to how those political responses have been translated into constitutional amendments, national

legislation, statements by international organisations and policy instruments. He considers responses which have generally been supportive of the ICC and those which have generally been in opposition to the ICC, even if, in some cases, they have been supportive of its establishment as a matter of principle. Detailed consideration is given to the position and strategies adopted by the US, as the leading opponent of the ICC.

Finally, in Part VII, *Dominic McGoldrick* considers the legal and political significance of a permanent ICC. He assesses the significance of the ICC in terms of its permanence, the pursuit of national and international justice, its place in the international institutional peace and security structure and in the international legal order.

PART I

The Origins and Development of the Permanent International Criminal Court

1

Criminal Trials Before International Tribunals: Legality And Legitimacy

DOMINIC MCGOLDRICK

1. INTRODUCTION

IN ASSESSING THE legality and the legitimacy of the ICC, an historical approach provides important guidance on relevant issues and questions. Why an ICC now? Why not before? How does it locate into the history of national and international war crimes trials and institutions? What is new or different or significant? What should the bases of comparison and judgement be? This chapter seeks to address these questions. Assessment of any criminal trials requires both a micro- and a macro-analysis. The micro-analysis focuses on the internal processes and procedures of the trials and the roles of the officials and participants. The macro-analysis focuses on the broader social, political and historical contexts. Both levels of analysis can review issues of legality and legitimacy.[1] This chapter presents a comparative critique of criminal trials before the International Military Tribunals at Nuremberg and Tokyo and the International Tribunals for the former Yugoslavia and for Rwanda. It also looks to future trials that could take place before the Permanent International Criminal Court.

Any trial can be viewed as a drama.[2] However, it is never an abstract drama. A trial or series of trials has to be localised in a system of criminal law and justice. International trials have to be localised in 'systems' of 'international criminal law' and 'international criminal justice'. However, the very existence of such 'systems' has been contested.[3] This goes to the heart of issues of legality and legitimacy for international trials. For much of its history 'international criminal law', if it has existed at all, has been rudimentary, indeterminate, and ineffectual.[4] It existed in the nether

[1] See T Franck, *The Power of Legitimacy Among Nations* (OUP, New York, 1990).
[2] Some post-modern legal analysis focuses on the function of trials as 'storytelling'.
[3] Evidence of the speed of development of the systems is the publication of *Archbold — International Criminal Courts* (Sweet & Maxwell, London, 2002).
[4] See JJ Paust *et al* (eds), *International Criminal Law — Cases and Materials* (Carolina Academic Press, Durham, 2000); C Greenwood, 'Historical Development and Legal Basis' in D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP, Oxford, 1999) 1–38; J Barboza, 'International Criminal Law' (1999) 278 *Receuil Des Cours — Collected Courses of the Hague Academy of International Law* 9–200; L Sunga, *The Emerging System of International Criminal Law* (Kluwer, The Hague, 1997); GK McDonald and OS Goldman, *Substantive and Procedural Aspects of International Criminal Law: the Experience of International and National Courts*, vols I and II (Kluwer, Cambridge, MA, 2000).

regions of international humanitarian law, which existed in the nether regions of public international law. A system of 'international criminal justice' might be thought to require some consensus on the existence and values of the 'international community'.[5] The existence of such a community in this sense and its values also remain contested.[6] What has not been contested is that the standards of legality and legitimacy by which international trials should be assessed have evolved. There has been a clear recognition of the need to comply with the human rights of defendants and to take greater account of the interests of victims. More generally, any trial or trials always take place in an evolving social and political context.

The second section of this chapter briefly records the history of national and international trials for 'war crimes' (used in a broad sense to include war crimes in the strict sense, crimes against humanity, genocide and crimes against peace), and considers the various purposes of such trials. The third section is a comparative examination of the establishment and functioning of the Nuremberg, Tokyo, Yugoslavian and Rwandan Tribunals respectively. The fourth section highlights the principal features of the Permanent International Criminal Court. The fifth section concludes with an assertion that war crimes trials before international tribunals have moved closer and closer towards satisfying purer norms of legality and legitimacy.

2. NATIONAL AND INTERNATIONAL WAR CRIMES TRIALS: AN OVERVIEW

2.1 The Purposes of War Crimes Trials

The general categorisation of 'war crimes trials' is an over simplification. It hides a variety of sub-categories. Such trials take place in different social and political contexts, pursue different agendas, have different signifiers, and are constrained by legal, economic and linguistic categorisations and cultural narratives.[7] National and international war crimes trials, like all 'trials', serve a variety of purposes.[8] These include deterrence,[9] punishment, reconciliation,[10] establishing

[5] The ICC Statute makes a number of references to the 'international community'. See A Cassese, 'Reflections On A Modern Criminal Justice System' (1998) 61 *MLR* 1.

[6] The formulation of the first para of the preamble to the ICC Statute is interesting, 'Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time'. See B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 (IV) *Receuil Des Cours — Collected Courses of the Hague Academy of International Law* 217–384.

[7] See RA Melikan, *The Trial in History — International and Domestic Trials* vol II (Manchester University Press, Manchester, 2003).

[8] National war crimes trials will have similar though usually more limited purposes.

[9] See C McGreal, 'Second-Class Justice System' *Manchester Guardian Weekly*, 24 April 2002 (there is some anectodal evidence from Congo and Burundi that militia leaders have curtailed attacks).

[10] See A Fatic, *Reconciliation via the War Crimes Tribunal* (Ashgate, Aldershot, 2000); Eighth Annual Report of ICTY, A/56/532 at para 229.

the historical facts,[11] creating an extensive, if necessarily partial, historical record,[12] making societies come face to face with the past,[13] reinforcing the concept of accountability,[14] re-establishing legal and moral order and an ordered system of justice, education,[15] rebuilding civil society, establishing or reinforcing the supremacy of international law over national law, building an international society governed by an inter-national rule of law,[16] and re-establishing international peace and security. Some of these purposes may conflict or appear to conflict at particular times.[17]

2.2 National Trials

National war crimes trials have a long and some would say (un)distinguished history.[18] National courts may appear more legitimate than international ones or vice versa. The obligation on States to prosecute certain war crimes, 'grave breaches', is a central element of international humanitarian law.[19] National jurisdiction has also been established over genocide, though it has rarely been

[11] Roling distinguishes between the trial truth and the historical truth, BVA Roling and A Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemaker* (Polity Press, Cambridge, 1993).
[12] See M Biddiss, 'The Nuremberg Trial: Two Exercises in Judgment' (1981) 16 *Journal of Contemporary History* 597.
[13] Debate has continued on the role of the German people in Nazism. See D Goldhagen, *Hitler's Willing Executioners — Ordinary Germans and the Holocaust* (Little, Brown, London, 1996); M Minow, *Between Vengeance and Forgiveness*: *Facing History After Genocide and Mass Atrocity* (Beacon Press, Boston, 1999).
[14] See SR Ratner and JS Abrams, *Accountability for Human Rights Atrocities in International Law* (OUP, Oxford, 1997).
[15] D Bloxham, *Genocide on Trial* (OUP, Oxford, 2001) submits that the Nuremberg trials were conceptually flawed as didactic tools. 'When education and understanding have spread through the family of nations there may be no need for international law'. G Lawrence (Lord Oaksey), 'The Nuremberg Trials and the Progress of International Law' 16 (Holdsworth Club, Birmingham, 1947).
[16] See C Bassiouni and C Blakesley, 'The Need for an International Criminal Court in the New World Order' (1992) 25 *Vandenberg Journal of Transnational Law* 151–82.
[17] See A D'Amato 'Peace vs Accountability in Bosnia' (1994) 88 *AJIL* 500–6; AJ Colson, 'The Logic of Peace and the Logic of Justice' (2000) 15 *International Relations* 51–62; Symposium: 'State Reconstruction After Civil Conflict' (2001) 95 *AJIL* 1–119; LE Fletcher and HM Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *HRQ* 573.
[18] See TLH McCormack and GJ Simpson (eds), *The Law of War Crimes — National and International Approaches* (Kluwer, The Hague, 1997); Paust *et al* (eds), *International Criminal Law*, see above n 4 at 707–857; H McCoubrey, 'War Crimes Jurisdiction and a Permanent International Criminal Court: Advantages and Difficulties' (1998) 3 *Journal of Armed Conflict Law* 19–26; H Ball, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience* (Univ Press of Kansas, Lawrence, 1999).
[19] Each of the Geneva Conventions of 1949 specifies what are grave breaches, as does Protocol I of 1977. See R Wolfrum, 'Enforcement of Humanitarian Law' in Fleck (ed), *The Handbook of Humanitarian Law*, 517 at 530–40; LC Green, *The Contemporary Law of Armed Conflict* (2nd edn) (Manchester University Press, Manchester, 2000) 286–316. There is no acceptance yet of a general duty to prosecute for any war crime. See A Cassese, 'On the Current Trend Towards Criminal Prosecutions and Punishment of Grave Breaches of International Humanitarian Law' (1998) 9 *EJIL* 2.

exercised.[20] Few States have established national jurisdiction over crimes against humanity as such,[21] and there have only been isolated prosecutions. The exercise of national jurisdiction over these three kinds of crimes would usually be based on the nationality of the offenders (nationality jurisdiction) or on the territorial location of the crimes (territorial jurisdiction). In addition, however, the three kinds of crimes are among the few areas of international law where there is general acceptance that States can, in principle, exercise jurisdiction over offences committed by any person anywhere in the world ('universal jurisdiction'). Perhaps the most famous national 'war crimes' trial asserting universal jurisdiction remains the Israeli trial of Adolf Eichmann, who had been head of the Jewish Office of the German Gestapo.[22] Eichmann was charged with 'crimes against the Jewish peoples and crimes against humanity'. That case raised legal controversy because the Israeli court asserted jurisdiction over a German national in respect of offences which had not taken place within the territory of Israel, and indeed, in respect of offences which had taken place when Israel did not even exist as a State.[23]

At the conclusion of the First World War, Articles 228 and 229 of the Versailles Treaty (1919) made provision for the trial of German military personnel accused of violating the laws and customs of war before Allied Military Commissions or before the military courts of any of the Allies.[24] Partly out of a concern not to jeopardise the stability of the Weimar Republic, no attempt was made to implement these provisions. Rather, the Allies requested Germany to prosecute a limited number of war criminals before its Imperial Supreme Court in Leipzig. The few resulting trials, 12 in number, were widely discredited. 888 out of 901 defendants were acquitted or had their cases dismissed.[25] After the Second World War, international trials attracted the greatest publicity. However, the largest volume of war crimes trials were held in Germany in the Allied occupation zones under Allied Control Council Law No 10, which allowed each occupying authority to carry out trials of persons held in its custody.[26] Individual States that held war crimes trials

[20] Eg, genocide was one of the charges in the Spanish indictment against General Pinochet. The Spanish understanding of genocide was not consistent with the definition of it in the Genocide Convention (1948).

[21] Eg, the UK had no offences of crimes against humanity as such until the International Criminal Court Act 2001. See Turns, in this volume, Pt 2.4.

[22] *Attorney-General of the Government of Israel v Eichmann* (1961) 36 *ILR* 5. See P Papadatos, *The Eichmann Trial* (Stevens, London, 1964); G Bach, 'The Trial of Adolf Eichmann' (1997) *Judicial Studies Board Journal* 15–17; JN Wenig, 'Enforcing the Lessons of History: Israel Judges the Holocaust' in McCormack and Simpson (eds), *The Law of War Crimes*, see above n 18 at 103–22 (this essay also discusses the *Damjanjuk Case* (1985) 79 *ILR* 535).

[23] The Jerusalem District Court found that the jurisdiction to try crimes under international law was universal.

[24] (1919) Treaty Series. The Treaty of Sevres between the Allied Powers and Turkey (1920) made provision for Turkey to surrender persons for trial. It was not ratified and was replaced by the Treaty of Lausanne (1923).

[25] See C Mullins, *The Leipzig Trials: An Account of the War Criminals Trial* (Witherby, London, 1921).

[26] Over a 1000 defendants were tried in the period from 1945–49. The British used the Royal Warrant system to establish courts under the law of the UK to try foreign nationals in Germany, see Rogers at n 28 below.

in Europe and in Asia included the US,[27] the UK,[28] Australia, Nationalist China, France, Greece, the Netherlands, Poland, and the USSR.[29] Since the 1940s, war crimes trials have been spasmodic at the national level but in the 1980s and 1990s there was a resurgence of prosecutions in Australia,[30] Canada,[31] and a number of European States.[32] The passage of more than half a century since the Second World War means that the possibilities of Second World War related prosecutions are fast diminishing. In 1999 Anthony Sawoniuk was the subject of the first and only prosecution in the UK under the War Crimes Act 1991, which provided jurisdiction in relation to war crimes committed by non-British nationals in German-controlled territory during the Second World War.[33] The 1990s have seen a relative revival of national war crimes trials, often related to the former Yugoslavia.

2.3 International Trials

The earliest international prosecution is often suggested to have been that of Conradin von Hofenstafen in 1268 for waging aggressive war. In 1474 Governor Peter of Hagenbach was tried and condemned before a court of 28 representatives of the Hanseatic cities at Breisach for various atrocities including murder, rape, pillage, and wanton confiscation.[34] Some five centuries later, Article 227 of the Treaty of Peace Between the Allied and the Associated Powers and Germany (Versailles, 1919) provide for the creation of an ad hoc international criminal tribunal to prosecute Wilhelm II of Hohenzollern, formerly the German Kaiser, for initiating the First World War.[35] He was to be indicted for, 'a supreme offence against international

[27] See FM Buscher, *The U.S. War Crimes Trial Programme in Germany 1945–55* (Greenwood, New York, 1989). The US was responsible for the 12 subsequent Nuremberg cases which involved representative proceedings against 185 military, industrial, medical, judicial and other figures. There was a re-educative element to these proceedings.

[28] See APV Rogers, 'War Crimes Trials Under the Royal Warrant: British Practice 1945–1949' (1990) 39 *ICLQ* 780.

[29] See J Appleman, *Military Tribunals and International Crimes* (Bobbs-Merrill, Indianapolis, 1954). The Berkeley War Crimes Center in the US is engaged in a project on collecting material relating to national war crimes trials, <http:///www.warcimescenter.berkeley.edu.project>.

[30] See G Triggs, 'Australia's War Crimes Trials: All Pity Choked' in McCormack and Simpson (eds), *The Law of War Crimes*, above n 18 at 123–49.

[31] See SA Williams, 'Laudable Principles Lacking Application: The Prosecution of War Criminals in Canada' in McCormack and Simpson (eds), *The Law of War Crimes*, above n 18 at 151–70.

[32] See A Marschik, 'The Politics of Persecution: European National Approaches to War Crimes' in McCormack and Simpson (eds), *The Law of War Crimes*, above n 18 at 65–101; LS Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: from Touvier to Barbie and Back Again' (1994) 32 *Columbia Journal of Transnational Law* 289–380.

[33] See *R v Sawoniuk (Anthony),* [2000] *Criminal Law Review* 506. Another individual was found to be unfit to plead. The investigations unit under the Act has been wound up. The passage of the Act was itself controversial.

[34] See G Schwarzenberger, *International Law as Applied by International Courts and Tribunals* vol 2: *Armed Conflict* 462–6 (Stevens, London, 1968). Hagenbach was convicted and beheaded.

[35] 2 Bevans 43. The peace treaties with Austria, Bulgaria, Hungary and Turkey also contained provisions on prosecuting international crimes.

morality and the sanctity of treaties'. Although an intergovernmental commission reported on the responsibilities of the authors of the war and on enforcement of penalties,[36] the tribunal was never established. The Kaiser had taken refuge in the Netherlands and the Dutch government had made it clear that he would not be surrendered for trial.[37]

In substance, therefore, 'The real history of international criminal law begins after WW II, and is often a history of institutions'.[38] Until the 1990s, the only successful historical precedents at the international level were the International Military Tribunals (IMTs) at Nuremberg and Tokyo. Both were major political events and were affected by political pressures.

3. NUREMBERG, TOKYO, YUGOSLAVIA, RWANDA: A COMPARATIVE ANALYSIS

3.1 Nuremberg

The Nuremberg IMT was undertaken only after other options, such as summary executions, were considered by the major Allied powers.[39] The establishment of the UN War Crimes Commission preceded it, but the Commission was marginalised and was not directly involved in the establishment of the Tribunal.[40] The agreement of the Allies on the trial of war criminals was expressed in a number of international statements but most notably in their Moscow Declaration of 1943. Under that Declaration, minor criminals were to be judged and punished in the countries where they committed their crimes. 'Major war criminals whose offences have no particular geographical location' were to be tried and punished 'by the joint decision of the Governments of the Allies'.[41] Major or minor status depended on rank rather than the seriousness of the crime charged. To that extent, it was intended as a show trial (in the proper sense)[42] of the 'big fish'. With Adolf Hitler, Heinrich Himmler, and Josef Goebbels dead, Reich Marshal Hermann Goering and former Foreign Minister Joachim von Ribbentrop were the major political figures. Alongside them were tried a mixture of other political figures, military and naval

[36] See (1920) 14 *AJIL* 95.

[37] The Netherlands had remained neutral during the First World War and was not a party to the Versailles Treaty. It further stated that the extradition would have violated Dutch law and its tradition of asylum.

[38] R Cryer, *Towards An Integrated Regime for the Prosecution of International Crimes* 315 (Ph D thesis, University of Nottingham, 2000; forthcoming, CUP, 2004).

[39] See BF Smith, *The American Road to Nuremberg — The Documentary Record 1944–45* (Hoover Press, Stanford, 1982); Smith, *The Road to Nuremberg* (Basic, New York, 1981); MR Marrus (comp), *The Nuremberg War Crimes Trials, 1945–46: a Documentary History* (Bedford Books, Boston, 1997).

[40] The Commission was established in 1942 and began work in 1943. See E Schwelb, 'The UN War Crimes Commission' (1946) 23 *BYIL* 363.

[41] Anglo-Soviet-American Communiqué from the Tripartite Conference in Moscow, 1 Nov 1943 (supp), (1944) 38 *AJIL* 3.

[42] They were not show trials in the Stalinesque sense, see GH Hodos, *Show Trials: Stalinist Purges in Eastern Europe, 1948–1954* (Praeger, New York, 1987).

officers, economic and financial figures, and propagandists. In this way, the Nazi system was put on trial.

Nuremberg has been described as 'the most majestic forensic drama ever enacted on the stage of history'.[43] Its legality and legitimacy have been subjected to sustained critiques.[44] A significant number of participants have published accounts of the trial.[45] The judgment of the Tribunal remains of seminal importance.[46] The international legal authority of the Allies to set up the Tribunal can be argued to have derived from: (i) their authority as the de facto territorial rulers of a defeated state, or (ii) from a pooling of jurisdiction that they could each have exercised over offences for which there was universal jurisdiction, or (iii) from a broader exercise of authority on behalf of the international community on the basis of universal jurisdiction. The Tribunal was established under the London Charter of 8 August 1945. The US, the UK, France, and the USSR had drafted this Charter.[47] The later adherence of 19 other Allied states to the Charter increased its international legitimacy.[48] The judges and the prosecutors were appointed by the original four powers. It was intended that there would be other trials but, in the event, none was held. Article 1 of the Charter provided that the defendants were to receive a 'just and prompt trial'. They were defended by German lawyers and received extensive legal assistance. The defence could cross-examine prosecution witnesses, submit evidence, witnesses, and documents. There were 33 prosecution witnesses and 61 defence witnesses. In addition, the defendants could and did testify on their own behalf. There were consistent complaints from the defence concerning access to and use of documents. The Control Council had some important responsibilities under the Charter, including the right to reduce or alter sentences, but not to increase them.

The Charter stated that the Tribunal and judges could not be challenged by the prosecution or by the defendants or by their counsel. The Tribunal stressed that the Allied powers had done jointly what they might have done singly. The making

[43] JH Morgan, *The Great Assize — an Examination of the Law of the Nuremberg Trials* (John Murray, London, 1948) 1. On the forensic aspects of the trial, see AD Gibb, *Perjury Unlimited* (Green, Edinburgh, 1954).

[44] R Ginsberg and VN Kudriavtsev (eds), *The Nuremberg Trial and International Law* (Nijhoff, Dordrecht, 1990); RE Conot, *Justice at Nuremberg* (Harper and Row, New York, 1975); A Tusa and J Tusa, *The Nuremberg Trial* (Macmillan, London, 1983); RK Woetzel, *The Nuremberg Trials in International Law* (Stevens, London, 1962); RS Clark, 'Nuremberg and Tokyo in Contemporary Perspective' in McCormack and Simpson (eds), *The Law of War Crimes*, above n 18 at 171–87; 'Essays on the Law of War and War Crimes In Honour of Telford Taylor' (1999) 37 *Col J Trans L* 649.

[45] These include T Taylor, *The Anatomy of the Nuremberg Trials* (A Knopf, New York, 1992); BF Smith, *Reaching Judgment at Nuremberg* (Deutsch, London, 1977); DA Sprecher, *Inside the Nuremberg Trial: a Prosecutor's Comprehensive Account* (2 vols), (University Press of America, Lanham, Md, 1999).

[46] See *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, 1946, (HMSO, Cmd 964); Proceedings (vols 1–23) (1946–51); H Stimson, 'The Nuremberg Trial: Landmark in Law' (1947) 25 *Foreign Affairs* 179–89. The soviet judge dissented from parts of the Tribunal's legal analysis, the three acquittals, and the imposition of a life sentence rather than the death penalty for Rudolf Hess.

[47] For the international agreement on establishing the Tribunal and the London Charter, see 82 United Nations Treaty Series, 279, 284.

[48] In accordance with Art 5 of the Charter.

of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich had unconditionally surrendered. It is often curiously overlooked that the IMT was designated as a 'military tribunal' (there was no civil authority in Germany). The London Charter was clearly selective. There was no possibility of prosecutions in relation to Allied actions such as the carpet bombings of cities, crimes against peace and against humanity by the USSR,[49] or war crimes by various Allied States. There was no appellate process.

It is generally accepted that the Nuremberg Tribunal sought to apply rules of international law, rather than rules of national law. Article 6 of the Charter provided for jurisdiction over three categories of offence for which there was individual responsibility: crimes against peace, war crimes, and crimes against humanity. The categories overlapped to some extent and were not carefully distinguished by the Tribunal. The second and third categories have formed the conceptual basis for the development of international criminal law since 1945.[50] 'War crimes' was an accepted category in 1945 both in terms of treaty law and customary international law. Crimes against peace and crimes against humanity were much more controversial in terms of whether they violated the principle of *nullem crimen sine lege* and thus constituted retroactive criminalisation. Crimes against peace,[51] and in particular the waging of an aggressive war, was the most controversial in terms of whether they existed at all at the relevant time and, if it did, whether they gave rise to individual criminal responsibility as distinct from the responsibility of the State.[52] The Tribunal considered that the crimes did exist and in particular that international agreements had made aggressive war illegal in the 1930s. As for individual responsibility, the Tribunal stated that the maxim *nullem crimen sine lege* was not a limitation on sovereignty but merely a general rule of justice to which there could be exceptions, and the circumstances before them constituted such an exception. In its view, waging aggressive war did give rise to individual criminal responsibility. The Tribunal argued that:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[53]

[49] Eg, when German forces were invading Poland from the north, south and west, Soviet troops were doing the same from the east in accordance with a secret protocol in an anti-aggression pact between the Soviet Union and Germany signed in 1939.

[50] See Paust *et al* (eds), *International Criminal Law*, above n 4 at 967–1080.

[51] *Ibid* at 861–966.

[52] For some broadly contemporary accounts see Oaksey, 'The Nuremberg Trials' (supportive); Viscount Kilmuir, 'Nuremberg in Retrospect' (Holdsworth Club, Birmingham, 1956, supportive); Morgan, *The Great Assize,* above n 43, (critical of references to international law rather than acts of de facto sovereigns and of the counts of conspiracy, aggressive war and crimes against humanity, and generally intemperate).

[53] Judgment of the IMT at 223. In the case between Bosnia and Yugoslavia (Serbia and Montenegro) the latter has argued that genocide only bears individual criminal responsibility and not state responsibility. See *Case Concerning Application of the Convention on the Prevention of Genocide*, (1993) ICJ Reports, 3 and 325 (interim measures), (1996) ICJ Reports, 595 (jurisdiction), (2003) ICJ Reports (rejecting a request for revision).

Similarly controversial was the position in relation to crimes against humanity because this crime was partly concerned with a State's treatment of its own population, a matter which had classically been considered as within its domestic jurisdiction.[54] In the event, crimes against humanity were narrowly interpreted by reference to the terms of the Charter on other offences and thus events before 1937 were excluded. On the evidence no defendant was convicted of crimes against humanity for an act committed before 1 September 1939.

The fourth charge was of conspiracy to commit offences within the three substantive categories. The presentation of the Nuremberg case on the basis of the conspiracy-criminal organisation theory was central to how it was conducted, the images it represented and its influence on perceptions of Nazi criminality.[55] The quadripartite process behind its organisation and construction, 'allowed most vested interests to pick what they wanted from the proceedings'.[56] The conspiracy charge was controversial for some of the Allies and for some of the judges. In the event, conspiracy was limited to crimes against peace, was strictly construed, confined to commanders and leaders, and limited to the period from 1938 onwards.

The personal jurisdiction of the Tribunal extended to organisations. If an organisation was found to be criminal, its members could be found guilty in subsequent proceedings before the lesser (national) court of the victorious power.[57] Much debate in the Tribunal was occasioned by this offence. There were no precedents for such international liability, and the Tribunal read in safeguards of voluntariness and knowledge. The SS, the Leadership Corps of the Nazi Party, and the Gestapo/SD were declared criminal but the SA, the Reich Cabinet, and the High Command were not.

In terms of evidence, there were no exclusionary rules.[58] One reason for this was that the trail was not before a jury and the IMT was to give reasons. Exclusionary rules are largely designed for jury trial. Thus, the cases mainly rested on undisputed German documents, '[t]he trial had involved scrutiny of a hundred thousand documents, a hundred thousand feet of film and twenty-five thousand still photographs'.[59] There were over 400 open sessions, 113 witnesses and more than five million words of oral evidence. Those defendants who were convicted and hanged were effectively hoisted on the petard of Germanic efficiency in record keeping.[60] The oral element of the trial was important in terms of keeping up its human interest. The oral evidence of Goering provided the trial with its

[54] See E Schwelb, 'Crimes Against Humanity' (1946) 23 *BYIL* 178–226.
[55] See Bloxham, *Genocide*, above n 15.
[56] *Ibid* at 227.
[57] See *Case of Ulrich Greifelt, Law Reports of Trials of War Criminals* (vol 13), (HMSO, London) 1–69.
[58] Art 19 of London Charter.
[59] See Tusa and Tusa, above n 44 at 487–8. Bloxham, *Genocide*, above n 15, suggests that the document led the approach of the IMT to be derived from US anti-trust suits.
[60] See J Mendelson, 'Trial by Document: The Problem of Due Process for War Criminals at Nuremberg' (1975) 7 *Prologue* 227–34.

most dramatic confrontation.[61] Twenty-four defendants were charged. One committed suicide and one was determined to be unfit to stand trial. Twenty-two were tried, one *in absentia* (Martin Bormann). The trial lasted ten months. Three defendants were acquitted. Sentencing was at the discretion of the Tribunal.[62] Of the 19 convicted, 12 were sentenced to death (including Bormann), three received life sentences, and four received terms of imprisonment ranging from ten to twenty years. The Control Council affirmed all of the sentences of the IMT. Goering committed suicide. Ten were executed by hanging, a method considered dishonourable by military personnel. Pleas by a number of them to be shot by firing squad were rejected. The convictions of Julius Streicher and Admiral Karl Donitz were the most controversial. The Nuremberg trial formed part of a wider context of allied occupation policy and a geo-political environment. That context precluded another major trial.[63]

The Cold War mists were assembling on a divided Germany. War crimes trials in the Allied zones continued but the politics of closure had to be addressed. Closure of war crimes trials is always a difficult issue because it allows political decisions to determine what would otherwise be legal or judicial decisions. For the Western Allies a desire to avoid the punitive reparations after the First World War meant that attention was increasingly focused on democratisation, economic reconstruction and the reintegration of Western Germany into Europe.

Nuremberg is the point in the constellation from which all legal discussion of war crimes trials proceeds or reverts.[64] That crimes against peace and crimes against humanity were retrospectively criminalised remains at best technically arguable. The purpose of the rule against retrospective criminalisation is that individuals should not be punished for actions which they could not have reasonably considered to be subject to criminal prohibition. International law was clearly evolving in the first half of the twentieth century, and the Nuremberg charges do not offend the purpose of the prohibition.[65] The law that the IMT applied was subsequently affirmed by the international community.[66] The concept of 'crimes against humanity' is now a central part of humanitarian law, and there is no requirement for the relevant conduct to be linked to an armed conflict.[67] The Tribunal interpreted the charges cautiously. As noted, three defendants were acquitted. The concept of 'crimes against peace' has fared less well. No crime of

[61] See IMT, above n 46, vol 9, 417–56, 496–619.
[62] Art 27 of London Charter.
[63] See above n 27 (on the 12 Nuremberg cases).
[64] 'The ambiguous legacies of Nuremberg linger at the margins of our unreliable moral memories; they inspire but also burden the conscience of our politics' D Luban, 'The Legacies of Nuremberg' (1987) 54 *Social Research* 779 at 829.
[65] See also *SW v UK*, (1995) 335–B ECHR, where it was held that judicial abolition of the common law marital rape exemption did not violate Art 7 of European Convention on Human Rights.
[66] See General Assembly Resolution 95(I) (1946) and the International Law Commission's formulation of the Nuremberg Principles (1950).
[67] See G Robertson, *Crimes Against Humanity* (Penguin, London, 2000); McCormack in this volume. There was such a requirement in the ICTY but not in the ICTR, see n 171 below.

'aggression' was included in the International Criminal Tribunal for Yugoslavia statute so as to insulate it from, 'the political issues surrounding the conflict'.[68] The crime of 'aggression' has been included in the jurisdiction of the International Criminal Court, but this remains dependent upon agreement on its definition. Such an agreement has not been reached.[69]

Nuremberg is 'the' precedent.[70] Without Nuremberg there would almost certainly have been no Tokyo. Half a century later the light (or shadow) of Nuremberg lay on the paths to the two ad hoc tribunals for Yugoslavia and Rwanda, and to the International Criminal Court.[71] Nuremberg also played a crucial role in the development of international human rights law. Holding individuals responsible for violations of international law 'duties' necessarily involved regarding those individuals as subjects of international law. The atrocities committed by the Nazis were partly responsible for the notion of international human 'rights' as expressed in the UN Charter (1945), the Universal Declaration of Human Rights (1948), and subsequent myriad regional and international instruments. Lord Kilmuir, one of the British prosecutors, identified the European Convention on Human Rights of 1950 as one of the results of Nuremberg,[72] along with Nuremberg's demonstration of the dynamic of international law.[73] The piercing of the veil of sovereignty by the notions of human rights and duties, along with extensive international procedures to implement them, has moved international law away from its classical inter-state sovereignty focus.[74] None of this is to gainsay that human rights violations remain extensive in practice. However, they are at least assessed against normative standards and monitored under international procedures. They are no longer regarded as matters within the domestic jurisdiction of sovereign states.

However, it is in a broader ethical and legitimation context that Nuremberg shines most brightly. Even accepting, *arguendo*, the range of legal and legitimacy criticisms directed against it, it remains historically remarkable that after the most destructive and uncivilised conflict in human history, there should have been

[68] See JC O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 96 *AJIL* 639 at 645.
[69] See Schabas in this volume; D Turns and C Byron, 'The Preparatory Commission for the International Criminal Court' (2001) 50 *ICLQ* 420–34.
[70] H Kelsen, 'Will the Judgment at Nuremberg Constitute a Precedent?' (1947) 1 *ICLQ* 153; G Lawrence (President of the IMT), 'The Nuremberg Trial' (1947) 23 *International Affairs* 151–64; Q Wright, 'The Law of the Nuremberg Trial', (1947) 41 *AJIL* 38; G Best, *Nuremberg and After: the Continuing History of War Crimes and Crimes Against Humanity* (University of Reading, Reading, 1984).
[71] See C Tomuschat, 'International Criminal Prosecution: the Precedent of Nuremberg Confirmed' (1994) 5 *Criminal Law Forum* 237. For an early call for permanent judicial machinery for enforcement of the Nuremberg law, see WE Jackson, 'Putting the Nuremberg Law to Work' (1947) 25 *Foreign Affairs* 550; RF Drinan, 'The ICC is a Permanent Nuremberg Tribunal' 34 (38) *National Catholic Reporter*, 19 July 2002 (US Rejection of Court Defies Law, Logic and Morality).
[72] See also AWB Simpson, *Human Rights and the End of Empire — Britain and the Genesis of the European Convention* (OUP, Oxford, 2001) 102–3.
[73] See Kilmuir, 'Nuremberg in Retrospect', above n 52.
[74] See SL Paulson, 'Classical Legal Positivism at Nuremberg' (1975) 4 (Winter) *Philosophy and Public Affairs* 132–58.

resort to the civilised institutional drama of a trial at law. The opening words of the US prosecutor Justice Robert H Jackson are among the most cited and remain valid:

> That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of law is one of the most significant tributes that power ever paid to reason.[75]

Nuremberg was also part of the broader political drama:

> A moment's reflection suggests that many of the significant forces that shaped the European and American transition from war to peace appeared in microcosm during the trial.[76]

Trials always take place in an evolving social and political and international context. In the ensuing half a century, writers have continued to search for the meanings and messages of the trial.[77] What voices were heard? What were not? Bloxham has argued that the specificity of the anti-Jewish elements of the Nazi crimes were downplayed in the post World War II war crimes trial programmes, in favour of an objectivised presentation:

> The overall effect was that crimes against Jews were subsumed within the general Nazi policies of repression and persecution. Legal conservatism was to some extent responsible, but the overarching framework for this refraction of Nazi persecution was formed by Allied preconceptions of Nazi criminality and the ways in which Anglo-Saxon liberal culture related to Jews.[78]

3.2 Tokyo

The Tokyo Tribunal was also a military Tribunal. As Japan was solely under US control, the US effectively determined the Tribunal's establishment and functioning. The Charter of the IMT for the Far East was set out in a Proclamation issued on 19 January 1946 by the Supreme Commander of the Allied Powers, General Douglas MacArthur.[79] Jurisdiction covered crimes against peace, war crimes, and crimes against humanity. The eleven judges from Allied States and territories were nominated by States but were appointed by MacArthur. There is evidence

[75] *Nuremberg Trial, Proceedings*, vol 1 at 49. See also *Report of Robert H Jackson, US Representative to the International Conference on Military Trials, London, 1945* (Washington, 1949).
[76] BF Smith, *American Road*, above n 39 at xvi.
[77] See Biddiss, above n 12.
[78] See above n 15, 57. He also notes that, 'The Sinti and the Roma were all but forgotten at Nuremberg and elsewhere…' See also JP Fox, 'The Jewish Factor in British War Crimes Policy in 1942' (1977) 92 *English Historical Review* 82, on some of the legal problems raised by the Jewish factor.
[79] 4 Bevans 20; US State Department, Publication No 2675. Lord Russell of Liverpool, *The Knights of Bushido: a Short History of Japanese War Crimes* (Cassell, London, 1958).

that MacArthur exercised substantial influence on the trials to ensure that they would not threaten the success of the occupation. The Tribunal applied rules of international law. Japanese counsel assisted by US attorneys represented the defendants.

The trial lasted two and a half years. Judgment was much more divided than at Nuremberg. There were disagreements between the judges as to whether the legal basis of the trial was (i) belligerent jurisdiction or (ii) the consent of Japan. There was no argument that it was done on the authority of the international community. The Tribunal indicted 28 representative Japanese political and military leaders, and tried and convicted 25 of them.[80] Of the 25, seven were sentenced to hang, 16 to life in prison, one to 20 years in prison and one to seven and a half years in prison. Conspiracy was charged. This was controversial but was brushed aside by the Tribunal. However, there was no provision for organisations to be charged. Allied Tribunals tried over 5,000 other Japanese for war crimes. As with Nuremberg, the Tokyo trial was selective.[81] There was no possibility of Allied prosecutions, for example, in relation to the nuclear bombings of Hiroshima and Nagasaki.

Tokyo has not left the same legacy as Nuremberg, and it became the poor relation.[82] Partly this is simply because Tokyo came afterwards and therefore was following the path of Nuremberg. However, there is also a sense in which Tokyo is seen as less legitimate than Nuremberg.[83] There was less of a break in Japanese governmental authority as the Emperor was allowed to continue.[84] Those prosecuted were seen by Japanese society as victims rather than criminals. As the Cold War descended in Europe, political pressures rendered the trial an embarrassment.[85] The judgment itself was more divided than that of Nuremberg and contained bitter dissent on some issues.[86] In historical memory, the nuclear bombings have remained more prominent than the offences for which the Japanese were tried.

[80] Two died and one became ill. Neither the Emperor nor any industrialists were indicted.

[81] On rape and the use of comfort women by the Japanese, see D Boling, 'Mass Rape, Enforced Prostitution and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?' (1995) 32 *Columbia Journal of Transnational Law* 533–90; Judgments of the Women's International Tribunal on Japanese Military Slavery (a People's Tribunal), <www.jca.apc.org> noted by C Chinkin, (2001) 95 *AJIL* 335–41.

[82] See RH Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton University Press, Princeton, 1971); BVA Roling and A Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemaker* (Polity Press, Cambridge, 1993); S Horwitz, 'The Tokyo Trial' (Nov, 1950) *International Conciliation* 473.

[83] 'The proceedings were generally considered to be procedurally as well as substantively unfair' LN Sadat, *The ICC and the Transformation of International Law* 2 (Transnational, Ardsley, New York, 2002).

[84] Effectively he was accorded impunity.

[85] See P Lowe, 'An Embarassing Necessity: the Tokyo Trial of Japanese Leaders, 1946–48' in RA Melikan (ed), *Domestic and International Trials, 1700–2000, The Trial in History*, vol II (Manchester University Press, Manchester, 2003) 137–56.

[86] See E Kopelman, 'Ideology and International Law: the Dissent of the Indian Justice at the Tokyo War Crimes Tribunal' (1991) 23 *New York University Journal of International Law and Politics* 373.

3.3 The International Criminal Tribunal for Yugoslavia (ICTY)[87]

In 1993, the Security Council (SC) established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory in the Former Yugoslavia since 1991.[88] Its establishment was part of a wide range of international legal responses to the conflict and dissolution of Yugoslavia.[89] The SC had established a Commission of Experts in 1992 to collect information and examine the evidence relating to grave breaches of the Geneva Convention and other violations of international humanitarian law committed in the territory of the former Yugoslavia.[90] A massive computer database had been established in the US. In its report to the UN Secretary-General, the Commission had recommended the establishment of an ad hoc tribunal.

The foundational document of the ICTY was a 35 page report submitted to the SC by the Secretary-General.[91] That report was prepared at the request of SC and was unanimously adopted by it.[92] The Secretary-General presented the report on a pretty much take it or leave it basis. No options were presented. Although a number of members of the SC would have liked to propose changes, they did not do so for fear that this would engage a process of negotiation and unravelling of the report. The report asserted that the SC would not be legislating. The ICTY would only apply existing law. The legal basis for the ICTY was Chapter VII of the UN Charter, which deals with threats to the peace, breaches of the peace, and acts of aggression. Decisions under Chapter VII are legally binding on members of the

[87] C Blakesley, 'Atrocity and its Prosecution: the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda' in McCormack and Simpson (eds), *The Law of War Crimes*, above n 18 at 189–228; K Lescure, *International Justice for Former Yugoslavia: the Workings of the International Criminal Tribunal of the Hague* (Kluwer, The Hague, 1996); V Morris and MP Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, Irvington New York, 1995); JC O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 87 *AJIL* 643; Symposium, 'A Critical Study of the International Tribunal for the former Yugoslavia' (1994) 5 *Criminal Law Forum*; R Wedgwood, 'War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal' (1994) 34 *Vanderbilt J Int Law* 276. See <www.un.org/icty> and <www.un.org/ictr> for the annual reports of the tribunals to the General Assembly (hereafter GA) and the Security Council (hereafter SC).

[88] SC Resolutions 808 (1993), 827 (1993). The Statute has been amended a number of times including SC Resolutions 1166 (1998), 1329 (2000), 1481 (2003) 1503 (2003).

[89] See D McGoldrick, 'The Tale of Yugoslavia: Lessons for Accommodating National Identity in National and International Law' in S Tierney (ed), *Accommodating National Identity: New Approaches in International and Domestic Law* (Kluwer, The Hague, 2000) 13–64; C Greenwood, 'The Prosecution of War Crimes in the Former Yugoslavia' (1994) 26 *Bracton Law Journal* 13; T Meron, 'The Case for War Crimes Trials in Yugoslavia' (1993) 72(3) *Foreign Affairs* 122–35.

[90] SC Resolution 780 (1992). See C Bassiouni, 'The Commission of Experts Established Pursuant to SC Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia' (1994) 5 *Criminal Law Forum* 279–340.

[91] United Nations Doc S/25704 (1993); (1993) 32 *ILM* 1159.

[92] The Secretary-General received reports from the Conference on Security Co-operation in Europe (S/25307) (1993), France (S/25266) (1993), and Italy (S/25300) (1993) and a number of States and non-governmental organisations made comments during the drafting of the report.

UN. According to SC Resolution 827, the aims were to put an end to the crimes being committed, to bring to justice those responsible for them, and to contribute to the restoration and maintenance of peace.

The eleven judges of the ICTY, drawn from legal systems across the world, were elected by the General Assembly in September 1993 and took office on 17 November 1993.[93] The ICTY has been composed of experts in criminal law, human rights, and civil liberties protection, and has included senior judicial officers. Initially the ICTY faced financial and practical constraints. It took 18 months to appoint the first Prosecutor. Additional courtrooms have had to be built. Additional judges have been appointed. A pool of 27 *ad litem* judges was established in 2001 to assist the ICTY to reduce the backlog.[94] The ICTY adopted a very pro-active and dynamic approach to its work. It was given the very important power to adopt its own rules of procedure and evidence[95] and took a substantial number of other practical steps. The first indictments were made public on 8 November 1994.

In Nuremberg and Tokyo the principal leaders and organisers were put on trial.[96] This was not the original position with the ICTY. Major political and military leaders were indicted but remained at large as the tribunal dealt with relatively minor figures, although there were convictions for substantial atrocities. However, the level of those detained for trial gradually rose as important political and military figures surrendered or were detained as the political situation in the FRY turned against them. Of critical importance, Former Yugoslavian and Serbian President Slobodan Milošević was surrendered to the ICTY in 2001. His was undoubtedly the ICTY's most important trial and has been considered to rival that of Nuremberg in terms of its historic and legal significance.[97] In 2001, Biljana Plavšić, former deputy to Radovan Karadžić and former President of the Bosnian Serb Republic, surrendered herself to the ICTY. She was the first woman to be indicted by the ICTY. In 2002 she pleaded guilty on one charge while others were dropped.[98] Other important figures have been brought before the ICTY, for example, General Krstić. Two major political and military leaders have been indicted but remain at large (as of 1 March 2003) namely Radovan Karadžić and Ratko Mladić.[99]

As of 17 October 2003 92 individuals had appeared in proceedings before the ICTY. Forty-one accused had been tried and four were being tried. There had been 21 convictions and five acquittals. Fifty-one suspects were in custody in the

[93] The list is submitted to the GA by the SC. The number was later increased to 16. The ICTY has had three female judges.
[94] See SC Res 1329 (2000).
[95] See ICTY, *Rules of Procedure and Evidence*, IT/32/REV 28 (2003); J Katz Cogan, 'The Problem of Obtaining Evidence for International Criminal Courts' (2000) 22 *Human Rights Quarterly* 404.
[96] See Smith, *Reaching Judgment*, above n 45 at 171–298.
[97] See D McGoldrick, 'The Trial of Slobodan Milošević: A Twenty-First Century Trial'? in Melikan, above n 85 at 179–84.
[98] On 27 Feb 2003 she was sentenced to 11 years in prison.
[99] In Oct 2003 it was reported that the Serb authorities had tried to arrest Mladić.

Tribunal's jail facility near The Hague. Twenty-four individuals have been transferred or released. Seven have been provisionally released. Fifty-six accused were in proceedings before the tribunal. Seventeen indictees remain at large, including two major figures. Of the first 45 persons detained, 27 suspects have been of Serbian or Bosnian Serb background, 14 of Croatian or Bosnian Croat background, three of Muslim or Bosnian backgrounds, and one of Macedonian background who also held Croatian citizenship.

The establishment of ICTY was a unique venture for the international community.[100] There were partial precedents from the Nuremberg and Tokyo Tribunals. However, these, 'were created in very different circumstances and were based on moral and juridical principles of a fundamentally different nature'.[101] The ICTY was not an organ of the victorious state, but an organ of the international community. The ICTY and the comparable Tribunal for Rwanda (ICTR) are technically subsidiary organisations of the United Nations' Security Council,[102] but they are operationally independent.[103] Much was therefore done to avoid the impression of a partial judgment by the victors of a conflict. This was particularly evident when the ICTY Prosecutor considered whether to bring prosecutions in response to the NATO bombings of Kosovo in 1999.[104] It may be stating the obvious but it was, of course, of fundamental importance for the ICTY and the ICTR that Nuremberg and Tokyo had actually taken place. Any arguments that new law was being created were of much lesser weight after these tribunals.[105]

The most general critique aimed at the ICTY (and the International Criminal Tribunal for Rwanda) is an indirect one. This is that the international community only established it to salve its conscience for its failure to act to stop the 'ethnic cleansing' which had taken place.[106] There is no international criminal offence of ethnic cleansing, nor indeed any national law with a specific offence of this title. The concept of 'ethnic' groups is more familiar to the law relating to international

[100] For a helpful collection of historical statements, see A Cassese (ed), *Path to The Hague: Selected Documents on the Origins of the ICTY* (ICTY, The Hague, 1996).
[101] First Annual Report of the Tribunal, submitted to the GA and SC, UN Doc A/49/342, 29 Aug 1994.
[102] See D Sarooshi, *The United Nations and the Development of Collective Security* (OUP, Oxford, 1999) 92–109; *id* 'The Legal Framework Governing United Nations Subsidiary Organisations' (1996) 67 *BYIL* 413 at 428–31, 453–8.
[103] There is necessarily some indirect UN control in terms of financing, appointment of judges and staff.
[104] See 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (ICTY, The Hague, June 2000), discussed in WJ Fenrick, 'Targeting and Proportionality During the NATO Bombing Campaign against Yugoslavia' (2001) 12 *EJIL* 489; P Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia' *id* 503; M Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on the Report to the Prosecutor of the ICTY' *id* 531. The bombings were in response to Serb human rights violation in Kosovo. See S Tierney, 'The Road Back to Hell: The International Response to the Crisis in Kosovo' in S Tierney (ed), *Accommodating National Identity* (Kluwer, Boston, 2000) 89–130.
[105] This did not preclude debate as to the applicable humanitarian law in respect of particular situations in the former Yugoslavia.
[106] See R Kerr, 'International Judicial Intervention: The International Criminal Tribunal for the Former Yugoslavia' (2000) 15(2) *International Relations* 17.

minority rights and international group rights.[107] The concept of genocide was also well known.[108] The primary response to the term 'ethnic cleansing' was not so much one of legal reflection but rather that it harked back to the atrocities committed by Nazi Germany in the Second World War. The systematic destruction of the Jewish population in Germany and in territories occupied by Germany was literally explained as an attempt to cleanse those territories of that ethnic group. It was the spectre that similar practices were occurring in the former Yugoslavia that so shocked the conscience of Europe and the world and was encapsulated in the expression 'ethnic cleansing'.[109]

3.4 Principal Legal Features

The place of the ICTY in international law and its general operation has been the subject of extensive investigation and analysis by international law scholars.[110] The most notable legal features of the process include the limitations on jurisdiction, the provisions for fair trials, and the punishments available.

There is concurrent jurisdiction between the ICTY and the domestic courts of the former Yugoslavia (that is, they can both exercise jurisdiction).[111] However, Article 9(2) of the ICTY Statute provides that the ICTY has primacy over national courts. Primacy can include retrial by the ICTY if the trial in the national court was for an ordinary crime, or if the national proceedings were not impartial or independent because they were designed to shield the accused from the ICTY, or if the case was not diligently prosecuted.[112] At any stage, the ICTY may formally request national courts to defer to its competence, but this has rarely happened. The ICTY's Rule 11bis makes provision of the ICTY to refer cases to states where the crime was committed or to where the accused was arrested. In July 2002 the Security Council endorsed a broad strategy for the transfer of cases involving intermediary and lower level accused to competent national jurisdictions as the best way of allowing the ICTY to achieve its objective of completing all trial activities at first instance by 2008 and all operations by 2010.[113] The Prosecutor is committed to ending all investigation by the end of 2005.[114] In October 2002, a military court in Nis, central Serbia, gave the first ruling in a war crimes case stemming from the armed conflict in Kosovo.[115] In 2003 Bosnia was planning to

[107] See P Thornberry, *International Law and the Rights of Minorities* (OUP, Oxford, 1991) 158–63; N Lerner, *Group Rights and Discrimination in International Law* (Nijhoff, Dordrecht, 1991).
[108] W Schabas, *Genocide in International Law: the Crime of Crimes* (CUP, Cambridge, 2000).
[109] See D Petrovic, 'Ethnic Cleansing — An Attempt at Methodology' (1994) 5 *EJIL* 342.
[110] See above nn 87–89.
[111] Art 9(1) ICTY Statute.
[112] Art 10 ICTY Statute. The ICTR Statute contains the same provision.
[113] See SC Presidential Statement S/2002/PRST/21 (23 July 2002).
[114] See ICTY's 2003 Report, UN Doc A/58/297 (20 Aug 2003).
[115] In Jan 2003 the first ICTY indictment involving charges against members of the Kosovo Liberation Army was confirmed.

establish a war crimes chamber within its state court, with the support of the ICTY.[116]

The jurisdiction of the ICTY is, however, limited in several ways. The ICTY only has competence over natural persons.[117] Following the suggestion of the Secretary-General, the SC did not give it competence over legal persons or on the basis of membership of organisations. The focus is on individual responsibility, including command responsibility,[118] rather than vicarious or imputed liability. Therefore, organisations, legal persons, and States cannot be brought to trial. Jurisdiction is also limited to conduct since 1 January 1991. This was chosen as a neutral date in terms of whether the conflict(s) were international or not. Jurisdiction is limited to the territory of the former Yugoslavia. It thus clearly covered the conflict in Kosovo in 1999.[119] Slobodan Milošović, then President of the Federal Republic of Yugoslavia, and four others were indicted for crimes against humanity in Kosovo in 1999.[120]

In terms of substantive jurisdiction,[121] the ICTY is concerned with grave breaches of the Geneva Conventions, violations of the law and customs of war, genocide, and crimes against humanity.[122] The Article on crimes against humanity is derived from Article 6 of the London Charter but adds an express reference to rape[123] and torture. The Secretary-General stressed that the need to apply the principle of *nullem crimen sine lege* meant that the Statute had to be cautious and require the ICTY to apply rules that were beyond any doubt part of customary international law. However, a particular problem is that while the offences themselves may be undoubted, their constituent elements for criminal law purposes are not necessarily specified. The Statute does not expressly refer to common Article 3 of the Geneva Conventions of 1949, which would apply in a non-international armed conflict. However, the reference to 'violations of the laws or customs of war' in Article 3 of the Statute covers common Article 3.[124]

[116] See S/PV.4837 (Oct 2003).
[117] Art 7 ICTY Statute. Art 6 ICTR Statute is the same.
[118] See I Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester University Press, Manchester, 2002).
[119] On 10 March 1998 the Chief Prosecutor, in a public statement, stated that the Tribunal's jurisdiction covered the violence in Kosovo. Subsequently, the ICTY Prosecutor requested the SC to amend Art 5 of ICTY Statute so as to cover events after the armed conflict in Kosovo.
[120] See the annual reports of the ICTY for 1999 and 2000.
[121] See J Paust, 'Applicability of International Criminal Laws to Events in the Former Yugoslavia' (1994) 9 *American Journal of International Law and Policy* 499.
[122] See Arts 2–5 of the Statute. Art 5 retains the link with an armed conflict. See C Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn) (Nijhoff, Dordrecht, 1999).
[123] On the controversy over rape, see C Chinkin, 'The Rape and Sexual Abuse of Women in International Law' (1994) 5 *EJIL* 326; CPM Clieren and MEM Tijssen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural and Evidential Issues' (1994) 5 *Criminal Law Forum* 471.
[124] See *Tadić Case*, Appeals Chamber, (2 Oct 1995) Case IT–94–1, para 137; T Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *AJIL* 78; T Meron, 'The International Criminalisation of Internal Atrocities' (1995) 89 *AJIL* 554; D Turns, 'War Crimes Without War? The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts' (1995) 7 *African Journal of International and Comparative Law* 804.

Genocide and crimes against humanity are difficult to prosecute. The mental element (m*ens rea*) for genocide requires a specific intent, which can be hard to prove.[125] It has been prosecuted at the ICTY but there was no successful conviction until 2001 in *Prosecutor v Krstić*.[126]

Under Article 20 of its Statute, the ICTY's trial chambers are to ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.[127] The fair trial safeguards are very extensive and draw very heavily on Article 14 of the International Covenant on Civil and Political Rights (1966).[128] The accused must be present and may be questioned only as a witness in his own defence. The accused is entitled to the presumption of innocence, and guilt must be proved beyond reasonable doubt. In practice, the proceedings before the ICTY have been more adversarial than inquisitorial[129] but there has been a notable evolution in the direction of civil law procedural practices, for example, the role of the pre-trial judge, case management, extensive disclosure obligations.[130]

Trial *in absentia* is not possible. Accused persons are held in a specially created detention unit that is housed within a Dutch prison. This is subject to the exclusive control and supervision of the UN. They are entitled to seek bail, which can be granted in exceptional circumstances.[131] The individual facilities are provided so as not to force different ethnic groupings together. Prison sentences are served outside Yugoslavia.

There is no possibility of imposing the death penalty.[132] This reflects the principled objection of many States around the world to that form of punishment.[133] In determining the terms of imprisonment, recourse is to be had to the general practice regarding prison sentences in the courts of the former Yugoslavia.[134] The longest sentence imposed has been 46 years, in *Prosecutor v Radislav Krstić* (2000).

[125] See ICJ's decisions on interim measures and jurisdiction concerning eight member States of NATO and relating to NATO's intervention in Kosovo in 1999, ICJ Reports (2000).
[126] *Prosecutor v Krstić*, Case IT–98–33 (2001). See also *Tadić*, and *Prosecutor v Jelišić*, (14 Dec 1999) Case IT–95–10; G Verdirame 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 *ICLQ* 578–98; Byron in this volume.
[127] See A Cassese, 'The ICTY and Human Rights' (1997) 4 *EHRLR* 329, who stresses the ICTY was essentially set up for the victims of crimes; C Warbrick, 'International Criminal Courts and Fair Trial' (1998) 3 *Journal of Armed Conflict Law* 45.
[128] For the extensive jurisprudence of the Human Rights Committee on Art 14 see DS Weissbrodt, *The Right to a Fair Trail Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights: Background, Development, and Interpretations* (London, Nijhoff, 2001).
[129] See M Findlay, 'Synthesis in Trial Procedures? The Experience of The International Criminal Tribunals' (2001) 50 *ICLQ* 26–53.
[130] See A Orie, 'Accusatorial v Inquisitorial ...' in A Cassese, P Gaeta and RWD Jones (eds), *The Rome Statute for an International Criminal Court* (OUP, Oxford, 2002) 1439.
[131] See PL Robinson, 'Ensuring Fair and Expeditious Trial at the ICTY' (2000) 11 *EJIL* 569 at 585–87.
[132] Art 24 ICTY Statute.
[133] See HR Commn resolution 2003/67, April 2003, adopted by 23 votes to 18 with 10 abstentions.
[134] *Ibid.* See D Turns, 'The International Criminal Tribunal for the Former Yugoslavia: the Erdemović case' (1997) 47 *ICLQ* 461; WA Schabas, 'Perverse Effects of the *nulla poena* Principle: National Practice and the Ad Hoc Tribunals' (2000) 11 *EJIL* 521.

There is no end date for the ICTY's jurisdiction. Termination of the ICTY is not provided for in Resolution 827. According to the report of the Secretary-General, termination is linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and SC decisions related thereto.[135] This could prove to be problematic if the SC were to intervene to terminate politically inopportune prosecutions. As of November 2002, the Prosecutor was continuing to seek indictments. The President of the ICTY has stated that it would take until 2008 to complete the trials of those presently in custody. There has been increasing discussion of a closure or exit strategy for the ICTY. This is partly a reflection of the more stable political situation in the Balkans, the possibility of the national courts in the region conducting trials, the trial of Milošević and the substantial financial costs of maintaining the ICTY.[136]

3.5 Problems of Implementation

While many important legal powers and limitations were set out in the Statute, implementing those provisions, or interpreting the Tribunal's power in situations where the Statute was silent, proved a challenge for the ICTY. A particular difficulty in terms of dealing with the systematic practice of ethnic cleansing was whether the ICTY could punish those who organised and instigated the policy in addition to the particular individuals who carried it out. The argument was that:

> the Tribunal will never be able to bring to justice those in command: plainly, reference is made here to those responsible for planning or ordering large-scale breaches of international humanitarian law occurring in the former Yugoslavia, or for omitting to prevent or punish the perpetrators of such breaches.[137]

The ICTY rejected this argument. It asserted that it would proceed against any person, regardless of status and rank, against whom the Prosecutor has issued an indictment confirmed by a Judge of the Tribunal.[138]

Nevertheless, bringing these persons to trial is difficult. Although the ICTY may issue proceeding against the leaders or organisers of those who committed large-scale breaches, if the ICTY's orders or any action taken by the SC does not secure their presence, then the individuals cannot be tried because the Statute does not permit trial *in absentia*. This has happened in relation to a number of major political and military figures including Karadžić and Mladić.

The only possibility is for the ICTY to hold 'Rule 61' hearings. Rule 61 applies when a suspect remains at large a reasonable time after an arrest warrant is issued, and the judge who issued the indictment is satisfied that the Prosecutor and the Registrar have taken all reasonable steps to bring about the arrest. In these cases a

[135] UN Doc S/25704, para 28.
[136] See text above n 113.
[137] UN Doc A/49/342, (1994) para 48.
[138] *Ibid* at para 49.

panel of three judges, including the indictment judge, can hold a hearing in which the Prosecutor's office can present all of its evidence, including witnesses. After the hearing, the panel states whether there are reasonable grounds for believing that the accused committed all or part of the crimes charged in the indictment. If there are reasonable grounds, the panel will issue an international arrest warrant. At the Prosecutor's request or of its own initiative, the panel can also order a State or States to adopt provisional measures to freeze the assets of the accused. The panel may also make a determination that a State has failed to co-operate with the Tribunal with regard to the accused in certain ways required by Article 29 of the Tribunal's Statute. The President of the ICTY can bring that matter to the SC.

Rule 61 hearings allow for further pre-trial enforcement efforts and serve a documentary function. They afford a means of redress for the victims of the alleged crimes committed by the absent accused, and give them an opportunity to testify in public and to have their testimony recorded for posterity. If an international arrest warrant is issued, the suspect becomes an international fugitive. The ICTY President has stressed that what was of particular importance to the victims or relatives of victims of rape, ethnic cleansing, torture, genocide, or wanton destruction of property was the punishment of the authors of those acts by an impartial tribunal. That, it was asserted, was at least in part a means of alleviating their suffering and anguish.[139] There have been five Rule 61 hearings involving eight indictees: Dragan Nikolić, Milan Martić, Milan Mrksić, Miroslav Radić, Ivica Rajić, Radovan Karadžić, Ratko Mladić and Veselin Sljivancanin. The passage of a number of years without recourse to Rule 61 hearings might suggest the ICTY is uncomfortable with them.

One of the remarkable features of the conflict in the former Yugoslavia is the amount of official and non-official documentation available. It is probably the best-recorded crisis in the course of human history. Notwithstanding this, the trials before the ICTY have primarily been based on oral testimony. The uniqueness of the ICTY's task and the limited scope of the express provisions of its Statute left the ICTY with a substantial amount of discretion in approaching a variety of issues ranging from matters of evidence, procedure, administration and organisation. The ICTY approached these with a commendable degree of sensitivity and intelligence particularly in dealing with the phenomenon of 'ethnic cleansing'. The ICTY has 'attempted to strike a balance between the strictly constructionist and the teleological approaches in the interpretation of the Statute'.[140] This balance is principally reflected in its rules of procedure and evidence. This is how the ICTY described its 'purpose-made set of rules':

> As an ad hoc institution, the Tribunal has been able to mould its uses and procedures to fit the task in hand. The Tribunal is charged with sole responsibility for judging the

[139] *Ibid* at para 51.
[140] *Ibid* at para 53. A more purposive approach to interpretation is often taken by international human rights bodies.

> alleged perpetrators of some of the most reprehensible crimes known to man, committed not on some foreign battlefield but on their own home ground, acts of terror and barbarism committed against their own neighbours. The tribunal therefore decided, when preparing its rules, to take into account the most conspicuous aspects of the armed conflict in the former Yugoslavia. First among these is the fact that, in the former Yugoslavia, it is not simply a matter of wars between the armies of two belligerent States or even between a single disciplined force with clear command structure and a civilian population. Instead, there are a number of parties involved in the conflict, ranging from the regular armies of States to military and paramilitary groups, with conspicuous uncertainty about who is in control of the latter. Secondly, an internecine strife is under way, aggravated by ethnic and religious conflict, genocide, mass rape and other manifestations of large scale and widespread breaches of human rights. Ethnic hatred springs afresh to turn friend into foe and places the claims of ancient blood above those of common humanity and decency. Thirdly, the unbearable abuses perpetuated in the region have spread terror and deep anguish among the civilian population. It follows that witnesses of massacres and atrocities may be deterred from testifying about those crimes or else be profoundly worried about the possible negative consequences that their testimony could have for themselves or for their relatives. In drafting the rules of procedure and evidence, the judges of the Tribunal have endeavoured to incorporate rules that address issues of particular concern arising from those aspects of the conflict, namely patterns of conduct, the protection of witnesses and sexual assault.[141]

The rules of evidence thus adopted made provision for the admissibility of evidence relating to 'patterns of conduct'. Such evidence was considered to be particularly relevant in establishing coercion sufficient to vitiate any alleged consent in matters of sexual assault, and in establishing one of the basic requirements of genocide, namely 'the intent to destroy, in whole or in part, a group'. When the intent had not been expressly and specifically manifested, one of the means of ascertaining its existence could lie in investigating the consistent behaviour of groups or units, so as to determine whether that intent could be inferred from their 'pattern of conduct'.

A number of rules were concerned with the protection of witnesses, given an expected reluctance to appear before the Tribunal to testify. The principal witness against the perpetrator of a crime would often be the victim, who could feel threatened, either directly or indirectly, and who might still have family within an area held by forces sympathetic to an accused. To enable witnesses to testify freely provision was made for the submission of evidence by deposition. These could be made locally and taken by means of video conference, if appropriate. In order to protect the 'equality of arms' (and, in particular, the rights of the accused), the procedure for taking depositions allowed for cross-examination of the witness. Arrangements have been made for the identity of witnesses who may be at risk not to be disclosed to the accused until such time as the witness can be brought under the protection of the ICTY. Witnesses may also be protected from public identification, if appropriate.

[141] *Ibid* at para 75.

An important and innovative provision for the protection of witnesses was the establishment of a Victims and Witnesses Section within the Registry.[142] This was created to provide counselling, not only on legal rights but also to give psychological help and support, and to recommend protective measures, where required. The Section has mainly dealt with female victims of rape and sexual assault. Its programmes cover over 300 witnesses or related persons from over 20 different countries.

As part of the special emphasis on crimes against women in the rules of procedure there are special provisions as to the standard of evidence, and matters of credibility of the witness, which may be raised by the defence. In particular, no corroboration of the victim's testimony is required in matters of sexual assault. The victim's previous sexual conduct is irrelevant and inadmissible. If a defence of consent is raised, the Tribunal may take note of factors that vitiate consent, including physical violence, and moral or psychological constraints. Before evidence of a victim's consent is admitted the accused has to satisfy the Trial Chamber in camera that the evidence is relevant and credible.[143] There can be a pre-trial hearing on the consent issue. The rules are clearly gender-friendly.[144] Where trial before the ICTY is not possible because there are real practical or psychological difficulties in getting women to testify, an alternative recourse is to some form of Truth and Reconciliation Commission which would at least seek to achieve some record, acknowledgment[145] and atonement of the wrongs done.[146] The idea is being considered but has not proved politically acceptable to date.[147]

The ICTY followed the pattern of the Nuremberg and Tokyo trials in that there are no technical rules for the admissibility of evidence. It did not wish to shackle itself to restrictive rules. There is no jury so no rules have to be adopted to accommodate them. The judges are thus responsible for weighing the probative value of the evidence before them. This is a common approach in international law. On this basis, all relevant evidence maybe admitted to the ICTY unless its probative value is substantially outweighed by the need to ensure a fair trial, or where the

[142] There are also a Defense Counsel Unit and a Judicial Support Services Unit.

[143] ICTY, r 96 (the same applies in the ICTR).

[144] See KD Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status' (1999) 93 *AJIL* 97; H Charlesworth and C Chinkin, *The Boundaries of International Law — A Feminist Analysis* (Manchester University Press, Manchester, 2000) 324–37.

[145] 'Acknowledging what we have done is often more painful than any arbitrarily imposed punishment. Living with ourselves when we have violated the fundamental values that all humanity embraces can be worse than any punishment imposed. Sometimes, imprisonment actually relieves the unbearable burden of shame and guilt' JR Van Eenwky, 'America Is Conspicuously Absent As The World Convenes the ICC' *The Seattle Post-Intelligencer*, 14 July 2002.

[146] See PB Hayner, 'Fifteen Truth Commissions — 1974–1994: A Comparative Assessment' (1994) 16 *HRQ* 597; AH Henkin, *The Legacy of Abuse — Confronting the Past, Facing the Future*, (Aspen Institute/ New York Law School, New York, 2002); JD Tepperman, 'Truth and Consequences' (2002) 81(2) *Foreign Affairs* 128 (noting 21 truth commissions since 1974 and citing a comment by Michael Ignatieff that the Truth Commissions can reduce the number of lies). Recently established truth commissions are those in Sierra Leone and East Timor.

[147] See ICTY Annual Report (1998), para 225. A conference on the proposal was held in Bosnia in May 2001.

evidence was obtained by a serious violation of human rights. Evidence could thus be excluded where it was obtained, for example, by torture, or inhumane or degrading treatment or punishment. An interesting addition is that the ICTY may order the production of additional or new evidence of its own motion. This is not normally the case in adversarial proceedings. The ICTY explained this by stating that:

> it was felt that, in the international sphere, the interest of justice is best served by such a provision and that the diminution, if any, of the parties' rights is minimal by comparison.[148]

At the outset there were no rules on the granting of immunity or on plea-bargaining. Subsequently, provision was made in the rules for a 'plea agreement procedure'.[149] Although the agreement is not binding on the ICTY it will usually be accepted.[150] Substantial co-operation by an accused, however, can be taken into account by the Chambers as a mitigating factor in sentencing as well as by the President, in consultation with the judges, for the purpose of granting pardon or commutation of sentence.

As the ICTY's volume of work increased the judges increasingly directed the management of the trials. The ICTY has adopted a largely adversarial approach, but there are significant elements that are more familiar to inquisitorial systems. The result has been described as '*sui generis*'.[151] There is no investigating judge to collect the evidence. As in a common law regime, this task falls to the Prosecutor. After confirmation of the indictment by a judge, the defence is entitled to collect and to have access to all relevant evidence. Both the prosecution and the defence are reciprocally bound to disclose all documents and witnesses. In *Prosecutor v Furundzia* (1998) the Prosecutor had failed to disclose that 'witness A' had received psychological counselling. The trial chamber subsequently found that A's memory had not been affected by any psychological disorder she may have had. Individuals, organisations, or Governments may, by leave, present written or oral submissions as amicus curiae, and a number of such briefs have been submitted. This is unusual in a common law adversarial context of a prosecutor against the defence without any third party intervention. It is more common in continental systems of law. The third parties must be seen as representing the wider interests of victims or the values of elements of the international community.

3.6 Co-operation with the ICTY

In accordance with SC Resolution 827 (1993), 'all states shall cooperate fully' with the ICTY and its organs, and shall take any measures necessary under their domestic law to implement the provisions 'and to comply with requests for

[148] UN Doc A/49/342, para 73.
[149] ICTY, rule 62*ter*.
[150] See the *Plavšić* case, above n 98, and the *Todorović* case n 172 below.
[151] See Robinson, above n 131.

assistance or orders issued by a trial chamber'.[152] States are thus under a binding legal obligation to co-operate with the ICTY in terms, for example, of arrest, search, surrender, or transfer of persons to the ICTY. Some States needed to enact implementing legislation to meet these requirements, while others claimed that they did not need to do so.[153] Co-operation has generally been good, but there have been particular problems with the Federal Republic of Yugoslavia, Croatia, and Republika Srpska (the Serb part of Bosnia).[154]

Obligations on States stemming from the Statute 'shall prevail over any legal impediment to the surrender or transfer of the accused to the Tribunal' that may exist under national legal systems. A common national obstacle is that some constitutions or national laws prevent the extradition of nationals. This principle is in conformity with international law given the large number of States who follow the practice. In the *Lockerbie Case*, the International Court of Justice ruled that the obligations under UN Charter overrode any rights of Libya under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971).[155] This was because under Article 103 of the Charter,

> In the event of a conflict between the obligations of the Members of the United Nations under, the present Charter and their obligations under any other international agreement, the obligations under the present Charter shall prevail.

Presumably, given that SC Resolution 827 (1993) was a binding decision adopted under Chapter VII, then the same argument would apply. The ICTY President explained that,

> a few countries have laid down an ad hoc procedure, while others planned to apply mutatis mutandis their national provisions relating to extradition, though only as regards questions of procedure and without making the transfer of the accused to the ICTY subject to the same restrictions that apply to extradition (for example non-extradition of nationals or of persons accused of political crimes). In certain countries, provision has been made for appeals against or review of decisions of national courts on the ICTY's request for transfer.[156]

As suggested, though, this could raise some difficult issues of national law. In terms of methods of transfer to the ICTY, the situation as of 17 October 2003 was that eleven persons have been arrested by national police, 20 had voluntarily surrendered, and 19 had been detained by international forces.

[152] See Art 29 of the Statute and r 58 of the rules of procedure and evidence.
[153] See C Warbrick, 'Cooperation with the ICTY' (1996) 45 *ICLQ* 947.
[154] A provision in the Dayton Peace Agreement on the former Yugoslavia prohibits persons indicted before the Tribunal from holding political office. Radovan Karadžić eventually stood down because of this. Co-operation with the Federal Republic of Yugoslavia improved in 2001 and a new law on co-operation was passed. Former President Milosevic was surrendered to the ICTY in 2001. In 2002 Yugoslavia was pressing the ICTY to leave future prosecutions to Yugoslavia.
[155] ICJ Reports (1992), 3 and 114.
[156] UN Doc A/49/342, para 180.

The other main area of domestic co-operation has been financial. In addition to UN funding, the ICTY has been supported by substantial financial contributions from individual States ($17.5 million). The UK contributed very substantial financing for the building of a second courtroom.

3.7 Legality and Legitimacy

Three of the principal issues of legality and legitimacy of the ICTY were raised in the *Tadić Case*.[157] First, Tadic argued that the Tribunal had not been lawfully established. The drafters of the UN Charter had not envisaged such a tribunal, the General Assembly had not been involved in its creation, the Council had not consistently created tribunals in other instances, the Council could not act in relation to individuals, there was no real threat to the peace, the Tribunal would not promote peace, and a political body could not create a judicial organ. Secondly, the primacy over national courts, which the SC resolution gave to the Tribunal, was unlawful and violated the national sovereignty of the States affected. Thirdly, the Tribunal lacked subject matter jurisdiction in respect of the charges against the defendant.[158] The trial chamber and the appellate chamber rejected these arguments but differed in their legal arguments for doing so.[159] The most interesting part of the legal analysis was that the appellate chamber accepted that it had jurisdiction to determine whether the ICTY had been lawfully established (*la competence de la competence*). In principle, at least, this raised the possibility that the Tribunal could have decided that it had been unlawfully established. It is difficult to determine the legal consequences in such a situation for the Tribunal, the judges, the Prosecutor and, not least, the defendants and indictees.[160] The political consequences for the SC's strategy would presumably have been devastating. Fortunately, the appellate chamber decided that the establishment of the ICTY was within the SC's powers under Article 41 of the Charter, and that the ICTY had been lawfully established. It took a broad, but not unlimited, view of the powers of the SC.[161] It considered that the Tribunal had been 'established by law'.[162] All of Tadić's other arguments were also rejected.[163]

[157] *Prosecutor v Tadić (Jurisdiction)* (1996) 35 *ILM* 35. See M P Scharf, *Balkan Justice: The Story Behind The First International War Crimes Trial Since Nuremberg* (Carolina Univ Press, Durham, 1997).
[158] See C Greenwood, 'International Humanitarian Law and the *Tadić* case' (1996) 7 *EJIL* 265.
[159] See GH Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia' (1996) 90 *AJIL* 64; JE Alvarez, 'Nuremberg Revisited: the *Tadić* case' (1996) 7 *EJIL* 245–64.
[160] See E Lauterpacht, 'The Legal Effects of Illegal Acts of International Organizations' in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (Stevens, London, 1965) 88–112.
[161] See also B Simma (ed), *Commentary on the United Nations Charter* (2nd edn) (OUP, Oxford, 2002) 743.
[162] 'For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments', *Tadić* (1996) 35 *ILM* 35 para 45.
[163] Judge Li dissented on the first issue arguing that ICTY had no competence to decide the issue. Judge Sidhwa dissented on the third issue. Tadic was later convicted and sentenced to 20 years, after an appeal on sentencing.

The ICTY has faced challenges to its credibility and effectiveness. Its progress has been painfully slow. Trials have been long and complicated involving substantial numbers of witnesses (over a hundred in a number of cases) and huge amounts of documentation. The longest trial to date was 223 days (Blaskić). The Prosecutor holds over 4.2 million pages of evidence and 6,400 videos and tapes. The 2002–03 budget totals $223 million. As of January 2004, there were 1,238 staff members from 84 countries. The cost per person tried has been astronomical.

The former President of the ICTY has examined the ICTY's development on three levels.[164] First, from an operational point of view, trial and appellate proceedings are regularly held, and decisions on 'both procedural and substantive matters are on the cutting edge of the development of international humanitarian law'.[165] For example, the decision in the *Tadić* appeal has had a world-wide impact on practice and doctrine. The ICTY has also developed an extensive jurisprudence on the narrower technical 'lawyers law'.[166] This includes the power and effect of ICTY decisions on individuals and on States,[167] whether representatives of NGO's, members of the ICRC and journalists can be compelled to testify before the ICTY,[168] command responsibility,[169] whether violations of the law of internal armed conflict can lead to criminal responsibility,[170] whether crimes against humanity require a connection with an international armed conflict,[171] whether the ICTY could try an individual who had been abducted,[172] whether rape could constitute torture,[173] and whether there is a distinction between the seriousness of a crime against humanity and that of a war crime.[174] Secondly, its experience has laid down the foundations for the establishment of a practical and permanent system of international justice. Without the ICTY there would probably have been no international tribunal in Rwanda. Without the two ad hoc tribunals there would almost certainly be no ICC. Thirdly, it is slowly beginning to have an

[164] ICTY Annual Report, (1999); UN Doc A/54/187.
[165] *Ibid* at para 201.
[166] See A Klip and G Sluiter (eds), *The International Criminal Tribunal for the Former Yugoslavia, 1993–1998 — Annotated Leading Cases of International Criminal Tribunals* (Intersentia, Antwerp, 1999); R Kolb, 'The Jurisprudence of the Yugoslavia and Rwanda Tribunals on their Jurisdiction and on International Crimes' (2000) 71 *BYIL* 259.
[167] See *Blaškić v Prosecutor*, (15 July 1994) IT–95–14; S Furuya, 'Legal Effect of Rules of the International Criminal Tribunals and Court Upon Individuals: Emerging International Law of Direct Effect' (2000) 47 *NILR* 111.
[168] See *Simić v Prosecutor*, IT–95–9 (on ICRC and SFOR); *Prosecutor v Brdjanin*, IT–99–36 (US journalist, Jonathon Randal, living in France could be compelled to testify about their reporting; case did not concern confidential sources). For criticism that the decision could turn journalists into targets see W Safire, 'Enter the Globocourt' *New York Times*, 20 June 2002. He cites the decision as a vivid example of what can be expected from the ICC.
[169] See D Sarooshi, 'Command Responsibility and the *Blaskić* case' (2001) 50 *ICLQ* 452–65; Bantekas, in this volume.
[170] The answer was yes, see *Tadić* Case.
[171] The answer was no, see *ibid.*
[172] *Prosecutor v Todorović*, (31 July 2001) IT–95–9/1. The matter was not ruled on because *Todorović* entered a guilty plea to one count and the prosecution withdrew the other counts.
[173] The answer was yes, in certain circumstances, *Prosecutor v Delalić and others*, (16 Nov 1998) IT–96–21, *Prosecutor v Kunarić, Kovać and Voković (Foca)*, (22 Feb 2001) IT–96–23 and IT–96–23/1.
[174] The answer was no (by majority), *Prosecutor v Tadić* (appeal on sentencing) (26 Jan 2000).

impact on the former Yugoslavia. The ICTY's legitimacy has not been accepted by the Federal Republic of Yugoslavia, but co-operation is improving. March 2001 saw the first official handover by Yugoslavia of a suspect to the ICTY. The ICTY has an extensive outreach programme to inform the population in the region about its work and its significance.

Finally, in terms of a wider international law, it is of significance that the SC characterised violations of international humanitarian law as threats to international peace and security and therefore opened the door to collective action under the auspices of the SC.

3.8 The International Criminal Tribunal for Rwanda (ICTR)[175]

The ICTR was established by the SC in 1994,[176] again after a report by a Commission of Experts.[177] Its establishment was in response to the massive number of killings and atrocities committed in Rwanda in 1994.[178] The perpetrators were mainly from the Hutu ethnic group, and the victims were mainly from the Tutsi ethnic group but also included pro-Tutsi Hutus. Interestingly, although the ICTR Statute was modelled on that of the ICTY, it was not drafted by the UN Secretary-General. Rather it was drafted by the US and New Zealand governments with some input from the government of Rwanda. As with the ICTY the argument is made that the establishment of the ICTR was partly due to embarrassment at the failure of the international community to intervene to stop the atrocities.[179]

The legality of the establishment of the ICTR was challenged in *Prosecutor v Kanyabashi (Jurisdiction)*.[180] The challenge was rejected with the ICTR ruling that the determination of a threat to peace was within the discretion of the SC, and that the creation of the ICTR was within the SC's powers under Article 41 of the Charter. The ICTR has 14 judges, five of whom are assigned to the appeal chamber but are based at the seat of the Tribunal in Arusha, Tanzania. It shares the appellate judges and, until 2003 when they were split, the Prosecutor with the ICTY.[181] The argument for this sharing of personnel was that it was useful to try

[175] See Blakesley, *Atrocity and its Prosecution,* above n 86; J Karhilo, 'The Establishment of the International Tribunal for Rwanda' (1995) 64 *Nordic Journal of International Law* 683; RS Lee, 'The Rwanda Tribunal' (1996) 9 *Leiden Journal of International Law* 37; 'Judging Genocide' *The Economist*, 14 June 2001.

[176] SC Res 955 (1994).

[177] SC Res 935 (1994).

[178] See G Prunier, *The Rwanda Crisis* (1995); *African Rights, Death, Despair and Defiance* (revised edn) (Hurst, London, 1995); *The Administration of Justice in Post-Genocide Rwanda* (United Nations High Commissioner for Human Rights, Field Operation in Rwanda, UN Doc HRFOR/JUSTICE/ June 1996/E; AJ Kuperman, 'Rwanda in Retrospect' (2000) 79(1) *Foreign Affairs* 94.

[179] See J Alvarez, 'Crime of Hate/ Crimes of State: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 365.

[180] (18 June 1997) ICTR–96–15–T. See V Morris, 'International Decisions: *Prosecutor v Kanyabashi*' (1998) 92 *AJIL* 66.

[181] See SC Resolutions 1503 and 1504 (2003).

to develop a body of specialised expertise. In practical terms the effect of the arrangement was to render administration and the role of Deputy Prosecutors, one based at each Tribunal, crucial. The investigatory and prosecutorial units of the ICTR are in Kigali, the capital of Rwanda, and the trial chambers sit in Arusha, Tanzania. For 2002–03, the ICTR's budget is $177 million and there are 810 staff representing over 80 nationalities.

With regard to jurisdiction, trial provisions, and punishment, the ICTR is similar, but not identical, to the ICTY. For example, as with the ICTY, the ICTR has concurrent but primary jurisdiction.[182] The jurisdiction of the ICTR is also restricted to natural persons. In terms of location, the Tribunal's authority is limited to crimes committed in the territory of Rwanda or in the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens.[183] The Tribunal can only try crimes committed between 1 January 1994 and 31 December 1994. The principal effect of the limitation could be that offences of planning, preparation, or of aiding or abetting offences under Articles 2 to 4 of the Statute could be excluded.[184] If substantive offences occurred during 1994 then the prior planning would be within the ICTR's temporal jurisdiction. The ICTR would have to terminate its operations when there are no outstanding investigations related to its temporal jurisdiction. The ICTR's 2001 report to the SC contemplated 136 new accused by 2005.[185] As has been noted, 'At its current rate of completion this would keep the court trying cases for 150 years'.[186] At some point the SC will have to make the political decision to bring the ICTR to a close. It plans to do so in 2010.

The subject-matter jurisdiction of the ICTR is different from that of the ICTY because the conflict was essentially a non-international one. The offences covered are genocide, crimes against humanity, and violations of Common Article 3 of the 1949 Geneva Conventions and of Additional Protocol II (1977) to those Conventions.[187] Incitement to genocide appears as a freestanding offence that is not linked to the actual occurrence of subsequent acts of genocide.[188] The SC rejected Rwanda's view that jurisdiction should be confined to genocide. This avoided the appearance that the Tribunal would only be used against opponents of the government. In practice, no cases at the ICTR have involved members of the ruling government (Rwandan Patriotic Front).

The testimony of witnesses has been the principal form of evidence before the ICTR. More than 230 prosecution and defence witnesses from various African,

[182] Art 8 ICTR Statute. See MH Morris, 'The Trials of Concurrent Jurisdiction: the Case of Rwanda' (1997) 7 *Duke Journal of Comparative Law* 349.
[183] Art 7 ICTR Statute.
[184] Unless the Tribunal took the view that the substantive commission of the offence in 1994 brought all elements of it within its jurisdiction.
[185] UN Doc A/56/351, para 5 (14 Sept 2001). The ICTR has the equivalent rule to Art 61 but has never used it.
[186] S de Bertadano, 'US in the Dock Over International Justice' *The Times*, 7 Jan 2003.
[187] Art 4 ICTR Statute.
[188] See Art 2(3)(c) ICTR Statute.

European, and American countries have testified before the Tribunal. Like the ICTY, the ICTR has a Witnesses and Victims Support Section. It receives considerable assistance from non-governmental organisations.

The Statutes of both the ICTY and the ICTR prohibit the imposition of the death penalty.[189] ICTR sentences can be served in Rwanda if human rights standards for imprisonment are met. The Tribunal maintains supervision over the sentence while it is being served.

The ICTR has indicted political, military, and media leaders, as well as senior governmental administrators. The ICTR rendered the first convictions by an international tribunal for genocide (*Prosecutor v Akayesu*). In *Prosecutor v Bayagwiza* the trial chamber in 1998 denied a motion to nullify Bayagwiza's arrest and detention. The appeal chamber in 1999 directed his release and dismissed the indictment against him with prejudice to the Prosecutor. That decision was heavily criticised, particularly by Rwanda. In 2000 the appeal chamber reviewed its decision ordering release and ordered a continuation of the proceedings. It reasoned that it had misunderstood the factual basis of the case.[190] Its reasoning is tenable but it left the ICTR open to allegations of being subject to political manipulation.

Over 50 individuals accused of involvement in the 1994 genocide in Rwanda have been arrested and detained at the ICTR's detention facility. June 2001 saw the first acquittal by the ICTR (Iganace Bagilishema). As of October 2003 the ICTR has indicted over 70 individuals, 55 of whom are in custody. Its first convictions were reached only in June 1998. A former Prime Minister and two other ministers are among those in custody. One of them was the first woman to be charged with war crimes before an international criminal court. After eight years the ICTR had twelve convictions and one acquittal.

Co-operation between the ICTR and States has generally been very good. The Tribunal's relationship with the government of Rwanda, however, has been somewhat problematic. Interestingly, the request for the ICTR's establishment came from the new Tutsi government of Rwanda, though the Government then proceeded to disagree with a number of aspects, including the temporal limitation on jurisdiction. Eventually it was the only member of the SC to vote against its establishment.[191] Despite its vote, the government expressed the intention to support the ICTR and to co-operate with it. Rwanda introduced a specific law to deal with national prosecutions for genocide. It came into force on 1 September 1996. This was in a context where the effective functioning of the Rwandese national judicial system had ceased. The law grouped the offences into four categories of seriousness and fixed penalties for each category with the possibility of substantial reductions for guilty pleas at various stages. The pleas had to be accompanied by an accurate and complete confession, disclosure of accomplices,

[189] Art 24 ICTY Statute; Art 37 ICTR Statute.
[190] Bayagwiza has appealed.
[191] It was purely coincidental that Rwanda was one of the non-permanent members of the SC at the time of the establishment of the ICTR. China abstained because it felt that there had not been enough consultation with Rwanda.

and an apology. This serves a number of purposes in terms of establishing an accurate historical record.[192] An apology serves as part of the process of national reconciliation. In Rwanda only an offender charged with the most serious offences (Category One) of being one of the leaders and organisers of genocide and the perpetrators of particularly heinous murders or sexual torture could be subject to the death penalty. The national proceedings in Rwanda before *Gacaca* (a community court or forum) have raised major human rights concerns in terms of conditions of imprisonment and the possibility of fair trials.[193] In 1995, the main prison in Kigali, designed for 750 persons, was holding 6,400. As of July 2001, over 120,000 persons were in detention. Detention is based solely on denunciation. More were dying in prison every year than were being tried. Western States have provided substantial financial assistance to Rwanda to fund national prosecutions. The Rwandan Government objected to the absence of the death penalty under the ICTR because under the Rwandan Penal Code there was provision for the death penalty.[194] Their argument that those tried by the ICTR would face lesser penalties than those tried under Rwandan law has been borne out. In 1998, Rwanda held a public execution of 20 individuals found guilty of genocide.[195] The ICTR relinquished its jurisdiction to Belgium in a case involving the death of a number of Belgian nuns.[196]

The work of the ICTR could have been allocated to the ICTY, but there were some fears that the situation in Rwanda would then be getting a second-class treatment. Rwanda criticised the absence of the death penalty and the lack of a separate Prosecutor or Appeal Chamber. The perception of the ICTR has always been that of the poor relation to the ICTY.[197] It faced severe financial limitations and was blighted by maladministration and inefficiency.[198] The number of translators has been inadequate. That judgments have not been translated into local languages has made it difficult for the work of the ICTR to appear relevant to the situation in Rwanda. The number of trials completed is very small. In January 2003 the SC appointed 23 ad litem judges to the ICTR to speed up proceedings.[199] Like the ICTY, the ICTR has a completion strategy.[200] As of July 2003

[192] The same purpose can and has been served by post-conflict truth commissions in jurisdictions such as Chile, Argentina and South Africa. See Minow, *Between Vengeance*, above n 13.

[193] 260,000 judges were selected most of whom have no training and no education beyond primary school. It is interesting to note that a large percentage of women had been elected as both Gacaca judges and local representatives in Rwanda. See CM Carroll, 'An Assessment of the Role and Effectiveness of the ICTR and the Rwandan National Justice System in Dealing With the Mass Atrocities of 1994' (2000) 18 *Boston Univ Int L J* 163.

[194] Republic of Rwanda, Decret-Loi 21/77, Code Penal, Art 26.

[195] There were international pleas to Rwanda not to carry out the executions but these were ignored.

[196] See ICTR's 2003 Report, UN Doc A/58/140 (11 July 2003).

[197] See C McGreal, above n 9 (Rwanda tribunals legacy might be that it is remembered as the first and last of its kind in Africa).

[198] See the *Report by the Law Society of England and Wales on the Rwanda Tribunal* (Law Society, London, 2002); de Bertodano, above n 186.

[199] SC Res 1431 (2002). Only three of them were women. See also SC Res 1512 (2003).

[200] See ICTR's 2003 Report, UN Doc A/58/140 (11 July 2003), paras 9–10.

the Prosecutor was conducting 26 investigations. Whatever indictments flow from them will conclude the ICTR's work. The prosecutor also identified 40 persons whose prosecution it is intended to defer to national jurisdiction. In 2002 the Procureur-General of Rwanda, G Gahima, suggested that the $100 million a year budget of ICTR would be better spent on wider efforts towards national reconciliation, good governance and national justice.[201]

4. THE PERMANENT INTERNATIONAL CRIMINAL COURT (ICC)

4.1 Development

The Permanent International Criminal Court is the first new major international institution of the twenty-first century. In part, it is a somewhat belated response to a twentieth century that has been described as the 'century of violence'.[202] It was also a century in which the idea of a permanent international criminal court was an intermittent feature of the agenda of international law.[203] The earliest proposal for a permanent ICC is considered to be that of Gustav Moynier, one of the founder members of the International Committee of the Red Cross. In 1872, after he had observed the atrocities in the Franco-Prussian War, he proposed a draft statute for a permanent criminal court.[204] As noted above, Article 227 of the Treaty of Peace Between the Allied and the Associated Powers and Germany (Versailles, 1919) provided for the creation of an ad hoc international criminal tribunal to persecute Kaiser Wilhelm. There was no proposal for a permanent court or tribunal. An ICC was barely discussed in the inter-war period.[205] The League of Nations devoted some attention to the idea in the context of a convention on terrorism, which was adopted in 1937 but never attracted sufficient ratifications for it to enter into force.[206] During World War II consideration was

[201] Statement at 55th annual DPI/NGO Conference, Sept 2002. He also noted that the idea of an amnesty was not acceptable to lot of Rwandan society.

[202] By E Hobsbawm, *Age of Extremes — The Short Twentieth Century, 1914–91* (Michael Joseph, London, 1994). Cf MV Mills, 'War Crimes in the 21st Century' 3 *Hofstra L & Policy Symp* (1999) 47. A 1998 study estimated that since WWII there had been 250 armed conflicts involving 170 million people. See JL Balint, 'An Empirical Study of Conflict, Conflict Victimisation and Legal Redress' (1998) 14 *Nouvelles Etudes Penales* 101.

[203] BB Ferencz, An International Criminal Court, *A Step Toward World Peace: A Documentary History And Analysis* (Oceana Publications, Dobbs Ferry, New York, 1980); M Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 *Harvard HRJ* 11–62; A Cassese, 'From Nuremberg to Rome: International Military Tribunals to the ICC' in Cassese *et al*, above n 130, 3; Sadat, above n 83, ch 2.

[204] See CK Hall, 'The First Proposal for a Permanent ICC' (1998) 322 *Int Rev Red Cross* 57.

[205] See J Brierly, 'Do We Need An International Criminal Court?' (1927) 8 *BYIL* 81; Judge MA Caloyanni, 'An International Criminal Court' 14 *Grotius Society — Problems of Peace and War* (London, 1929) 69–79.

[206] See Convention for the Creation of an International Criminal Court, League of Nations Official Journal, Special Supplement 156 (1938); MO Hudson, 'The Proposed ICC' (1938) 32 *AJIL* 549; VV Pella, 'Towards an International Criminal Court' (1950) 44 *AJIL* 37.

again given to the possibility of international prosecutions. The outcome was to produce the trials that became the fundamental 'history-making' events[207] in the history of international war crimes prosecutions — the Nuremberg Trial of the Major German War Criminals and the Tokyo Tribunal.[208] Both tribunals were ad hoc. No consideration was given to any idea of establishing a permanent tribunal and giving it retrospective jurisdiction.

The idea of a permanent ICC within the United Nations dates from at least 1948 when the Genocide Convention envisaged the possibility of persons being tried by 'such international penal tribunal as may have jurisdiction'.[209] The International Law Commission (ILC) prepared draft statutes on an ICC in 1951 and 1953 but consideration was postponed pending the adoption of a definition of aggression.[210] Similarly work on a Draft Code of Offences (later Crimes) Against the Peace and Security of Mankind was undertaken from 1947–53, then suspended awaiting the definition of aggression, and then resumed from 1983 to 1996.[211] In 1989 16 Caribbean and Latin American States, led by Trinidad and Tobago, and supported by NGO's and some prominent academics, requested the General Assembly to ask the International Law Commission to resume work on the ICC in the context of an attempt to provide a jurisdiction for dealing with drug trafficking.[212] The Statute of the ICC did not eventually include any provisions on drug trafficking though Trinidad and Tobago was still pushing the issue at the Rome Conference and has continued to do so at the PrepCom. The majority of States took the view that an ICC was not the best method of dealing with that particular problem. Both drugs trafficking and terrorism are difficult to investigate and prosecute. The development of credible evidence can require extensive and sustained fieldwork and resort to highly classified information. There is also the financing issue, that is, whether a referral to the ICC might be a way of national systems avoiding the expense of trials. Trials for terrorist offences usually raise heightened security concerns and can open states to political pressures from kidnapping, hijacking and blackmail.[213]

Although an ICC had been on the UN's agenda almost since its inception little progress had been made. However, events in Yugoslavia and Rwanda transformed political thinking and, with the end of the Cold War, progress was

[207] This is not just a retrospective judgment. That they were history-making events was understood by many of its participants.
[208] See Pt III above.
[209] See GA Resolution 260 (9 Dec 1948) and Art VI of Genocide Convention (1948). See also the UN's Apartheid and Torture Conventions.
[210] See GA Resolution 3314(XX) (1974) on Definition of Aggression.
[211] The Draft Code adopted in 1996 covered aggression, genocide, crimes against humanity and war crimes, See ILC Yearbook, 1996, 14–120. The future status of the Code remains uncertain. It may effectively have been superseded by the ICC and by the Elements of Crimes, see text to nn 238–40 below.
[212] GA Resolution 44/39 (1989). See the statement of Robinson at the special treaty event for the ICC Statute on 11 April 2002.
[213] See D Vagts, 'Which Courts Should Try Persons Accused of Terrorism?' (2003) 14 *EJIL* 313.

astonishingly quick.[214] In 1992 the drafting of an ICC Statute was separated off to become a parallel exercise.[215] The ILC prepared a report containing a draft Statute.[216] After two years of discussion in its Sixth Committee, the General Assembly of the UN decided to convene an international diplomatic conference.[217] The intense negotiations in Rome in 1998[218] were based on the report of the preparatory committee on the establishment of an ICC,[219] which contained a draft Statute and a draft final act.[220]

On 17 July 1998, a diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court ended with the adoption of the 'Rome Statute of the International Criminal Court' (ICC).[221] The Statute is a substantial document containing 128 articles and divided into 13 parts.[222] Its adoption and implementation raise profound issues of constitutional, institutional, substantive and procedural law.[223] Many of these issues were interlinked and so the Statute represented a package deal.[224] On a philosophical level the ICC purports to signify the values of global justice, human rights, and the rule of law. One hundred and twenty States voted in favour of the Treaty (including UK, France, Russia), seven voted against (thought to be US, China, Libya, Iraq, Israel, Qatar and Yemen), and 21 abstained. Among the abstainers were several Arab and

[214] See J Dugard, 'Obstacles in the Way of an International Criminal Court' (1997) 56 *Cambridge LJ* 329.
[215] See J Crawford, 'The Work of the ILC' in Cassese *et al*, above n 130, 23; See MC Bassiouni and C Blakesley, 'The Need for an International Criminal Court in the New World Order' (1992) 25(2) *Vanderbilt J Int L* 151; BB Ferencz, 'An International Criminal Code and Court: Where They Stand and Where They're Going' (1992) 30(2) *Columbia J Trans L* 375.
[216] UN Doc A/49/10. See J Crawford, 'The ILC's Draft Statute for an International Criminal Court' (1994) 88 *AJIL* 140. Crawford's work was fundamental to the success of the ICC project.
[217] GA Resolution 46 (50th session), UN Doc A/RES/50/46. See LS Wexler, 'The Proposed Permanent International Criminal Court: An Appraisal' (1996) 29 *Cornell International Law Journal* 665.
[218] See P Kirsch and D Robinson, 'Reaching Agreement at the Rome Conference' in Cassese *et al*, n 130 above, 67.
[219] The Preparatory Committee met six times between 1996 and 1998. See A Bos, 'From the ILC to the Rome Conference' in Cassese *et al*, above n 130, 35.
[220] UN Doc A/CONF 183/2/Add 1 (14 April 1988).
[221] UN Doc A/CONF 183/9; (1998) 37 *ILM* 999. See R Lee (ed), *The ICC — the Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer, Hague, 1999); A Cassese *et al*, n 130 above; B Bromhill, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP, Oxford, 2003); D McGoldrick, 'The Permanent International Criminal Court: an End to the Culture of Impunity?' (1999) *Criminal Law Review* 627.
[222] See C Bassiouni, *The Statute of the ICC and Related Instruments: Legislative History 1994–2000* (Transnational, Ardsley, New York, 2003).
[223] See O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court — Observers' Notes, Article by Article* (1999); D Sarooshi, 'The Statute of International Criminal Court' (1999) 48 *ICLQ* 387; M Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *AJIL* 22; J Pejic, 'The International Criminal Court Statute: An Appraisal of the Rome Package' 34 *International Lawyer* (Spring), 65 (American Bar Association, New York, 2000); 'Symposium: The International Criminal Court' (1999) 10 *EJIL* 93–191; 'Developments in International Criminal Law' (1999) 93 *AJIL* 1–123.
[224] Cf see P Kirsch and JT Holmes, 'The Rome Conference of an ICC, The Negotiating Process' (1999) 93 *AJIL* 2; S Rosenne, 'Poor Drafting and Imperfect Organisation: Flaws to Overcome in the Rome Statute' (2000) 41 *Va JIL* 164.

Islamic states, and a number from the Commonwealth Caribbean. The Statute was immediately opened for signature.

As of 1 March 2003 the Statute had been signed by 139 States. It required ratification by 60 States to come into force.[225] Despite the high number of signatures the general expectation was that it might take a decade or more before necessary ratifications were achieved. The expectation proved wrong. With a strong political and legal momentum the sixtieth ratification was achieved on 11 April 2002.[226] The Statute entered into force on 1 July 2002.[227] As of November 2003, there were 92 states parties.

4.2 The Principal Legal Features of the ICC

It is helpful to outline in comparative terms the principal features of the ICC that are central to its legality and legitimacy.[228] It is a 'permanent' court. It has a relationship agreement with the UN but it is not a UN body. Under the Statute, the SC has power to refer situations to the ICC, and it also has the power to suspend investigations or proceedings at the ICC.[229] The jurisdiction of the court is based on a treaty, and reservations to the treaty are not permitted.[230] There is, however, a limited possibility for a state to opt out of the court's jurisdiction in respect of war crimes for a period of seven years.[231] The conditions for the exercise of jurisdiction are based on the exercise of nationality jurisdiction or territorial jurisdiction.[232] The ICC is based on the principle of 'complementarity'. It is only permitted to exercise jurisdiction when national courts are unable (eg as in Rwanda where agents of the State were committing the crimes and therefore the State was going to protect them) or unwilling to do so (eg as in Somalia where the country's judicial structures had collapsed or in Cambodia where the Pol Pot regime had destroyed the country's court system). The ICC does not have retrospective jurisdiction.[233]

The ICC only has jurisdiction over natural persons[234] and trial *in absentia* is not possible.[235] The crimes within its jurisdiction are genocide, crimes against

[225] See A Pellet, 'Entry into Force and Amendment of the Statute' in Cassese *et al*, above n 130 at 145.
[226] In fact 10 ratifications were received on that date in an arranged ceremony at the UN in New York so the honour of being the 'sixtieth' state was shared.
[227] See Art 126 Statute. Useful websites on the ICC are <www.icc-cpi.int>; <www.un.org>; <www.iccnow.org/icc>; <www.cij.org/cij>; <www.demon.co.uk/iwpr>.
[228] See G Boas, 'Comparing the ICTY and the ICC: Some Procedural and Substantive Points' (2000) 47 *NILR* 267.
[229] This requires a decision under Chapter VII of the Charter and is thus subject to the veto. See SC Resolution 1422, discussed by Sarooshi in this volume below.
[230] See Pellet, above n 225.
[231] As of Nov 2003, only France and Colombia had exercised this opt-out.
[232] S Bourgoin, 'Jurisdiction *ratione loci*', in Cassese *et al*, above n 130 at 559; M Frulli, 'Jurisdiction *ratione personae*' in Cassese *et al*, above n 130 at 527; JD van der Vyver, 'Personal and Territorial Jurisdiction of the ICC' (2000) 14 *Emory International Law Review* 1.
[233] See S Bourgoin, 'Jurisdiction *ratione temporis*' in Cassese *et al*, above n 130 at 543.
[234] See M Frulli, n 254 below.
[235] See DJ Brown, 'The ICC and Trial in Absentia' (1999) 24 *Brooklyn JIL* 763.

humanity, war crimes and aggression.[236] Exercise of jurisdiction over aggression is dependent on agreement on a definition of the offence. No agreement has been reached as of at the end of the PrepCom (which concluded at the end of the first meeting of the ASP) the matter had to be handed over to the Assembly of States Parties. At its first meeting it decided to establish a special working group on the crime of aggression.[237]

In devising the ICC some states put particular emphasis on the principle of legality as part of a need for a high degree of legal certainty. In the Statute this was reflected in its length and detail particularly in respect of the detailed specification of crimes and the requirement that even more detailed 'Elements of Crimes' be adopted by the Assembly of States Parties.[238] A concensus was reached on the 'Elements of Crimes' in the PrepCom and the Assembly of States Parties approved these.[239] The drafting of the Elements allowed for some revision of outdated language, for example, on denying quarter and for using clear, plain language, consistency across crimes, greater precision, for example, on forced disappearances. The Elements are to be submitted to the judges of the ICC. They are not binding but 'shall assist the court in the interpretation and application' of the crimes in the Rome Statute.[240] It is likely that the Judges will approach the EC with considerable deference. There is no obligation on States to implement the crimes in the Statute into national law but it is prudent for States to do so. Given the key role of the complementarity principle, it is likely that the EC will have an important influence on the introduction and interpretation of national legislation that parallels the crimes on the Statute. The Elements of Crimes will provide important guidance to national legislatures, military personnel and prosecutors.

States exhibited some degree of mistrust over judges. In part this was a reflection of the number of changes made by the judges to the Rules of the ICTY and the ICTR. The Statute kept control over rule making in the hands of States. The Rules of Procedure and Evidence are adopted by the States parties and enter into force, that is, they are binding.[241] Again the rules were adopted by concensus and adopted by the ASP. [242] Extensive consideration of gender issues and the interests of victims are reflected in the Statute, the Elements of Crimes, and the Rules of Procedure and Evidence.[243] The ICC is dependent on co-operation from States,

[236] See N Boister, 'The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed ICC: Law, Pragmatism, Politics' (1998) 3 *J Armed Conflict Law* 27.
[237] See ICC-ASP/1/Res.1 (September 2002); Schabas, in this volume.
[238] The principle of legality is also reflected in Art 22 of the Statute, eg, 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted', Art 22(2) Statute.
[239] See ICC-ASP/1/3, p 112; R Lee (ed), *The International Criminal Court — Elements of Crimes and Rules of Procedure and Evidence* (Transnational, Ardsley, New York, 2001).
[240] Art 9 Statute.
[241] Art 51 Statute.
[242] UN Doc PCNICC/2000/1/Add 1. See R Lee, above n 239.
[243] See R Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill LJ* 217; BC Bedont, 'Gender-Specific Provisions in the

including non-States parties. This includes access to archives, access to witnesses, intelligence information, the surrender of indictees and general legal co-operation across a range of issues that will inevitable arise.

5. CONCLUSIONS

The Nuremberg trial ensured that the Holocaust was 'the' defining event of the twentieth century.[244] Indeed, in a small number of countries it is a criminal offence to deny the Holocaust or the Nuremberg judgment.[245] With hindsight, Nuremberg and Tokyo have become precedents in the increasing criminalisation of international law.[246] This has taken place alongside the growth of the human rights movement and the relative decline of the concept of absolute sovereignty.[247] There has been a move away from immunity and from amnesties for gross human rights violations.[248] This is also reflected in transnational criminal prosecutions, such as in the *Pinochet* case,[249] and in civil claims. The ICC will not operate retrospectively, and there may still be ad hoc international or mixed national/international tribunals in the interim,[250] such as East Timor,[251] Kosovo,[252] for Cambodia[253] and Sierra Leone.[254] In principle, the ICC should spur national

Statute of the ICC' in F Lattanzi and WA Schabas (eds), *Essays on the Rome Statute of the ICC* (Sirente, Fagnano Ripa, 1999) 183.

[244] See P Baldwin (ed), *Reworking the Past: Hitler, the Holocaust and the Historians' Debate* (Beacon, Boston Mass, 1990); LL Langer, *Admitting the Holocaust: Collected Essays* (OUP, New York, 1995).
[245] See D McGoldrick and T O'Donnell, 'Hate-Speech Laws: Consistency with National and International Human Rights Laws' (1998) 18 *Legal Studies* 453. See also *Irving v Penguin Books*, 2000WL 362478 (11 April 2000) (failed libel action by one historian against another historian).
[246] See T Meron, 'Is International Law Moving Towards Criminalisation?' (1998) 9 *EJIL* 18; T Meron, *War Crimes Law Comes of Age* (OUP, Oxford, 2000); P Sands (ed), *From Nuremberg to The Hague — The Future of International Criminal Justice* (CUP, Cambridge, 2003).
[247] States that have opposed the ICC, such as US, India and China, have often based their arguments on sovereignty grounds. See Simpson in this volume.
[248] See LN Sadat, above n 83, 55–69.
[249] *R v Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte [No 3]* [1999] 2 All ER 97: no immunity for ex-head of state charged with torture. See D Turns, 'Pinochet's fallout: jurisdiction and immunity for criminal violations of international law' (2000) 20 *Legal Studies* 566.
[250] See D Turns, '"Internationalised" or Ad Hoc Justice for International Criminal Law in a Time of Transition: The Cases of East Timor, Kosovo, Sierra Leone and Cambodia' (2001) 6 *Austrian Rev International and European Law* 123.
[251] See Turns, *ibid.* Minor offences are dealt with through locally-mediated community reconciliation agreements.
[252] See H Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *AJIL* 46.
[253] See S Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' (2001) 12 *Crim Law Forum* 185. In 2002 the UN ended negotiations with the Cambodian government over the establishment of a court. However, negotiations resumed in January 2003 and an agreement was reached in June 2003. See website of the Coalition for International Justice, <www.cij.org>.
[254] See M Frulli, 'The Special Court for Sierra Leone: Some Preliminary Comments' (2000) *EJIL* 11, 833; website of the Coalition for International Justice, <www.cij.org> The UN Secretary-General appointed the Registrar, Prosecutor and officials of the Court. The court is financed by voluntary

prosecutions so as to avoid ICC jurisdiction under the complementarity principle. The Statute of the ICC, the Elements of Crimes, and its detailed rules of Procedure and Evidence go a long way towards satisfying standards of certainty and accessibility in the law. National and international tribunals are already citing its normative standards. The ICC is an organ of the international community. The UN Secretary-General, Kofi Annan, expressed that idea in these terms,

> I believe it is now generally understood that certain crimes, as long as they are left unpunished, cast doubt on the very idea of an international community.[255]

It is submitted in conclusion that war crimes trials before international tribunals have moved closer and closer towards satisfying purer norms of legality and legitimacy, with the ICC encapsulating a particular legal moment.

contributions. The estimated costs are $15–$20 million per annum. The US is contributing $5 million per annum.

[255] Statement of Secretary-General on closing of 9th Session of Prepcom for ICC, SG/SM/8201 (19 April 2001).

2

Politics, Sovereignty, Remembrance

GERRY SIMPSON[1]

1. INTRODUCTION

IN A RETROSPECTIVE on the Nuremberg Trial written 42 years after the proceedings, David Luban asked:

> What are the enduring contributions of the Nuremberg Trial to the moral life of mankind and to its legal embodiment? That is my question. And my answer is this: the achievements at which the trial was aiming were compromised, rendered equivocal.[2]

For him, the trial was tainted by politics,[3] by sovereignty[4] and by the imperfections of 'moral memory'.[5] In this chapter I want to suggest that histories of the International Criminal Court are likely to be equally ambivalent in light of the fact that the Court was created at the intersection of a series of tensions.[6] I want to make some tentative observations concerning three of these, namely: law and politics; sovereignty and the international; and remembering and forgetting. I will discuss each of them in the context of the international criminal court negotiations in Rome in June/July 1998. In particular, and in the context of this book, I want to think about what we mean when we talk about 'politics' in relation to criminal law. This will involve a brief excursus into the phenomenon of 'political trials' as well as discussion of the structure of negotiation at Rome.

[1] Versions of this chapter have been presented at the JFK School of Government, the Australian National University Law School and the University of Nottingham School of Law. Thanks to Jennifer Welch and Claire Cullen for adept research assistance and Dominic McGoldrick for his patience. Earlier, abbreviated versions of parts 3 and 4 of this essay appeared in the (1999) *University of California (Davis) Journal of International Law.*

[2] D Luban, 'The Legacies of Nuremberg' (1987) 54 *Social Research* at 781.

[3] *Id* at 786.

[4] *Id* at 781.

[5] *Id* at 829.

[6] For the idea of 'ambivalence' as a response to war crimes trials see H Arendt, *Eichmann in Jerusalem* (Penguin, London, 1994).

2. LAW AND POLITICS

2.1 Impressions of Rome

At the Rome Conference there was an unstated split between the diplomats and the lawyers, partially reflected in the division of responsibilities between the working groups on procedure and general principles of criminal law (technical, legalistic, detailed) and the Committee of the Whole (debating the wider procedural, jurisdictional and political matters).[7] This split, in turn, was reflected in the professional division between the diplomats (seeking agreement) and the lawyers (seeking agreement *and* committed to the idea of legality (for example, fair trial, *nullem crimen sine lege*). It might be said that legal advisers were representing their own State's interests but also the ideal of a legal order (and, perhaps more radically put, the interests of as yet unnamed accused) while the diplomats were engaged in the politics of negotiation, compromise threat and promise.

On the other hand, the diplomats and lawyers *together* saw themselves as building a workable legal structure in the face of unwarranted political intrusion from the outside, represented sometimes by US Congressional isolationism, sometimes by the utopian politics of the NGO community stationed in Rome itself. Accordingly, I suspect that many of the delegates and advisers found themselves occupying both sides of the politics/law divide simultaneously. The Australian delegation, of which I was part, viewed itself, variously, as political common sense to the legalist-idealism of the NGOs, legal purism to the *realpolitik* of the Americans, universalism to the cultural atavism of the 'Arab bloc' and so on. At a more mundane level, law and politics were split along conventional lines. In the Drafting Committee, lawyers beavered away on juridical formulations that would reflect the 'consensus' while outside the conference hall the diplomatic élites met in private to bargain, cajole and threaten. In the middle were the 'informal formals' searching for a position that would bring law and politics together under one roof.

2.2 Political Trials

These impressions of Rome are reflected, partially, in the way law and politics are discussed in the wider field of international criminal law and in popular discourse on the subject. Inevitably, there is a great deal of loose talk about the political and legal in relation to, particularly, war crimes trials themselves. In this context, it is quite common to hear people refer, dismissively, to 'political trials'. Indeed, it is almost a mark of sophistication to dismiss war crimes trials as 'political' and this

[7] MC Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Transnational Publishers, New York, 1998); RS Lee, *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, and Results* (Kluwer, The Hague, 1999).

can be viewed as part of a general commitment to the idea of both maintaining a separation of the political and legal and deprecating those institutions that fail to do so. Some go further and label these trials 'show trials' thereby also sharing the same view as virtually every defendant from Goering to Barbie and, now, Miloševi'c. But when I ask those lay-observers if these are show trials like the Moscow Show Trials, the answer is invariably, 'No'. They are political but not *that* political or perhaps political in a different way. They are for show but perhaps not solely for show. And this is surely right. The legal and the political do unite in war crimes trials and in the construction of legal institutions but they do so in unstable and complex ways.[8]

As a preliminary to investigating the role of law and politics at the International Criminal Court, I want to conclude these initial thoughts by disentangling the language embedded in the phrase 'political trials'. First, it might be said that war crimes trials are trials of the 'political' or, at least, indictments of the political. In the course of a war crimes trial one of the unspoken purposes of the trial is to expose the grubby world of politics before the grandeur of the law. The evidence presented at trial seems to be saying that *this* is what happens when politics is allowed to run riot. Hence, the very idea of a court procedure displacing lawlessness is an important purpose of trial. The architects of the Nuremberg war crimes trials, for example, were keen to impress upon the German people not just the criminality of their leaders but also the virtues of the rule of law.[9] Often, then, a war crimes trial can be viewed as the 'trial' of politics in the sense of a series of tribulations or tests to be undergone before a new society can emerge untainted by the old.

Frequently, however, particular types of politics are on trial. Most obviously, the trial is an indictment of the political project of the accused. So, national socialism was on trial at Nuremberg, nationalism at The Hague (ICTY) and racism in Arusha (ICTR). The trial of major Nazi war criminals involved the investigation and prosecution of crimes against humanity but only those committed as part of an aggressive war undertaken on behalf of a specific ideological project.

But this sort of trial can cut another way. It can become a political contest over historical truth or political responsibility and this can prove embarrassing for the prosecuting State or organisation. Austen Chamberlain anticipated some of this when he cautioned against plans to prosecute the Kaiser after the Great War by remarking that 'his defence will be our trial'.[10] Klaus Barbie's trial was perhaps the most convoluted example of this sort of political trial. Variously intended as a commemoration of French resistance during the Second World War, a celebration

[8] For a longer analysis see my forthcoming *War and Crime* (Polity Press, Cambridge, 2004) and J Shklar, *Legalism* (Harvard UP, Cambridge (Mass), 1964). See also F Mégret, 'The Politics of International Criminal Justice' (2002) 13 *EJIL* at 1261.

[9] See Luban, 'The Legacies of Nuremberg', above n 2 at 793–95.

[10] GJ Bass, *Stay the Hand of Vengeance* (Princeton University Press, Princeton NJ, 2000) at 69.

of the humanism of the Fifth Republic and an act of remembrance for those French Jews who had perished in the Holocaust, the Barbie Trial ended up as a 'national psychodrama' in which the French State was implicated in crimes against humanity against the Algerians and the idea of crimes against humanity was re-defined by the prosecution with the transparent intention of excluding those acts committed by the French in Algeria.[11]

This decision of the French State to adopt a definition of crimes against humanity as: 'All inhumane acts and persecutions, which are carried out in the name of a State practising a policy of ideological hegemony', like the Australian legislation asserting jurisdiction only over crimes committed between 1939 and 1945, suggests, of course, that the politics of a war crimes trial is the politics of victor's justice.[12] In each case, there was a transparent effort to exclude the alleged crimes of the prosecuting State from the scope of the legislation or indictment. The phrase 'victor's justice' conveys the idea that these are political trials in the sense that the Court will pursue a certain type of politics (and one designed primarily or incidentally to vindicate the victors).[13] This is the easiest canard to raise about war crimes trials. Slobodan Milošević began his defence by promptly denouncing the Trial as an illegitimate sham: 'I never heard of indictments that resemble political pamphlets with poor, bad intentions'.[14] Indeed, he claimed, it was 'a political trial' (the ultimate insult):

> I wish to say that the entire world knows that this is a political process. So we are not here speaking about legal procedures that evolve into political ones. This is a political process to begin with, and as far as what I would prefer, I would prefer the truth.[15]

This defence was given a subtler twist in the *Tadić Case* where Tadic challenged the legality of the trial by describing it as illegitimate. In doing so, the defence focused on the Security Council's role in creating the Court and the resultant lack of legitimacy.[16] This, the defence argued, was victor's justice, political strategy disguised as universal legality.

[11] A Finklekraut, *Remembering in Vain* (Columbia University Press, New York, 1992); G Binder, 'Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie' (1989) 98 *Yale Law Journal* 1321.

[12] The 'Barbie' Trial (*Féderation National des Déportées et Internés Résistants et Patriots and Others v Barbie*, 78 ILR 124 (French Cour de Cassation 1985); 100 ILR 330 (French Cour de Cassation 1988); *War Crimes Amendment Act* 1988 (Australia).

[13] C af Jochnick and R Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 *Harv Int'l LJ* 49; E Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' (1991) 23 *N Y U J Int'l L and Pol* 373; R Minear, *Victor's Justice:* The Tokyo War Crimes Trial (Princeton University Press, Princeton, 1971).

[14] *Milošević* (Interlocutory Appeal Hearing on Joinder of Issues) (1 Feb 2002) Case no IT–02–54, Transcripts at 351.

[15] *Id* at 352.

[16] See F King and AM La Rosa, 'Jurisprudence of the ICTY: Tadić' *European Journal of International Law* at <http://www.ejil.org/journal/Vol9/No4/sr1.html>.

2.3 The International Criminal Court

In a sense, the International Criminal Court was meant to transcend the political. Correspondingly, its trials would resist the appellation, 'political trials'. These trials would be international, impartial, non-selective. Definitions would be agreed beforehand, *ad hocery* would be eliminated for good and instead there would be a permanent system of universal justice. Nuremberg would be remembered as a provocation to action but not a direct precedent or inspiration.

The relationship between law and politics was a common theme in scholarship about the ICC and international efforts to prosecute and convict war criminals. A standard position emerged which sought to implicate something called 'politics' in the ruination or compromise of something called 'law'.[17] A just and meaningful international criminal order could only, then, be created by cleansing that system of political influence.[18]

Of course, there is no evading politics at one, perhaps trivial, level. Treaty making is political — it seeks to secure political ends, it is 'an architecture of compromise' and it involves a pooling of political aspirations. As Hans Kelsen described it, law is 'a specific social technique for the achievement of ends prescribed by politics'.[19] Indeed, law could have no meaning in the absence of politics. Law is politics transformed.[20] In this sense, law can neither be reduced to politics nor can it be incubated from politics. But when commentators and observers criticise the politicisation of law or dismiss war crimes trials as 'political' they may mean something different and less innocuous. Perhaps they are suggesting that law, instead of being the rational implementation of a collective politics, is the product of irrational selfish urges attributable to States' national interests.

However, the view that law is politics in this sense seems seriously deficient too. In Rome, for example, I was struck by the seriousness with which legal arguments, arguments based on the rule of law and textual interpretation, were presented and received in both the formal and informal sessions. Of course, crude national interest intruded but not as often as one might imagine. Equally, it was often hard to identify just what constituted the national interest in a particular case. Indeed, I think it is somewhat artificial to talk in terms of, say, the US national interest when the US position was an amalgam of different, and often competing, positions founded on the various perspectives of government agencies and congressional or White House constituencies.

[17] See generally MC Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: the Need to Establish a Permanent International Criminal Court' (1997) 10 *Harv Hum Rts J* 11, (calling for an international criminal justice system safeguarded from political compromise).
[18] See *id.*
[19] H Kelsen, *The Law of the United Nations* (Stevens, London, 1958) XVIII.
[20] See W Levi, (1995) *Revue De Droit Int'l* 126, ('Without political decisions a legal norm could have no rational content? … legal norms are the translation of political decisions into legally binding rules of behaviour').

Indeed, the whole question of what constitutes politics for the purposes of analysing or criticising a treaty-making process or a war crimes trial is yet to be fully articulated. I have provided some pointers above but I want to conclude this section by referring to two disagreements from the Rome Conference, each of which illustrates how unstable and contentious is the whole idea of what constitutes 'the political'.

The first disagreement involved the putative role of the independent prosecutor. A major criticism of the idea of the independent prosecutor came from the Americans who believed that an unfettered prosecutor would politicise the judicial and prosecutorial process. 'Politics', here, was defined as something beyond State control, a partiality or lack of restraint, that might redound to the disadvantage of the Great Powers in particular. In other words, 'independence', the Holy Grail of many legalists, was decried by some delegations as the very epitome of political (or politicised) discretion. Those who called for an independent prosecutor did so *because* such an institution would act beyond the immediate interests of States. Discretion was the key to transcending politics. 'Politics' in this case was defined as State control itself.

A similar debate arose in respect of the role of the Security Council though here the issue was different. On one side, there were those, predominantly larger, States who wished to incorporate 'political reality' into the operation of the Court. They, accordingly, supported a key role for the Security Council. The Security Council represented good politics here — the politics of necessity and management. Indeed, this was not simply good politics but good law. The UN Charter already gave the Council constitutional authority over peace and security and the repression of aggression. It made little sense, then, to exclude it from key decision-making at the ICC. To do so would be to deny legal effect to the Charter in order to satisfy some pre-existing political antipathy towards the Council. Others, however, were more diffident, arguing that the Security Council had the potential to discredit the legal process. The Council, for this group, represented pure politics or a form of *realpolitik* that had no place in a legal, or at least judicial, institution.

What is remarkable about these two jurisdictional debates is the way in which the category, 'politics' itself, proved to be highly contested. These disagreements were not about the role of politics in legal institutions but rather about the space occupied by the political in the language and practice of international criminal law.

3. SOVEREIGNTY AND THE INTERNATIONAL

> It has been a general principle of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in

> our problems … We have some regrettable circumstances at times in our country in which minorities are unfairly treated … (Robert Jackson, US Prosecutor at Nuremberg, 1945).[21]

International criminal law is built on a bridge linking the domestic to the international legal order. Historically, with the exception of piracy, individual criminal responsibility was regarded as a matter for municipal courts. Indeed, according to some writers on the State, control over and direction of the criminal law machinery was the key attribute of sovereignty. It is little wonder, then, that international criminal law has developed so haphazardly. 'Sovereignty' appears in the arguments of lawyers, the commitments of diplomats and reassurances of international bureaucrats as a barrier to the over-ambitious extension of international criminal law. The apparent movement or tension between sovereignty and the international is a constant in the history of the field. The modern international criminal law system may well have been inaugurated by the International Military Tribunals at Nuremberg and Tokyo,[22] but this was not the preferred model for prosecution during the post war period. From the late 1940s onwards national prosecutions and trials supplanted the international effort boldly commenced at Nuremberg.[23] The key juridical moments of the post-war era, then, are found in the trials of Eichmann, Demjanjuk, Barbie, Polyukhovich, Preibke, Touvier and others and not in the failures at the international level.[24]

In a book published in 1997, Tim McCormack and I described how these domestic trials have tended to demonstrate that 'good history makes bad law'.[25] Few, if any, of these trials have been terribly satisfactory from a strictly legal perspective. Cases of mistaken identity, failing memory and dubious assertions of jurisdiction abound.[26] In addition, many of these trials have proved politically embarrassing for those States initiating prosecution.[27] States, understandably chastened by these experiences and conscious of public revulsion caused by the failure to prosecute in Cambodia or, initially, in the Balkans, were perhaps more responsive to new international initiatives than at any time before. Now, with the

[21] R Jackson, *International Conference on Military Trials*, (London, 1945, *Dept. of State Pub. No 3080*) at 331, 333.

[22] See generally T McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Law Regime', in T McCormack and G Simpson (eds), *The Law of War Crimes: International and National Approaches* (Kluwer, The Hague, 1997) 31, 57–58, (documenting importance of Nuremberg and Tokyo trials).

[23] Nuremberg was an initiative located somewhere between the national and the international. The war crimes trials were organised and administered by the Four Powers (in the case of Nuremberg) and by the United States acting more or less alone (in the case of Tokyo). To that extent they were multi-sovereign or 'allied' rather than truly international.

[24] See generally G Simpson, 'Didactic and Dissident Stories in War Crimes Trials' (1997) 60 *Alb L Rev* 801 (discussing these cases).

[25] See T McCormack and G Simpson, *The Law of War Crimes,* above n 22 at xvii, xviii.

[26] See M Kirby, 'War Crimes Prosecution — an Australian Update' (1993) *Australian Bar Review* 109, 111–12 (describing problems in the prosecutions of Ivan Polyukhovich, Mikolay Berezowski and Heinrich Wagner).

[27] See G Simpson, above n 24 at 833–37 (describing dissident function of war crimes proceedings).

creation of the three ad hoc tribunals for Rwanda, Yugoslavia and Sierra Leone and the establishment of the ICC we appear to be moving back to the international level, returning, in some respects at least, to the Nuremberg precedent.[28] This return to the international is also a move back to the institutional delivery of justice but it is also a return to another set of arguments about the claims of sovereignty and the limits of the international.

On the face of it, States in Rome appeared willing to forego certain sovereign prerogatives as a way of divesting themselves of the responsibilities of prosecution. However, Rome did not represent an unequivocal triumph for the international. The question of sovereignty arose repeatedly throughout the negotiations. Indeed, perhaps the dominant theme of the Rome Conference was the need to reconcile the demands of sovereignty with the desire for a functioning international institution. To what extent was an international system based on State consent hospitable to an international criminal order founded on centralised coercion?

At least one school of legal theory, positivism, holds that criminal law makes little sense in a system without a public sovereign or in an order with no authoritative enforcement mechanism. The 'horizontal' version of positivism found in international law accepts that law can flourish in such a non-centralised system (through rigorously ascertained State consent) but sees little role for individual accountability or any distinction between crimes and delicts.[29] Other critics of the Court were less concerned with the philosophical objections to the Statute. Instead, they wondered if the work of the Court would merely overlap with or duplicate the multiplicity of institutional and legal mechanisms already available to confront human rights abuses, war crimes and grave breaches of the international humanitarian laws of war.[30] Was it not possible to accomplish the ends sought through more comprehensive extradition agreements, the use of various treaty regimes (for example, the Torture Convention[31]), human rights reporting and communication procedures (for example, the Optional Protocol to the International Covenant on Civil and Political Rights[32]) or by making better use of

[28] See generally L Sohn, 'From Nazi Germany and Japan to Yugoslavia and Rwanda: Similarities and Differences' (1997) 12 *Conn J Int'l L* 209 (discussing important differences between various tribunals, including punishment of leaders and available evidence). On where Nuremberg is properly located see above n 23.

[29] See generally P Weil, 'Towards Relative Normativity in International Law' (1988) 77 *AJIL* 413 (discussing and regretting *jus cogens* theory, the distinction between international crimes and delicts, rules of general international law, and obligations *erga omnes*).

[30] See US Department of State, 'Comments of the Government of the United States on Draft Articles for a Statute of an International Criminal Court', 1 June 1994, at 14 ('Unless addressed in the Statute, an overlap will exist between the International Court of Justice and the (ICC) regarding jurisdiction to determine questions relating to the interpretation and application of … treaties … Consequently, it is possible that the two courts will opine on the same or similar issues').

[31] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 Feb 1985, S Treaty Doc No 100–20 (1988), 1465 UNTS 85.

[32] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 Dec 1966, GA Res 2200A (XXI), UN GAOR, 21st Sess, Supp No 16, at 59, UN Doc A/6316 (1966), 999 *UNTS* 171 (entered into force 23 March 1976).

the Geneva Conventions and Protocols[33] (for example, Protocol I, Article 88 on mutual assistance or Article 90 establishing a fact-finding Commission) not to mention domestic war crimes trials and tort litigation?[34] Ultimately, these concerns carried little weight. The delegates mostly by-passed the philosophical questions by adopting a mode once described by Nigel Purvis as 'functional pragmatism'[35] — they simply got on with the job of setting up a court. As for the alternatives to the Court, it was believed that the Court would complement these efforts rather than displace them.

The apparent conflict between sovereignty and international criminal law could not be so easily wished away, however. This conflict is inevitably acute in the case of a treaty whose consequences might be the prosecution of State nationals in international courts. For example, the failure of the US Government to support the statute can be attributed to this very real fear and the protection of sovereign prerogatives remained a concern for most of the negotiating States.

The Statute proposed (at least) three important ways in which State sovereignty was buttressed within the regime established: complementarity, content and consent.

3.1 Complementarity

Article 17 of the Statute provides for complementarity between national and international legal systems.[36] Potential jurisdictional tension is resolved on functional grounds with the domestic institutions given a degree of primacy or presumptive jurisdiction. The Court is obliged to declare a case inadmissible in situations where 'the case is being investigated or prosecuted by a State which has jurisdiction over it'.[37] Jurisdiction falls to the International Criminal Court only in the *exceptional* instance where 'the State is unable or unwilling genuinely to carry out the investigation'.[38] Examples of this include the collapse of the national legal order, unjustifiable delay or absence of intent to prosecute.[39] So, it is only in cases of national paralysis that the International Criminal Court fills the jurisdictional lacuna. This system can be compared to the one operating in the ICTY where the Tribunal has clear primacy over national laws in the Balkans.[40]

[33] *Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 12 Dec 1977, 1125 UNTS 3, reprinted in (1977) 16 ILM 1391 (entered into force 7 Dec 1978).
[34] See *Alien Tort Claims Statute* 28 USC 1350 (1999) ('The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States').
[35] N Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 *Harv Int'l L J* 81.
[36] See *Rome Statute of the International Criminal Court*, Art 17. See Cameron in this volume.
[37] *Id* at Art 17(1)(a).
[38] *Id.*
[39] *Id* at Art 17(2) and (3).
[40] See *Statute of the International Tribunal for the Former Yugoslavia*, Art 9(2), annexed to Report of the Secretary-General Pursuant to Para 2 of UN Security Council Res 808, UN GAOR, 19 May 1993, UN Doc S/25704, reprinted in 32 *ILM* 1159, 1193–97.

Complementarity operates in a quite different manner preferring fully functioning sovereign entities over international institutionalism. It is only dysfunctional or aberrant sovereignties that forfeit their claim to primacy over the Court.

3.2 Content

State sovereignty is protected in another respect relating this time to substantive law or content rather than procedural capacity. The jurisdiction of the proposed International Criminal Court is restricted to a relatively small number of cases; that is, those involving war crimes, crimes against humanity, genocide and, in the event of future agreement, aggression.[41] This leaves a vast array of international crimes firmly within national jurisdiction. So, for example, despite vigorous debate, a continuing preference for national jurisdictions manifested itself in relation to terrorism and narcotics where the current system of mutual assistance and national enforcement prevailed over the idea that the International Criminal Court should have jurisdiction over such crimes. Ultimately, the jurisdiction of the Court was confined to a relatively small number of traditional offences whose criminality was thought to be beyond dispute.

3.3 Consent

Finally, sovereignty was privileged within the statute through the mechanisms of consent embedded in the jurisdictional regime. There are three distinct methods by which the court can acquire jurisdiction over a crime: the State complaint method, the Security Council referral mechanism and the institution of the independent prosecutor as a source of jurisdiction.[42] Each has tended to vie for supremacy throughout the drafting and negotiating processes at the International Law Commission, the Sixth Committee, in the ad hoc committees and in the preparatory committees as well as in Rome itself.

In the end, each of them appears in the Statute but each appeals to a different constituency. The State complaint method defers to statist sensibilities (and sensitivities) that continue to circulate in international law. The Security Council referral process operates in the spirit of the UN collective security framework and mirrors the current practice of creating ad hoc tribunals by decree.[43] This mechanism might be described as the permanent ad hoc procedure and has obvious attractions for the Great Powers and those who subscribe to realist conceptions of

[41] See *Rome Statute*, Art 5.
[42] See *id* at Art 13 ('Exercise of Jurisdiction'). The jurisdiction of the independent prosecutor must be established in accordance with Art 15. *Id.*
[43] See United Nations Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, SC Resn *827*, UN SCOR, 48th Sess, 3217th mtg, UN Doc S/RES/827 (1993), reprinted in 32 *ILM* 1203.

international legal order. Finally, in Article 15, there is the surprise inclusion of the independent prosecutor as a separate 'source' of jurisdiction. This appeals to an instinctive legalism with its preference for a base of legal authority removed from the interests of States or the prerogatives of Great Powers.[44]

How do each of these systems of jurisdiction relate to our central idea of consent and the way this idea manoeuvres between the sovereign and the international? Under the State complaint method, a State that is also a party to the Statute may, under Article 14, request the prosecutor to investigate 'a situation'.[45] The State is also under a weak obligation to furnish the prosecutor with relevant supporting documentation.[46] States who become parties to the Statute automatically accept the jurisdiction of the Court with respect to Article 5 crimes.[47] This is a significant departure from both the original and the revised International Law Commission Draft where an opt-in provision was included whereby a State party then had to accept the jurisdiction of the Court for one or more of the crimes listed under Article 5. In this sense at least, sovereignty ceded some ground.

The proposed role of the prosecutor was a contentious one. In the original 1994 ILC Draft Statute, the Prosecutor had no role in initiating prosecutions,[48] but by the time the Rome Conference was convened the idea of an independent prosecutor had gathered support. The compromise developed in the draft resembles the ICTY's Rule 61 procedures to the extent that it gives the pre-trial chamber a special role in vetting prosecutorial discretion.[49] Under Article 15(4), the Pre-Trial Chamber has to decide whether the prosecutor has made out a reasonable basis to proceed.[50]

In each of the two above cases there appears to have been a shift from a sovereign-centric position (reflected in the ILC Drafts) to a more internationalised and centralised system (no opt-out provision, a more dynamic Prosecutor). However, it would be wrong to see this as a wholesale displacement of sovereignty. State consent continues to play a significant role in conditioning possible prosecutions. In the case of jurisdiction, in the two cases involving State complaints and prosecutor initiated investigations, either the territorial State or the State of nationality of the accused must also have accepted the jurisdiction of the Court in order for a prosecution to proceed.[51] This would make prosecutions in cases analogous to those in, say, the former Yugoslavia difficult to initiate since the State

[44] See *Rome Statute*, Art 15 (establishing procedure for independent prosecutor).
[45] See *id* at Art 14(1) ('A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes').
[46] See *id* at Art 14(2) (mandating that a referring State will provide documentation).
[47] *Id* at Art 12.
[48] See Report of the International Law Commission, 46th Sess, 2 May–22 July 1994, UN GAOR, 49th Sess, Supp No 10, UN Doc A/49/10 (1994) [hereinafter *ILC Report*].
[49] See *ICTY Statute* at Art 61.
[50] See *Rome Statute* at Art 15(4).
[51] *Id* at Art 12(2).

of nationality and the territorial State might be one and the same and that State would likely be hostile to the idea of international criminal prosecution. In any event, the consent of the custodial State, while not required under the terms of the Statute, surely remains a practical necessity in virtually all cases.

In the case of jurisdiction acquired through the Security Council's Chapter VII powers, it has been argued throughout this process that the Security Council, because of its special peace-enforcing role in the Charter, must retain a referral power built into the Court's statute. This makes sense when seen in the light of the Charter system but may appear questionable to those immersed in legal traditions that find intolerable the overt involvement of political organs in decisions of a judicial nature.[52]

More controversial still were the various proposals to give the Security Council a veto over proceedings at the International Criminal Court. These proposals took two forms and were embodied in the ILC's original Draft Article 23.[53] Under Article 23(2) the ICC was to have no jurisdiction over the crime of aggression unless the Council had determined that an act of aggression had already taken place.[54] This was problematic on a number of grounds partly because it had the potential to prejudice the rights of the accused and partly because the Council has never found there to be an act of aggression since 1945. This whole issue is now, of course, moot because of the failure to reach agreement on a definition of aggression.

Article 23(3) of the ILC Draft included a provision which barred the ICC from commencing proceedings arising from a situation which the Security Council was dealing with under its Chapter VII powers.[55] This provision has been retained albeit in a modified form. Under Article 16 of the Rome Statute, the Security Council has to pass a resolution renewable every 12 months maintaining exclusive jurisdiction over the relevant situation.[56]

All of the above indicates that the relationship between sovereignty and the international is ambiguous in the case of Security Council-initiated prosecutions because, while the consent of the Security Council members represents a fetter on judicial institutionalism, it is also the expression of a particular form of realist internationalism dictating *against* State consent mechanisms. Another way to put this is to say that the consent of some States (Council members, the P5) is elevated in importance while the consent of other States is reduced.

So, will the court exercise jurisdiction frequently, infrequently or not at all? It seems to me that the State complaint mechanism is not likely to yield many cases.

[52] See the discussion of this in Pt 2.3 above.
[53] ILC Report, at Art 23.
[54] *Id.*
[55] *Id.*
[56] See *Rome Statute*, at Art 16 ('No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'). See also SC Res 1422 (2002), discussed by Sarooshi in this volume.

States rarely bring actions against each other at this level and the consent of either the nationality or territorial State may be difficult to acquire. The same goes for prosecutor initiated proceedings. The prosecutor is constrained by the need for State consent, by the restraints built into Article 15, by the principle of complementarity and by the very structure of international politics.

This leaves the possibility of prosecutions arising out of Security Council referrals. Again a peculiar constellation of political factors are necessary to make the Security Council act in this field. War crimes trials throughout history have tended to occur when defeat and criminality coincide.[57] The complex relationship between sovereignty and the international means that this rather harsh insight is unlikely to require great modification when observers look back on the first decade of the ICC's existence.

4. REMEMBERING AND FORGETTING

After John Gotti, the notorious New York Mafia Boss, killed his predecessor Paul Castellano, he sent a message to the Castellano Family. According to FBI agent, Bruce Mouw, Gotti's lieutenants 'told them [Castellano's Family] that what happened, let it go, and start paying tribute to Gotti'.[58] In El Salvador investigations began in 1999 into the disappeared children, those children who were abducted from their villages or taken from the arms of their murdered parents during the civil war there. Not everyone agrees with the investigations.[59] 'Is it worth it to reopen wounds when we have been able to throw a little forgetting on them?' asks General Adolfo Blandon.[60]

Remembrance and amnesia compete for dominance in the way different sectors of a population or community choose or are forced to respond to the problem of crime and atrocity.[61] At the official rhetorical level, the war crimes field functions in a manner far removed from that described in the Gotti and Blandon cases.[62] Thus, the preamble to the Rome Statute begins by reminding us, 'that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'[63] and the opening Statements of the various delegates are littered with such declarations. Indeed, memorialising or commemorating is an important function of a war crimes trial and the potential educative role of a war crimes trial is rarely far from the minds

[57] *But* see Simpson, above n 24 at 809 (describing, in this regard, the difference between Nuremberg and Tokyo tribunals and those in former Yugoslavia and Rwanda).
[58] See J Goldberg, 'The Don is Done', *NY Times Magazine,* 31 Jan 1999, §6, at 1.
[59] See T Rosenberg, 'What Did You Do in the War, Mama?', *NY Times Magazine,* 7 Feb 1999, §6, at 2.
[60] *Id.*
[61] The particular quality of the remembrance can also be hotly disputed. See the debate surrounding the relative merits of truth commissions and war crimes tribunals.
[62] See Simpson, above n 24 at 820 (citing difficulties in transposing notion of crime from municipal to international settings).
[63] See *Rome Statute,* preamble.

of those supporting the idea of trials.[64] From Nuremberg to Eichmann and beyond, we were told the criminal trial would tell the truth about the Holocaust by placing it on some sort of official judicial record.

Yet, the establishment of the Court may also represent some sort of closure (or forgetting).[65] It does this in two ways. First, at the strictly jurisdictional level, crimes taking place before entry into force of this statute will not fall within the Court's jurisdiction.[66] In other words, the Court will not have jurisdiction over Pol Pot's accomplices or war crimes arising out of the Second World War or those that occurred in the Balkans. The temporal jurisdiction of the Court excludes the past. The Statute invites us to forget the atrocities of the past and turn our attention to those as yet uncommitted crimes.[67]

Secondly, and associated with this point, the establishment of the ICC and the various tribunals marks not just a transfer of jurisdiction to the international level but also the beginning of what might be described as the post-Nazi era in international criminal law. This historical shift was exemplified by Dusko Tadić's conviction on counts of murder, torture, and crimes against humanity in May 1997.[68] In the same month the DNA remains of Martin Bormann were being analysed by forensic experts in Germany.[69] Bormann was the one remaining member of the German High Command indicted at Nuremberg who was unaccounted for.[70] Of course, new enemies have emerged. Perhaps none of them represent evil in quite the unadorned manner of the Nazis but, no doubt, their prosecution and trial will become a key aim of the new Court. The success of this court as an instrument of remembrance and justice, however, will rest on the manner in which it comes to terms with the crimes of friends and allies as well as enemies.

5. CONCLUSION

In this chapter, I have tried to suggest different ways to characterise three apparent areas of conflict present at the ICC negotiations and in the Court's statute.

[64] See Simpson, above n 24 at 824 (detailing the various ways in which this is accomplished and problems associated with pedagogical function in its relationship to legality and fairness).

[65] See J Alvarez, 'Rush to Closure: Lessons of the Tadić Judgment' (1998) 96 *Mich L Rev* 2031, 2032 (describing form, structure and content of Tadić Judgment and expressing doubts about the notion of closure).

[66] See *Rome Statute*, Art 11 ('The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute').

[67] Each war crimes trial is to an extent an invitation to forget other crimes beyond the scope of the particular trial. See Simpson, above n 24 at 810 (stating that each war crimes trial is an exercise in partial justice and that majority of war crimes go unpunished). Other justice systems may deal with the past, eg, World War II crimes or the grave breaches of the Geneva Conventions 1949/Additional Protocol I.

[68] *Prosecutor v Dusko Tadić aka 'Dule'* (7 May 1997) Case no IT–94–1, available at <http://www.un.org/icty/tadic/trialc2/judgement-e/970507jt.htm>

[69] See 'DNA Tests for "Bormann Bones,"' *Jerusalem Post*, 5 May 1997, at 4.

[70] See R Boyes, 'DNA Tests on Skull End Long Hunt for Bormann', *The Times*, 4 May 1998, at 14 (stating that Bormann was condemned to death in absentia at Nuremberg and reporting that remains confirm Bormann poisoned himself not far from Hitler's bunker in 1945).

In each case, I think it is possible to say that the dichotomy or opposition between these competing ideas is more complicated than might be initially appreciated. However, in identifying them I have tried to show how delegates negotiated in the shadow of politics and remembrance while attempting a reconciliation of the imperatives of sovereignty and global justice. Their dilemmas were those of international criminal law itself.

PART II

Jurisdiction and Admissibility

3

Jurisdiction and Admissibility Issues under the ICC Statute

IAIN CAMERON

1. INTRODUCTION

THE ADOPTION OF the Statute of the International Criminal Court (hereinafter ICC)[1] has led to a flurry of academic activity, illustrating the enormous symbolic significance of the creation of a permanent court for international crimes. The present chapter will deal with jurisdiction and admissibility issues.[2] This means, in practice, discussion of the role of the prosecutor and the Pre-Trial Chamber. It is therefore helpful to note at the outset that the ICC Statute creates a court structure consisting of four main organs: 1) the Presidency; 2) the Court, divided into pre-trial, trial and appellate chambers; 3) the Prosecutor; and 4) the Registry (Article 34). In addition, there is the Assembly of States Parties, which, inter alia, has the power to appoint judges and the prosecutor, to amend the treaty, to adopt rules of procedure and evidence and to recommend measures against States not complying with their obligations under the Statute (Article 112).

The chapter has the following structure. I will begin by sketching out the provisions in the Statute dealing with the jurisdiction of the court ratione temporis, ratione materiae and ratione personae. The Court does not have jurisdiction unless either the State in which the crime was committed (the 'territorial State')

[1] Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9 (17 July 1998), reprinted in (1998) 37 *ILM* 999 (hereinafter Rome Statute). In accordance with Art 126(1), the Statute entered into force on 1 July 2002, after 60 ratifications.

[2] Amongst the many articles on the issue see, eg, CL Blakesley, 'Jurisdiction, Definition of Crimes and Triggering Mechanisms' (1997) 25 *Denver JILP* 233; BS Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 *Yale JIL* 383, D Ntanda Nsereko, 'The ICC: Jurisdictional and Related Issues' (1999) 10 *Criminal Law Forum* 87, and the articles by M Frulli, S Bourgon, JP Kaul, P Kirsch and D Robinson in A Cassesse, P Gaeta and J Jones, '*The Rome Statute of the ICC: A Commentary, vol (1)* (OUP, Oxford, 2002). By admissibility I mean the conditions which have to be satisfied for taking up a case. I will not go into the issues of admissibility of evidence under Art 69(3). See, eg, S Fernandez de Gurmendi and H Friman, 'The Rules of Procedure and Evidence of the ICC' (2000) 3 *YBIHL* 112. For discussion of the tension experienced by the ICTY between civil and common law conceptions of evidence see C Stafferling, *Towards an International Criminal Procedure* (OUP, Oxford, 2001).

or the State of which the accused is a national (the 'State of nationality') is a party to the Statute or has specifically accepted the jurisdiction of the Court. This prerequisite does not apply if the matter is referred to the Court by the Security Council. Discussion of the territorial and nationality limits involves saying something about the extent to which international law at present permits States to go further, and try offenders before national courts for international offences under the 'universal principle of jurisdiction'. It is necessary to look at this issue as, even when the ICC is fully operational, prosecutions before national courts will still be more common, and probably more significant, than prosecutions before the ICC. Looking at the universality principle in turn necessitates a brief discussion of the differing ideologies of jurisdiction existing in the world. I will then look at the means by which the Court's jurisdiction can be constituted, the so-called 'trigger mechanisms'. Next, I will examine the admissibility provisions. Admissibility issues arise mainly as a result of one of the fundamental features of the Statute, the principle of 'complementarity', that is the idea that the ICC should be subsidiary to national prosecution, and only begin functioning if the offender is not already being prosecuted at the national level, or that national criminal proceedings are or were in some way inadequate. I will also look at one controversial issue relating to admissibility, namely amnesties. I will end this chapter with a number of concluding remarks relating to the workability of the system as a whole.

2. JURISDICTION *RATIONE MATERIAE*

The jurisdiction of the ICC is limited to 'most serious crimes of international concern' (Article 1) defined as aggression, genocide, crimes against humanity and war crimes in internal and international conflicts (Articles 6–8). Attempts at the Rome conference to include terrorist offences and drug trafficking offences were not successful.[3] The view was taken that such offences were not as serious as the four 'core' crimes or that they were not crimes under customary international law or that the offences, while raising similar issues of 'impunity', were better dealt with by improved mutual assistance arrangements.[4] There are special difficulties involved in defining the crime of aggression, in particular as regards the relationship between State responsibility and individual responsibility and the role of the Security Council in determining the existence of aggression. Jurisdiction over this

[3] See, eg, the comment of RL Maharaj, Attorney General Trinidad-and-Tobago 'drug traffickers have adversely affected the fabric of Caribbean societies. They poison our children; and the transboundary activities of drug traffickers and that of their armed supporters pose a grave threat to humanity. Their actions ought to be regarded as a most serious crime of international concern', 15 June 1998, at <www.un.org/icc/index.htm>.

[4] In the light of the priority now being given to anti-terrorist measures, the questions have arisen in academic contexts as to the extent to which terrorist offences can fall under the definition of 'crimes against humanity' and failing this, the desirability of adding certain terrorist offences to the statute. See, eg, AP Rubin, 'Legal Response to Terror: An International Criminal Court?' (2002) 43 *Harv ILJ* 65.

offence was therefore made conditional on a later amendment to the Statute (adopted in accordance with Articles 121 and 123).[5]

The conduct set out in Articles 6–8, involving killing and causing serious injury to people, can be assumed to be criminalised in every State in the world. This does not mean that there is already a duty under national law to prosecute and punish in all circumstances people who have committed the acts in question. The fact that, in many States, such prosecutions have rarely occurred when the acts in question have been committed by State agents is the *raison d'etre* of the Statute. I will not go into the extent to which the material definitions of the offences set out in Articles 6–8 reflect the existing state of customary international law (that is to what extent these articles are codificatory).[6] However, something must be said, albeit briefly, about the closely linked issue of the extent of extraterritorial jurisdiction over these offences.

2.1 Extraterritorial Jurisdiction

It is evident that for the war crimes offences in Article 8(2)(a) and (b), an obligation to criminalise the extraterritorial commission of these acts and to prosecute alleged offenders follows clearly from almost universally ratified multilateral conventions, namely the Geneva Conventions of 1949 and the (admittedly less universally but still very widely ratified) Additional Protocol I of 1977.[7] As regards genocide, the Genocide Convention deliberately only provides in Article VI for territorial jurisdiction, and the jurisdiction of an international criminal court which might be established (putting it mildly, a distant prospect in 1948).[8] However, developments since then, in particular the case-law of the ICTY and ICTR, arguably show that genocide is a crime even under customary international law and, moreover, that universal jurisdiction applies to it.[9] The question marks

[5] The Preparatory Commission for the International Criminal Court (PCNICC) established at the time of adoption of the Statute has been working on the issue. See in particular the draft text of a resolution of the Assembly of State Parties on the continuity of work with respect to the crime of aggression, PCNICC/2002/2/Add 24 July 2002, adopted by the Assembly (ICC-ASP/1/Res 1, 10 Sept 2002). See Schabas in this volume.

[6] See the chapters by Schabas, Byron, Rowe and McCormack in this volume. The question will become pressing when and if the Security Council decides to refer a case to the Court under Art 13(b) or where a State prosecutes an alleged offender under its own laws and the State of nationality and/or territoriality objects that this goes beyond what international law permits. See text at nn 13–15, 58–62 below.

[7] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949, 75 UNTS 85, Geneva Convention (III) Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135, Geneva Convention (III) Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287, Protocol I Additional to the Geneva Conventions of 12 Aug 1949 Relating the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3. As of 30 Oct 2003, the four Geneva conventions had 190 parties. Protocol I had 119 parties, <www.icrc.org/ihl.nsf/>

[8] Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277.

[9] The Convention has 134 parties and two signatories, UN Treaty Collection Online as of 30 Oct 2003. The status of genocide as an international crime was unanimously confirmed in GA Res 96 (I) (1946).

which remain concern the obligation to prosecute offenders in internal conflicts (Article 8(2)(c)) and extraterritorial jurisdiction at custom over crimes against humanity (Article 7).[10] As mentioned, the issue of jurisdiction is closely linked with the issue of the content of the offences in question. States have no difficulty in accepting, for example, piracy as an offence of universal jurisdiction. There is no, or little, State interest in defending pirates. Piracy is defined in such a way — requiring in practice a ship to ship attack on the high seas[11] — that there are hardly any pirates. But forced evacuation of, or even massacres of, ethnic minorities or ordering bombardments of civilian targets is often official policy in a conflict. There are many such conflicts going on, even in parties to the Statute.[12] Conceding extraterritorial jurisdiction over crimes against humanity or crimes committed in internal conflicts will mean that the potential radically increases for the courts of one State sitting in judgement over the 'ordinary' acts of officials in other States. Moreover, with an extensive notion of command responsibility, senior officials — Foreign Ministers, Presidents — can be held responsible. There are few, if any foreign ministries, which want the sort of problems that this will cause for normal interstate relations.[13]

On the other hand, States are understandably reluctant to say this. Instead, the debate is put in legal terms of insufficient State practice to create custom, or the need for the presence of the accused in the territory to constitute jurisdiction, or an extensive approach is taken to the issue of State immunity for official acts, and so on. Still, as far as internal conflicts are concerned, States have really conceded the principle. Additional Protocol II involves a duty to criminalise war crimes in

In *Prosecutor v Akayesu*, Trial Chamber Judgment (2 Sept 1998) Case no ICTR–96–4–I, as found at <www.ictr.org> (hereinafter cited as: *Akayesu* Case), at para 495 the Tribunal held 'the Genocide Convention is undeniably considered part of customary international law'. See also *Prosecutor v Krstić*, Trial Chamber Judgment (2 Aug 2001) ICTY Case no IT–98–33, as found at <www.un.org/icty> (hereinafter cited as: *Krstić* Case) at para 541. One can, of course, argue (although not very convincingly) that this case-law relates to the specific regimes established by the Security Council and does not reflect custom. See also *Barcelona Traction* Case (1970) at para 33–34 and Application of the Convention on Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v Yugoslavia*), Preliminary Objections, ICJ Rep 1996, 594 at para 31 regarding genocide as an *erga omnes* norm and the fact that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention. As regards doctrine, see, eg, *Restatement (Third) of the Foreign Relations Law of the US*, vol 2 (1987) § 702 (a) with comments at 161 and 174.

[10] At least one offence exists at custom which is common in internal conflicts and which can also be committed in a pattern such as to constitute a crime against humanity, namely torture. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment, 1984, (1985) 24 *ILM* 535 has 132 States and an additional 11 signatories, UN Online Treaty Collection as of 30 Oct 2003. Duties to investigate and prosecute torture can now also be derived from the general human rights treaties. Eg, the European Court of Human Rights (ECtHR) stated in *Aksoy v Turkey*, 18 Dec 1996, at para 98, and repeated several times since then, that Art 3 of the European Convention on Human Rights (1950, 5 ETS) involves such a duty.

[11] See the UN Convention on the Law of the Sea (UNCLOS), 1982, (1982) 21 *ILM* 1261, Arts 101–3.

[12] The Uppsala Conflict Project identified 24 major armed conflicts going on in 2001, including several in States party or signatory to the Statute. See *SIPRI Yearbook 2002* (OUP, Oxford, 2002) 63.

[13] Not surprisingly, some of the strongest critics belong to the category of former senior officials. See, eg, HA Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80 *Foreign Affairs* 86.

internal conflicts. The Protocol is widely ratified.[14] Admittedly, the Protocol does not explicitly provide for extraterritorial jurisdiction, but there is persuasive case-law from the ICTY and some national courts that such jurisdictional competence exists at customary international law.[15] My own view is that while it is debatable whether the Geneva Conventions 'grave breaches' regime applies to offences committed in internal conflicts in the sense of obliging States other than the territorial State to hunt down, prosecute and punish offenders present on their territories, I consider it to be without doubt that there is now a permissive rule to this effect allowing them to do so, and correspondingly, that territorial States cannot claim that a prosecution of an offender in another State violates the principle of non-intervention. It might seem strange to invoke the principle of non-intervention as an argument for refraining from prosecution, an argument that has been busily misused by authoritarian and dictatorial regimes to avoid the UN or other States investigating and criticising human rights abuses at least since 1945. None the less, it is clear that the principle applies to jurisdictional claims. What is unclear are its limits.[16] In doctrine, one's approach to the issue tends to be heavily influenced by the extent of the jurisdictional claims made by the State(s) with which one is most familiar, and, as I explain below, I think the narrow approach to jurisdiction taken by many common law writers is not supported by State practice and nor is it well conceived.

As regards the question of the permissible extent of jurisdiction over crimes against humanity, the issue is unresolved, despite the recent *Arrest Warrant* case. Much ink has been spilled on the issue.[17] I consider that there is extraterritorial

[14] Protocol II Additional to the Geneva Conventions of 12 Aug 1949 Relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 513 (hereinafter 'Protocol II') has 156 parties (see <www.icrc.org/ihl.nsf/> as of 30 Oct 2003).

[15] Much of the discussion has centred around the implications of the judgments of the trial and appeal chambers in the Tadić case, *Prosecutor v Tadić*, Case no IT–94–1, (1996) 35 *ILM* 32 (Trial Chamber) and 15 July 1999 (Appeal Chamber) available at <www.un.org/icty/tadic/appeal/>

[16] See, inter alia, I Cameron, *The Protective Principle of International Criminal Jurisdiction* (Dartmouth, Aldershot, 1994) 343–45, and the EU and UN GA response to the US 'Helms Burton' legislation, Council Reg No 2271/96, Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country, 1996 OJ (L309) 39, GA Res 51/22, 6 Dec 1996. The question of limits on jurisdictional claims was (fortunately) not decided by the ICJ in the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium),* Judgement (Merits) of 2002 as found at <www.icj-cij.org> (hereinafter cited as: *Arrest Warrant* Case (2002). See, text at nn 59–63, 61 below. However, the issue of jurisdiction has arisen recently in a new application, *Certain Criminal Proceedings in France* (*Republic of the Congo v France*) <www.icj-cij.org>

[17] For a useful overview of the development of the concept of crimes against humanity, and comments on the extent to which the Statute can be said to be codificatory in this regard, see M McAuliffe deGuzman, 'The Road from Rome: The Developing Law of Crimes Against Humanity' (2000) 22 *HRQ* 335. For case law, see F McKay, *Jurisdiction In Europe: Criminal Prosecutions In Europe Since 1990 For War Crimes, Crimes Against Humanity, Torture And Genocide* (Redress, London, 1999). As regards the specific issue of universal jurisdiction, for a detailed discussion of doctrine and State practice (albeit not free from the errors I note above) see Amnesty International, 'Universal Jurisdiction: the Duty to Enact and Enforce Jurisdiction' 1 Sept 2001, at <www.web.amnesty.org/ai/nsf/recent/ior53/017/2001> See also MT Kamminga, '*Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice', (International Law

jurisdiction over these offences and I think much of the discussion has been dominated by writers from common law countries and so has failed to take account of different conceptions of jurisdiction applying in non-common law States.

3. JURISDICTION *RATIONE TEMPORIS*

Under Article 11(1), the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute, or, under Article 11(2) where a State becomes a party to the Statute after its entry into force, with respect to crimes committed after the entry into force of the Statute for that State.[18] The exception to Article 11(2) is where the new State party has made a declaration under Article 12(3), granting the ICC jurisdiction with immediate effect or even to back date acceptance to a time before it became a party (but after the entry into force of the Statute, Article 24). This provision is designed for new governments which have overthrown a tyrannical regime.[19] Lastly on this point, it should be noted that under Article 124 it is possible for State parties to make a (seven years) temporal reservation to the jurisdiction of the Court as regards war crimes.

4. JURISDICTION RATIONE PERSONAE

While almost all the offences set out in the Statute require a considerable level of organisation to be committed, and so the typical perpetrator will normally be a State official, the whole purpose of the Statute is to create and confirm individual responsibility for these acts. Article 25(2) of the Statute accordingly provides that:

> a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

Association, London Conference 2000); The 'Princeton Principles on Universal Jurisdiction', Program in Law and Public Affairs, Princeton, 2001; S Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Princeton UP, Princeton, 2003).

[18] An argument can be made that the reference to a 'situation' in Art 13(a) and (b) means that the Security Council and a state party may only refer to the prosecutor crimes conflicts ('situations') which post-date the entry into force of the Statute. As almost every conflict going on today has its roots in history, and most conceivable future conflicts can be seen as a revival of historical enmities, such an interpretation would mean that there is hardly any scope for referral by either a state party or the Security Council.

[19] Art 12(3) refers to 'the crime in question', something which US critics have seized upon as it would seem to allow the territorial State to pick and choose amongst offences, giving, eg, the ICC jurisdiction over the actions of peacekeepers who killed civilians accidentally, but not over the States own troops — whose genocide the peacekeepers had been sent to stop. See, eg, WK Lietzau, 'The US and the ICC: International Criminal Law after Rome: Concerns from a US Military Perspective' (2001) 64 *Law and Contemporary Problems* 119 at 129. Bassiouni, Chairman of the Drafting Committee at the Rome Conference, confirmed that this was a drafting error. See CM Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 *Cornell ILJ* 443 at 453–54.

As the International Military Tribunal (IMT) at Nuremberg stated, 'crimes against international law are committed by men, not by abstract entities; and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[20] But the IMT had also declared certain Nazi organisations to be 'criminal' and the question arose when drafting the Statute as to whether even legal persons should be held responsible for the core crimes.[21] This would have allowed, for example, the freezing of assets of a continuing organisation or the seizure of its assets to compensate victims.[22] However, the majority of delegates at the Rome conference took the view that creating responsibility for legal persons would tend to undermine individual responsibility. Article 25(1) therefore specifically provides that only natural persons can be responsible.[23] One can note that not all natural persons are responsible. Under Article 26, the Court shall not exercise jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the crime.[24] In conclusion on this point, one can note that while custody over a suspect is not a precondition to jurisdiction, it is a precondition for trial. In other words, trial in absentia is not permitted (Article 63).[25]

The Rules of Procedure attempt to correct this. Rule 44 provides that such an acceptance bestows jurisdiction 'with respect to the crimes referred to in Art 5 of relevance to the situation'. Rules of Procedure, PCNICC/2000/1/add 1, adopted by the first Assembly of State Parties, 3–10 Sept 2002 (hereafter 'Rules of Procedure'). The exception is also interesting from a consitutional perspective, as it can involve a government by-passing constitutional restrictions on transfer of power to international bodies (something which will presumably usually require the consent of the legislature). Cf Vienna Convention on the Law of Treaties (1969), Art 26.

[20] *France et al v Goering et al*, (1946) 23 IMT 1, [1946] Annual Digest 202. One can note here that the controversial concept of 'crimes of state' was dropped in the ILC Arts on State Responsibility and replaced with the concept of 'serious breaches of peremptory norms'. See Art 40 of GA Resolution 56/83 on Responsibility of States for Internationally Wrongful Acts. For discussion see generally J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge UP, Cambridge, 2003).

[21] Cf Draft Art 23(5) proposed by PrepCom which provided: 'The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives'. Aiding and abetting, attempts etc are offences under Art 25.

[22] It can be noted here that two prosecutions have been brought against the oil company Total under the Belgian legislation on crimes against humanity (English translation in (1999) 38 *ILM* 918). For the indictments, see <www.icai-online.org/46139,Index.html>

[23] This issue has achieved greater prominence after the September 11 terrorist attacks and the consequent UN and EU sanctions directed against Al-Qaeda and other groups considered to be terrorists. For a discussion of such measures see, I Cameron, *Legal Safeguards and UN Targeted Sanctions, Report to the Swedish Government*, Oct 2002, <www.jur.uu.se/sii/index.html> and 'EU Anti-Terrorist Blacklisting' (2003) 3 *Nottingham Human Rights Law Review* 225.

[24] Experience from, inter alia, Sierra Leone shows that children can be coerced or persuaded into committing horrific crimes. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000, in force Feb 2002, forbids the use of child soldiers in conflict. For information on the widespread use of children in conflicts, see the *Coalition to Stop the Use of Child Soldiers Report to the Security Council*, following SC Resolution 1379 (Nov 2001), <www.child-soldiers.org/cs/childsoldiers.nsf/>

[25] Indictments can obviously be issued and the Pre-Trial Chamber may hold hearings in the absence of the accused (Art 61(2)). The ICTY developed a practice of issuing sealed indictments after confidential hearings.

5. THE EFFECT OF THE TERRITORIALITY AND NATIONALITY CONDITIONS ON JURISDICTION

As already mentioned, in cases where the prosecutor initiates the investigation or the matter is referred to him or her by a State party, the Court does not have jurisdiction unless either the territorial State or the State of nationality State is a party to the Statute or has specifically accepted the jurisdiction of the Court with regard to the crime in question. Many of the States at the drafting conference had wished to go further, and dispense with such requirements.[26] They argued basically that there was already a customary duty obliging States to prosecute people who were alleged to have committed offences falling under Articles 6–8 and that, accordingly, there was nothing preventing granting this competence even to an international court. Other States rejected this and argued that not making ICC jurisdiction subject to territoriality and nationality requirements would be to ignore the prohibition on third party effect of treaties and/or a violation of the principle of non-intervention.[27] The US in particular attempted to insist that the consent of both the territorial State and the State of nationality should be required. It did so in order to prevent the risk, as it saw it, of the territorial State giving consent to prosecute US troops on peacekeeping and peace enforcement operations.[28] The US strategy was 'outcome based' rather than based on legal arguments,[29] although such can be constructed.

Obviously, no convincing legal analogies can be drawn from the position under States' laws which naturally take jurisdiction over all crimes committed within their territories, whether by nationals or non-nationals. On the other hand, it is possible to argue that it is not simply a question of delegation: it is one thing for States to exercise jurisdiction themselves, it is another thing to create an international court with the power to exercise jurisdiction. States can naturally

[26] Eg, 65 States supported the Korean proposal for a 'reciprocating states' regime similar to that provided for in the hijacking and hostages conventions, ie, an *aut dedere aut judicare* rule, permitting jurisdiction based only on the presence of the accused in the territory (See UN Doc A/CONF 183/C 1/L 6). While 'true' universality is conceptually different from an *aut dedere* rule, in practice this would have allowed for a form of universal jurisdiction.

[27] See, eg, the intervention of the head of the US delegation which threatened to 'actively oppose this court if the principle of universal jurisdiction or some variant of it were embodied in the jurisdiction of the court. As theoretically attractive as the principle of universal jurisdiction may be for the cause of international justice, it is not a principle accepted in the practice of most governments of the world …', Intervention on the Bureau's Discussion Paper (A/CONF 18 3/C 1/L 53), 9 July 1998, as quoted in Ntanda Nsereko, see above n 2 at 103. As noted above, the idea that universal jurisdiction is not generally accepted for the majority of the core crimes is quite incorrect.

[28] The US had several other strategies pursuing this same purpose, namely the principle of complementarity, restrictions on prosecutorial discretion, Security Council vetoes on prosecutions and the opt-out provision on war crimes. MA Summers, 'A Fresh Look at the Jurisdictional Provisions of the Statute of the International Criminal Court: The Case for Scrapping the Treaty' (2001) 20 *Wisconsin ILJ* 57 at 62. The former two strategies complicate the structure of the ICC system and the latter two strategies, although not fully accepted at the Rome Conference, none the less resulted in provisions in the ICC Statute which weaken it.

[29] J Gurule, 'US Opposition to the 1998 Rome Statute Establishing an ICC: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?' (2001) 35 *Cornell ILJ* 1 at 5.

undertake to refrain from exercising jurisdiction[30] or to grant immunities to State officials and so waive the right to prosecute.[31] The ICC Statute (Article 27) expressly excludes immunities for State officials.[32] Thus, the ICC can end up having to rule on what are in practice inter-State disputes.[33] There is some merit in this argument. On the other hand, it cannot be pushed too far: national courts, including US courts, have occasionally convicted foreign officials of offences when these officials were fairly obviously acting under their governments' instructions.[34] In any event, in the end, the conference accepted that the consent of either the territorial State or the State of nationality was sufficient. This was a decision which was undoubtedly necessary to maintain the integrity of the treaty, but has been directly responsible for the subsequent fierce US opposition to it.

Although the peacekeeping scenario was the main US concern, 'territorial' jurisdiction should be understood in the light of the existing principles on localisation of crime, that is, governing where a crime is committed. State practice will probably show that the great majority, if not all, States take jurisdiction over an offence if an essential component element of it takes place in the territory of the State (commonly known as the 'principle of ubiquity').[35] This would obviously allow a State party which had been subject to, for example, a bombing or missile attack launched by US forces outside the territory which caused disproportionate civil casualties, to assert jurisdiction over a 'war crime' (and, ipso facto, for the

[30] Eg, in relation to crimes on board ships in territorial waters, UNCLOS Art 27.

[31] With the end of the Cold War, public opinion is finding immunity for visiting servicemen harder to accept. For a discussion of one recent incident when an acquittal of US servicemen caused public protests in the host state see WM Reisman and RD Sloane, 'The Incident at Cavalese and Strategic Compensation' (2000) 94 *AJIL* 505. I will not go into the US attempts to use the protection envisaged for existing Status of Forces Agreements (SOFAs) in Art 96 to exclude future SOFAs and the legality of Security Council Resolutions 1442 (2002) and 1487 (2003). See the chapter by Sarooshi in the present volume. It should, however, be stressed, that many states, among them many European states, are severely critical of the US action. See, eg, the Parliamentary Assembly of the Council of Europe Resolution 1336 (2003), 'Threats to the International Criminal Court', <http://assembly.coe.int/>

[32] The ICJ in the *Arrest Warrant* case, n 16 above, in fact seized upon this provision as an excuse for not permitting national courts to 'break through' State immunity and prosecute foreign ministers for crimes against humanity (para 61).

[33] See, eg, M Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' (2001) 64 *Law & Contemp Probs* 13; R Wedgewood, 'The ICC: An American View' (1999) 10 *EJIL* 93 at 99.

[34] In addition to the well-known Pinochet prosecution (*R v Bow Street Metropolitan Stipendiary Magistrate and others ex p Pinochet Ugarte* [1999] 2 All ER), see the prosecution of an East German official for spying in Mexico, *US v Zehe*, 601 F Supp 196 (D Mass 1985), the German-Iran 'Mykonosos' case, Keesings Records of World Events, 41612–3, 41716, 41843 (1997), the UK prosecution of an (unaccredited) Nigerian diplomat involved in the attempted kidnapping of former government minister Dikko, *R v Lambeth JJ, ex p Yusufu* (1985) *Crim LR* 510 and the conviction of a Libyan security agent in the Lockerbie case, *HM Advocate v Al Magrahi*, (2001) 40 *ILM* 582.

[35] Harvard Research in International Law, 'Convention on Jurisdiction with Respect to Crime 25' (1935) *AJIL* Supp 439. I say 'probably' because there is unfortunately no modern comprehensive survey comparable to that behind the Harvard Draft Convention. For European approaches, see the European Committee on Crime Problems, Select Committee of Experts on Extraterritorial Jurisdiction, Extraterritorial Criminal Jurisdiction (1990). For a discussion of the principle of ubiquity and localisation see Cameron, above n 16 at 52–67.

ICC to do so).[36] There is certainly no support in State practice for requiring all the 'territorial' States to consent before a prosecution can be brought over a crime which can be localised to any one of them.

As regards nationality, international law only partially regulates States' granting and removing of nationality,[37] and so a number of question marks remain concerning who is a national. Crimes can obviously be committed by stateless persons, or by dual nationals. In the case of a stateless person, there is no State of nationality and, bearing in mind the desirability of eliminating loopholes, it would seem sensible to equate the State of nationality with the State of permanent residence.[38] Arguably, one can go further and find that temporary residence, or presence, in a State party to the ICC Statute is sufficient to grant the ICC jurisdiction over a stateless person.[39] Certainly there is no State (apart from the territorial State) that would have the right to protest an assumption of jurisdiction by the ICC. In the case of a dual national, the correct approach should be to regard it as sufficient to constitute ICC jurisdiction if one of the States of nationality is a party to the ICC Statute.[40] A similar approach can be taken to people who, at the time of the offence, had the nationality of the territorial State (A), or another State (B), neither being a State party, but who, usually after a period as refugees, have later obtained the nationality of another State (C), a party to the Statute. In such cases I would say that the fact that C is a State party should suffice. The reverse situation, A or B being parties, but C not, is of course possible, bearing in mind how easy it is to acquire the nationality of some countries (if you have money). In many such cases, however, A or B will probably not recognise the new nationality, or will regard the alleged perpetrator as a dual national.

The more problematic situation is that of suspected offenders, nationals of A, a non-party, who have obtained residence permits for State C, a party, or who are merely present in State C, in transit or awaiting a determination of residence permits or nationality. Presence or even domicile does not constitute nationality, even if the practice of many States is to equate long-term residence with nationality, as far as extending criminal jurisdiction is concerned.[41] For such people, the literal wording of the Statute excludes ICC jurisdiction, notwithstanding the fact that

[36] Cf the ECtHR decision in *Bankovic et al v Belgium* and sixteen other NATO States, No 52207/99, 12 Dec 2001, where the ECtHR found that bombing Belgrade did not bring it within the 'jurisdiction' of the relevant State parties to the ECHR within the meaning of Art 1. So, a US veto in the Security Council as regards determining an act of aggression would not prevent 'territorial' jurisdiction over a war crime.

[37] See in particular, *Nationality Decrees in Tunis and Morocco* (*France v GB*), Advisory Opinion, 1923 PCIJ (Ser B) No 4 at 24, *Nottebohm Case* (*Lichtenstein v Guatemala*), 1955 ICJ Rep 4. See further the ILC Draft Arts on 'Nationality of Natural Persons in Relation to the Succession of States', adopted at the 51st session, at <www.un.org/law/ilc/guide/gfra.htm>

[38] Z Deen-Racsmany, 'The Nationality of the Offender and the Jurisdiction of the ICC' (2001) 95 *AJIL* 606 at 616.

[39] Deen-Racsmany, *ibid* 617 argues against this, but I think her argument fails to appreciate the basis of representation jurisdiction, examined below.

[40] *Ibid* 609–11.

[41] See eg, Swedish Criminal Code, Ch 2, s 2(2), Danish Criminal Code, Ch 1, s 7.

C is a party. However, as explained below, this does not mean that C itself necessarily lacks jurisdiction over their offences.

How common will it be that nationals of A will commit crimes falling within ICC jurisdiction *ratione materiae* in A or B, neither A nor B being party to the Statute and that these people then turn up in C? I think that it will not be uncommon. To begin with, there is the problem of dissolving States, such as former Yugoslavia, where the nationality of perpetrators has caused the ICTY considerable legal-technical problems.[42] But more generally, one can say that conflicts often spill over to neighbouring States. States need not be geographical neighbours to be involved in each others' conflicts. Almost every State in the world has, besides resident aliens, groups of nationals or whose ethnic origin lies in another State, whether they came as immigrants or asylum seekers. Where that other State is experiencing an internal conflict, these groups can easily be actively drawn into that conflict, and begin supporting guerrilla/terrorist groups in a variety of ways, including volunteering to serve in armed groups. Money can also be a motivation. Mercenaries participated in the Yugoslavia conflict. Finally, there is also the possibility of such crimes being committed as part of a peacekeeping or peace enforcement effort — as already mentioned, one of the major stumbling blocks to US ratification of the treaty.

Normally, the obvious solution would be to extradite the alleged offender to face trial in the State of territoriality/nationality, but for a variety of reasons extradition might not be possible or practicable. A and B may well not be interested in, or capable of, punishing the alleged offenders. Or, on the contrary, they may be too interested in punishing them, so that there is a risk of persecution. Or the penalties applicable to the offence might include the death penalty, and so C may be barred by national law or international human rights standards from extraditing (or, even from refusing admission to a person seeking refugee status).[43] Or there may be other humanitarian reasons for refusing a request.

It is apparent that the territoriality and nationality conditions have the potential to restrict considerably ICC jurisdiction. But it is important to note that even where there is ICC jurisdiction, the ICC prosecutor may choose not to request transfer of an offender, taking perhaps into account limited prosecutorial resources, or considering that the person in question is only a little, though perhaps very bad, fish.[44] Public opinion in a *Rechtstaat* is unlikely to take kindly to people who are suspected of very serious offences not being held accountable for their alleged crimes. In the circumstances, the question arises as to whether a State can, or should, itself exercise jurisdiction over alleged offenders committing the 'core crimes' even in the absence of a nationality or territoriality connection.

[42] See eg, *Prosecutor v Blaškić*, Judgment (3 March 2000), Case No IT–95–14–T.

[43] Persons suspected of war crimes, genocide or crimes against humanity can be excluded from refugee status under Art 1F of the Convention Relating to the Status of Refugees, 1951, 189 UNTS 150. This is a simplification. For a discussion of the application of the 'exclusion clauses' see the special supplement issue of the (2000) 12 *International Journal of Refugee Law*.

[44] See text at n 69 below.

Under the ICC Statute a State party is under no explicit obligation to try offenders, and ipso facto under no obligation to extend its own jurisdiction to be able to punish alleged offenders.[45] The UK, for example, rejected attempts to provide for universal jurisdiction partly on the basis that this was not required by the ICC Statute and partly on the basis that alleged offenders who for some reason or another may not be transferred to the ICC could be deported or extradited — a solution which will certainly not be available in some cases, as explained above.[46] But regardless of whether an obligation to criminalise and prosecute exists at treaty or custom, a number of State parties, such as Germany and Sweden, have taken the opportunity to extend their criminal jurisdiction over breaches of the laws of war in internal conflicts, genocide and crimes against humanity committed in other States in order to have at least the possibility of prosecuting alleged offenders where extradition/transfer is not possible or practicable.[47] They do so because they suspect, rightly in my view, that the fight against impunity symbolised by the ICC will otherwise risk not being very meaningful. I look at this in the next section.

6. UNIVERSAL AND REPRESENTATION JURISDICTION: DIFFERING CONCEPTIONS

The ICC Statute is a jurisdictional 'overlay': how States implement the Statute will depend upon their approaches to the underlying issue of jurisdiction. To put it another way, they will fit the Statute into their existing jurisdictional matrix, as illustrated by the examples of Germany, Sweden and the UK above. My views on jurisdiction are heavily influenced by Nordic approaches to the issue. These in turn build upon a different (from the common law) approach to the function of the criminal law, which is based on German legal reasoning. This is much more sophisticated than common law thinking in this respect. Sophistication is, of course, not necessarily a virtue in itself. However, I consider this way of looking at the function of the criminal law is also much more in tune with the needs of an ever more globalised legal order.

At the risk of considerable simplification, a State's assertions of jurisdiction in criminal matters, and indeed the subject of international criminal law as a whole,

[45] It is only under an obligation to co-operate with the ICC, in particular to transfer alleged offenders to the ICC. A State's enforcement jurisdiction (in this context, to extradite/transfer) need not be identical with its prescriptive jurisdiction (in this context, to criminalise conduct).

[46] See the comments made by Baroness Scotland during the passage of the UK International Criminal Court Bill, HL 12 Feb 2001, col 84.

[47] For the Swedish legislative proposal, see SOU 2002: 98. For a discussion in English of the German law, see H Satzger, 'German Criminal Law and the Rome Statute — A Critical Analysis of the New German Code of Crimes Against International Law' (2002) 2 *International Criminal Law Review*, 261. Although not an extension of jurisdiction, I can also mention here, as a symbol of increased EU seriousness towards making prosecution of war criminals more effective, the Council Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, OJ L 167 26 June 2002.

could be said to be based upon two basic theories: those of 'protectionism' and 'universalism'.[48] The former justifies assertions of jurisdiction on the basis of the need to protect the asserting State's interests. The latter justifies assertions of jurisdiction on the basis of the protection of the interests of individuals, of the interests of other States, or the common interests of States. It incorporates, but is not limited to, the principle of universality. This principle should be used, in my view, to denote jurisdiction over only the last of these, namely offences against the common interests of States as laid down in custom and multilateral treaties, in other words international crimes.[49]

While all States make and enforce jurisdictional claims primarily to protect their own interests and values, States make varying use of the principle of 'universalism'. Again at the risk of simplification, Germanic influenced States make most use of it, Francophone influenced States less use and common law States very little use.[50] The most pure form of the principle of 'universalism' is 'representation' jurisdiction, under which a State acts on behalf of ('represents') another State in prosecuting a criminal, providing that certain conditions are fulfilled. These usually involve 'double criminality', the individual being actually present upon its territory, and often, a request being made by the territorial State for his or her extradition or for mutual assistance in investigating the offence. The requirement of double criminality is fundamental, that is, the offence in question must be criminal under both the laws of the requested State and under the laws of the place of the offence (the *lex loci deliciti*).[51]

Double criminality, of course, is not limited to representation jurisdiction. Some States, such as Germany, Belgium and the Nordic States, have as the standard rule for jurisdiction over nationals' offences abroad a requirement of double criminality ('conditional jurisdiction'). More progressive States go so far as to apply the principle of double criminality in concreto, that is, they allow the accused to take advantage of justifications and excuses which might exist in the *lex locus delictus*, including prescription rules.[52] Conditional jurisdictional claims

[48] Which are not to be confused with the 'protective' and 'universal' principles. On the theories see eg, C Lombois, *Droit Pénal International* (2nd edn) (Dalloz, Paris, 1979) 280–90.

[49] For a definition see eg, Kamminga, above n 17, 'Under the principle of universal jurisdiction a State is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim'. See also I Brownlie, *Principles of Public International Law* (6th edn) (OUP, Oxford, 2003) 303. I consider, however, that these standard definitions of universal jurisdiction fail to distinguish properly between this and representation jurisdiction.

[50] Delmas-Marty speaks of four 'models' of claim on a spectrum of protectionism to universalism: pure national, integrated national, modified international and pure international. See M Delmas-Marty, 'The ICC and the Interaction of National and International Legal Systems' in Cassesse *et al*, above n 2.

[51] A variant of this, although it is usually treated as a separate principle is 'distribution of competence' 'which deals with the situation where the State of the place of the offence waives its right to prosecute or punish an offender and instead permits the offender's State of nationality or domicile to prosecute or punish him. This principle can be found in conventions dealing with road traffic offences and transfer of sentences. See generally D Oehler, *Internationales Strafrecht* (2nd edn) (Heymann, Köln, 1983) 138–40.

[52] See eg, the Swedish *travaux préparatoires* to the Criminal Code Prop [legislative bill] 1972:98 at 99f.

in general respect the principle of non-intervention, as the prosecuting State is not doing anything which the territorial State could not also do. If a *lex mitior* (lowest penalty applicable) rule is also applied, it cannot even be argued that the prosecuting State is punishing any harder than the territorial State. Such claims are also fairer on the accused in that it has greater predictability (a value which is part of the principle of legality). They respect his/her human freedom to do things which are not criminal in the place where they are committed. As regards representation claims in particular, these have the practical advantage of allowing a State the option of refusing to extradite a domiciled alien without risking resulting tensions with the State requesting extradition (because the alien can be prosecuted in the State of domicile). They can be more convenient for the prosecutor: an alien may have committed a series of similar crimes in different States. Globally speaking it will often be a more efficient use of the resources of the criminal justice systems affected to agree on a single prosecution of the offender and a single sentence. This would usually be better for the accused too. Representation jurisdiction enables him or her to be tried in the State of domicile where he or she is likely to be familiar with the language and procedure. In terms of humanity and rehabilitation this principle also has considerable advantages as it enables a convicted person to serve his or her sentence with a minimum of cultural and language alienation and in circumstances which make it easier for relatives to visit him or her. For all these reasons, representation jurisdiction, and conditional nationality jurisdiction, are generally speaking to be preferred for reasons of criminal policy. The concomitant of this is that unconditional claims to jurisdiction should be kept to a minimum.

Representation jurisdiction, occasionally known as the principle of 'vicarious administration of justice' is, however, dimly understood in many States.[53] I believe that part of the reason for this is that it is based upon a deep, ideological, view of viewing the concept of a crime which differs considerably from the view taken by, particularly, common law States.[54] A crime can be conceived as a breach of an edict of the ruler. By committing a crime, for example, murder, the wrongdoer has disturbed the peace of the realm. Such a conception of crime severely limits the possibility of regarding the criminal law as being extraterritorially applicable. Breaching the edict of a foreign sovereign — murdering a foreigner in another State — does not affect the peace of the realm except in the most indirect way.[55]

[53] For discussions see eg, Amnesty International, 'Universal Jurisdiction', above n 17; M Henzelin, *Le Principe de l'Universalité en Droit Pénal International: Droit et Obligation pour les Etats de Poursuivre et Juger Selon le Principle de l'Universalité* (Helbing/Lichtenhahn, Bâle/Genève/Munich and Bruylant, Brussels, 2000). For early attempts to explain the principle to common lawyers, see J Meyer, 'The Vicarious Administration of Justice: An Overlooked Principle of Jurisdiction' (1990) 31 *Harv ILJ* 108 and O Lagodny and C Blakesley, 'Finding Harmony Amidst Disagreement over Extradition and Issues of Extraterritoriality under International Criminal Law' (1991) 24 *Vand JIL* 1 at 36–38.

[54] See N Jareborg, *Scraps of Penal Theory* (Iustus, Uppsala, 2002) 72–88. Jareborg describes the three conceptions of crime as 'primitive', 'collectivist' and 'radical'.

[55] See eg, Lord Tucker's explanation in *Board of Trade v Owen* as to why a conspiracy to commit an offence abroad was not criminal under English law 'the answer to this is that it is necessary to recognise

A second, more sophisticated, conception of crime is as an attack on the social order of the State. This social order can be attacked by acts outwith the State, either by nationals disobeying the laws of the State or by aliens attacking the interests of the State directly. Thus, extraterritorial applicability is possible under this conception. On the other hand, a murder committed by an alien on another alien in State A can only very indirectly disturb the social order of State B. So such acts would not really be seen as the concern of State B. Thirdly, and finally, a crime can be conceived as an attack on a protected interest possessed by either an individual or a collective. If the crime of murder is individualised in this way it makes no difference where it is committed. Murder is murder.

This conception of crime obviously only fits 'common crimes', not crimes against State interests, where common values tend to be lacking. None the less, common crimes constitute the vast majority of crimes in the world. Jurisdictional claims should naturally be based on the typical case of international criminality, rather than the exception. Seen in this light, it is clear that the representation principle is based on a radically different theory, or 'world-view', compared to the universality principle. The underlying theory owes more to Kant than to positivism (expressed in this case by the creation of international crimes by means of multilateral treaties). So representation should not be seen as a sub-group of the universality principle, without changing the meaning of that principle.[56]

In many cases, then, the legal systems of, inter alia, the Nordic States and Germany, already take jurisdiction over people accused of extraterritorial crimes committed in internal conflicts and crimes against humanity — the two controversial crimes within ICC jurisdiction.[57] However, there can none the less be problems, both theoretically and practically with using the representation principle in such cases which have a strong connection to politics. Theoretically, the principle falls down in that it is more difficult to argue that the prosecuting State is simply representing the territorial State. The territorial State almost certainly is actively against the prosecution of the person in question. And practically there are great problems. As mentioned, representation jurisdiction is often made conditional on the refusal of an extradition request. Such a request will often not be forthcoming. Where one has to show double criminality in concreto the perpetrator

the [function of the] offence to aid in the preservation of the Queen's peace, the maintenance of law and order within the realm with which, generally speaking, the criminal law is alone concerned', (1957) All ER 411 at 415.

[56] Contra the ECE Committee of Experts, above n 35 and the Amnesty International Report, above n 17.

[57] For a German example of a prosecution for offences committed in an internal conflict, see *Public Prosecutor v Djajif*, Bayerisches Obertes Lansdesgericht, Urteil vom 23 Mai 1997 – 3 StR 20/96, reported in C Safferling, (1998) 92 *AJIL* 528. For Swedish investigations (none of which led to a prosecution, but not for want of jurisdiction) see I Cameron, 'Swedish International Criminal Law and Gross Human Rights Offences', in P Asp, C Herlitz, L Holmquist (eds), *Flores juris et legum: Festskrift till Nils Jareborg* (Iustus, Uppsala, 2002).

may be able to argue that there are justifications and excuses under the *lex locus delictus*. While these might not be available for crimes such as rape, they may well be available for murder committed in the context of an armed conflict. Amnesties or prescription rules may also be capable of being invoked.[58]

Even if these factors do not cause problems, there will often be a refusal to co-operate in amassing evidence. So, if one wants to be able to secure convictions against people committing heinous war crimes and crimes against humanity, taking unconditional jurisdiction is a sensible precaution. This will not solve the evidential problem, of course, and it will give rise to other problems from the perspective of the accused. The application of the law of the punishing State as regards justifications and excuses (for example, self-defence), will be designed for peacetime, and may well be unfair on the accused. Similarly, sentencing rules (for example, mandatory life sentences for murder) may not be sufficiently flexible in the circumstances. It may be necessary to insert a *ne bis poena in idem* rule in sentencing (that is, providing for mandatory deduction of whatever previous sentences have been served by the accused in the locus delictus for the offence). Still, all things considered, the reasons for exercising unconditional jurisdiction in these cases will usually outweigh the reasons for exercising restraint as far as unconditional jurisdiction is concerned.

The issue then becomes whether the principle of non-intervention forbids the exercise of unconditional extraterritorial jurisdiction over war crimes in internal conflicts and crimes against humanity. I would argue that the Rome Conference resulting in the adoption of the ICC Statute is evidence of State practice on the content of non-intervention in this respect.[59] Support can also be drawn from the *Arrest Warrant* case. Although the ICJ did not, formally speaking, deal with the jurisdiction question in its judgment on the merits, 11 of the 15 judges raised the issue of jurisdiction in their separate and dissenting opinions.[60] The majority of these 11 accept universal jurisdiction over these crimes, although several none the less required some nexus, such as presence of the accused on the territory. Certainly, requiring presence is an eminently sensible way of reducing the scope for conflict between States.[61]

In any event, the Nordic States and Germany have been sufficiently emboldened to take unconditional jurisdiction over all the core crimes in Articles 6–8 of the

[58] For a discussion of an Italian case concerning the effect to be given to an Argentinian amnesty (*Fortunato Galtieri case*, 25 March 1997) see N Roht-Arriaza and L Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 *HRQ* 843. See also R Boed, 'The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations' (2000) 33 *Cornell ILJ* 297. For a discussion of amnesties and the ICC, see Pt 9 below.

[59] If one considers that the Security Council is bound by general international law, and Security Council practice can constitute evidence of customary international law, then the creation of the ICTY and ICTR (and the possibility in the Statute for referrals to the ICC) would strengthen this viewpoint.

[60] See, in particular, the separate opinions of Judges Guillaume, Higgins, Kooijmans and Buergenthal, and the dissenting opinion of Judge ad hoc Wyngaert.

[61] Noteworthy here is that, even for war crimes in international conflicts, the ICRC only expects a State to prosecute if an alleged offender is found on its territory. See ICRC commentary to Art 146 (Geneva Convention IV) at <www.icrc.org/ihl/nsl>

ICC Statute.[62] The already wide representational jurisdiction exercised in these States has certainly helped create a viewpoint that taking unconditional universal jurisdiction over the core crimes is relatively uncontroversial. And Belgium has not interpreted the *Arrest Warrant* judgment as requiring it to remove its jurisdictional claims, only to modify them to provide for official immunity.[63] Under the new law, the possibility of trial in absentia will still exist provided there is a territorial nexus, for example, the fact that the victim is a Belgian national or a permanent resident, although to avoid political conflicts, a new procedure has been introduced requiring the consent of the federal prosecutor for prosecutions to be brought.[64]

But, the common lawyer may ask, what is the point when evidence will so seldom be forthcoming? Arguably, a wide jurisdictional claim may even create false expectations of justice for victims. For example, the fact that a war crime has occurred may be clear, but the culprits will often be unknown. Without access to military records, faceless bomber pilots or tank gunners cannot be identified. There is something in this argument. But, although it all comes down to evidence in the end, jurisdictional claims should be made on the basis of rational choices as to the crimes which we want to be able to prosecute, not on predictions — guesswork — on how often sufficient evidence will be forthcoming to obtain convictions. While there will be many cases where insufficient evidence can be obtained in the face of the opposition of the territorial State, there will be some cases where sufficient evidence can be gathered. Admittedly, this will probably be more often the case in systems based on the free evaluation of all evidence rather than through a presentation of direct witness testimony as is the case for criminal prosecutions under the common law. But in any system, to be unable to prosecute a suspected mass murderer purely because of a jurisdictional gap is a very bad thing. I think the argument for not letting the 'evidential tail wag the jurisdictional dog' is compelling.

7. TRIGGERING MECHANISMS AND ADMISSIBILITY PROCEDURE

I will turn now to the processes by which jurisdiction can be constituted and admissibility issues. The system by which ICC jurisdiction can be 'triggered' is

[62] The Swedish approach is to take unconditional universal jurisdiction (ie, not requiring presence of the suspect), but to require the permission of the Chief Public Prosecutor to prosecute. The Chief Public Prosecutor is required to take into consideration the seriousness of the offence and how closely connected it is to Swedish interests (SOU 2002:98, 415). This is obviously a good idea, but may not be an option in States which, for constitutional or historical reasons (eg, the desire to minimise political interference in the prosecutorial process) regard the possibility for a victim to trigger an investigation by the prosecutor (*parti civile*) as an essential safeguard against misuse of power.

[63] I will not go into the poor reasoning of the majority in the *Arrest Warrant* case, convincingly criticised by dissenting Judge Wyngaert. At least it can be said that the majority was not entirely clear as to whether it accepted the distinction between substantive and procedural immunity and whether torture and crimes against humanity fall within the concept of private acts, for which there is only substantive immunity (and which therefore ceases after the period of office terminates).

[64] Loi du 5 août 2003 relative à la répression des violations graves du droit international, available at <www.ulb.ac.be/droit/cdi/loi2003.html> The same web site contains the *travaux préparatoires*. Thanks to P Klein for helpful comments on the Belgian legislation.

relatively complex, reflecting compromises in Rome to allay US and other States' concerns over a too-powerful prosecutor. There are four different trigger mechanisms: where the prosecutor initiates the investigation, where the matter is referred to her or him by a State party, where a non-State party specifically accepts the jurisdiction of the Court with regard to the crime in question and where the Security Council refers the matter to the court. It is difficult to see many cases of non-State parties voluntarily putting their heads in the noose, as it were, except in the special situation of the overthrow of a tyrannical regime. Bearing in mind States' lack of willingness to take each other to court in human rights cases, it seems unlikely that many cases will be referred to the prosecutor by States. As to how often the Security Council is willing to refer a case, one must assume that the presence on the Security Council of several States with large, rattling, internal conflict skeletons in their closets, including China and Russia, will act as a powerful disincentive to referral. Still, the CNN factor, the weight of public opinion and the likely lack of enthusiasm for doing anything more radical (that is, intervening militarily to stop massacres) may result in a referral, especially if the precedent-creating effect of it can be kept low. But prosecutions brought *proprio motu* by the prosecutor will probably be the most common means of constituting jurisdiction.

All cases coming before the Court are first reviewed by the Prosecutor to determine whether there is a 'reasonable basis' to continue the investigation (Article 53). This means looking at both jurisdiction and admissibility: either lack of jurisdiction or inadmissibility can lead to the case not being brought, or being abandoned. However, where the Security Council has determined under Chapter VII UNC that there is a threat to international peace and security, and referred a case concerning a core crime to the ICC, this will more or less constitute jurisdiction, and so this will presumably be sufficient for the Prosecutor to assume that there is a reasonable basis for investigating the crime. None the less, it is difficult to see how a Security Council referral can release the Prosecutor from his or her duty to consider issues of admissibility.[65] Under Article 15(2), the prosecutor shall, in initiating a case, 'analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the UN, IGOs or NGOs or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court'.

Experience from the ICTY and ICTR show that convictions tend to be largely based on witness testimony.[66] Where the prosecutor investigates a case *proprio motu*, he or she must also submit the case to the Pre-Trial Chamber for

[65] However, opinions differ on this point. See Summers, above n 28 at 67, n 63.

[66] For discussions the practical problems, particularly delays caused by hearing many witnesses, and reconciling fair trial with the protection of witnesses (anonymity etc) see eg, F Harhoff, 'Legal and Practical Problems in the International Prosecution of Individuals' (2001) 69 *Nordic JIL* 53; JK Coogan, 'The Problem of Obtaining Evidence for International Criminal Courts' (2000) 22 *HRQ* 404; *id* 'International Criminal Courts and Fair Trials' (2002) 27 *Yale JIL* 111.

authorisation to commence a formal investigation (Article 15(3)). The Pre-Trial Chamber looks at both jurisdiction and admissibility. Its decision to proceed is without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case (Article 15(4)). The Pre-Trial Chamber consists of three judges and decides by simple majority.

Article 16 deals with the power of the Security Council, acting in its capacity as primary maintainer of international peace and security, to suspend a prosecution for a period of 12 months. The period can be extended, but the veto of the permanent members will apply. As noted already, the Security Council has, controversially, already made use of this power in Resolutions 1442 (2002) and 1487 (2003).

7.1 Admissibility

Article 17 deals with admissibility grounds. The Statute presumes admissibility. Articles 17(1)(a) and (b) provide that a case is inadmissible if the case has been investigated or is being investigated by a State which has jurisdiction over it, unless this State was or is unwilling or unable genuinely to carry out the investigation or prosecution. The third ground for inadmissibility is *ne bis in idem*, in Article 17(1)(c), that is, that the person has already been tried for the offence in question.[67] This rule is specified further in Articles 20 which provides that no person who has been tried by another court for crimes falling within the jurisdiction of the Court:

> unless the proceedings in the other court: were (a) for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

The result of Articles 17(1)(a), (b) and (c) is that the ICC, unlike the ICTY and ICTR, has only subsidiary jurisdiction. Acceptance of this, the principle of complementarity, was fundamental to States' willingness to accept the ICC at all.[68]

[67] The principle is probably not part of customary international law. See *E v Police Inspector of Basle*, 75 ILR 34 and *Re Hartman and Pude*, (1977) *IYBIL* 299. However, it is recognised in many regional conventions, particularly in Europe. See eg, European Convention on Transfer of Proceedings in Criminal Matters, 1972, ETS No 73, Convention between the Member States of the European Communities on Double Jeopardy, Cm 438 (1987), Convention Applying the Schengen Agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 1990, (1991) 30 *ILM* 84 and the Council Framework decision on the European Arrest Warrant, 18 July 2002, OJ L 190. The principle is also voluntarily recognised by, inter alia, the English courts. See *R v Thomas* [1984] 3 All ER 34.

[68] There is already copious literature on the principle, see eg, Gurule, above n 29; JT Holmes, 'The Principle of Complementarity', in RS Lee (ed), *The International Criminal Court: the Making of the*

The fourth ground, insufficient gravity of the case, in Article 17(1)(d), is not further defined, although some guidance is given in Article 53 which refers to the factors which the prosecutor may take into account in deciding not to bring a prosecution, namely the gravity of the crime and the interests of victims, the age or infirmity of the alleged perpetrator and his or her role in the alleged crime.[69]

Where the Prosecutor considers that one of these grounds apply, he or she will decide not to proceed with the investigation. As regards the first three grounds, the referring State, or Security Council, as appropriate, can apply to the Pre-Trial Chamber which may decide to request the Prosecutor to reconsider the decision not to proceed.[70] As regards decisions not to proceed on the basis of Article 17(1)(d) there is a further level of control: the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on the interests of justice exception.[71] All decisions not to proceed can be reconsidered and reopened in the light of further information (Article 53(4)).

When the Prosecutor has determined that there is a 'reasonable basis' to commence an investigation based upon a State Party referral, or has initiated an investigation *proprio motu*, the Prosecutor is to provide notice of the pending investigation, to all State parties and those non-parties that would normally have jurisdiction over the crimes concerned.[72] Upon receipt of such notice, a State may file a motion in the Pre-Trial Chamber requesting that the Prosecutor defer to the State's investigation or prosecution. Article 18(2) provides that within one month of receipt of notice from the Prosecutor, a State may inform the Court that it is investigating or has investigated its nationals or other persons within its jurisdiction with respect to criminal acts within the Court's jurisdiction, and request that the Prosecutor defer to the State's investigation. Under Article 18(2), the Prosecutor either may defer to the State's investigation or apply to the Pre-Trial

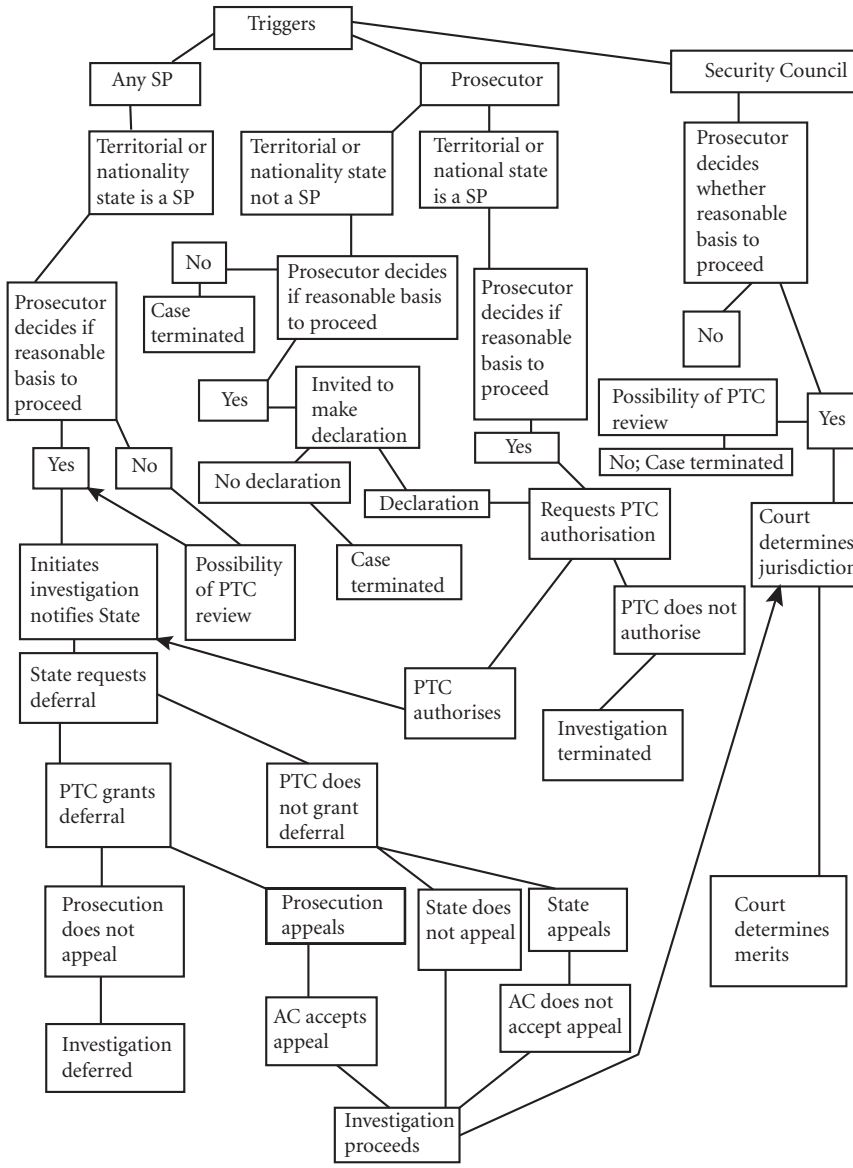
Rome Statute: Issues, Negotiations, Results (Kluwer, Dordrecht, 1999); MM El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Michigan JIL* 869.

[69] Art 53 allows the prosecutor to refuse to initiate a prosecution, or abandon it if already brought, if it has become apparent that the case is inadmissible or that it is not 'in the interests of justice' to proceed. It thus seems that the gravity of the offence is a relevant factor in both admissibility and interests of justice decisions. The grounds for refusing to initiate refer only to gravity of the offence and the interests of the victim, whereas the prosecutor can take into account the other two grounds in deciding whether to abandon a prosecution. The age and state of health of the accused has occasionally been invoked for not prosecuting (eg, GDR leader Honecker) or extraditing (eg, Pinochet) people suspected of crimes against humanity. It can be noted here that the ECtHR has rejected arguments that trial and imprisonment of very old war criminals constitutes inhuman or degrading treatment. See eg, *Papon v France*, No 64666/01, 7 June 2001.

[70] Art 53(3)(a). Under r 107, applications for reconsideration must be made within 90 days.

[71] Rule 109 provides that the Pre-trial Chamber has 180 days in which to decide whether to make such a review. Decisions to confirm or not confirm the Prosecutor's decision are by a majority and reasons must be given (r 110).

[72] Art 18(1). The notification shall contain information on the specific crimes (r 52), although under Art 18(3) the Prosecutor may limit the scope of the information provided to the States where this is necessary to protect persons, prevent destruction of evidence or prevent flight of suspects and potential witnesses.



Chamber to authorise the investigation. After a period of six months, or if there has been a significant change of circumstances which affects the principle of complementarity, the Prosecutor can review the decision to defer. Exceptionally, even if an investigation is deferred, the Prosecutor can convince the Pre-Trial Chamber to permit taking of evidence where there is 'a unique opportunity to obtain

important evidence or there is a significant risk that evidence may not be subsequently available'.[73]

7.2 Procedures for Challenges to Jurisdiction and Admissibility

Article 19 sets out the procedure for making challenges to jurisdiction and admissibility. The main rule is that the Court, *proprio motu*, should satisfy itself that it has jurisdiction and determine the admissibility of a case. Under Article 19(2), challenges to admissibility may also be brought by:

> (1) An accused or a person for whom a warrant of arrest or summons to appear has been issued under Article 58; (2) a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; and (3) a State from which acceptance of jurisdiction is required under Article 12 (the territorial State or State of nationality). Additionally, under Article 19(3), the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility.[74]

The entities which have referred the case to the Prosecutor as well as victims are entitled to submit observations to the Court. Obviously, resolving such preliminary issues will risk causing substantial delays, even if it is intended that admissibility may only be challenged once (Article 19(4)).

The complicated series of operations involved in triggering jurisdiction and in determining jurisdiction and admissibility can be shown in simplified (!) form in the diagram on page 85.

8. COMPLEMENTARITY IN PRACTICE

If complementarity works properly, then the ICC will have no cases. But no one really expects this. The question is, how many cases will the ICC get, or rather, take? The crucial question here relates to how the ICC will interpret its powers in relation to complementarity, first as regards decisions not to bring prosecutions, and secondly as regards national proceedings which have been brought, but which resulted in an acquittal. Will the ICC see its role as a sort of appellate court, allowing it to take up a case where it thinks the national prosecutor has made an error on the facts, or the national court has, on the evidence, reached a mistaken verdict? Will it see itself as entitled to take up what it regards as mistakes of law? Something which particularly worries the US in this respect is the risk that the ICC will develop its own interpretation of what the laws of armed conflict

[73] Art 18(6) and r 57. More detailed rules on unique evidential opportunities are set out in Art 56 which deal particularly with preserving the rights of the defence.

[74] According to Summers, see above n 28, jurisdiction/admissibility issues can in fact be raised in ten different ways.

demand, for example, as regards artillery or bombing targeting decisions which it later transpires cause civilian casualties (Article 51 of Protocol I). Or will the ICC grant a 'margin of appreciation' as regards the law and facts and only intervene where a decision not to prosecute is totally unwarranted, or a trial verdict is manifestly unsupported by the evidence?

Although the *travaux préparatoires* indicate that many delegations were unhappy about the idea of the ICC acting as an appellate court, in the end, relatively little guidance was given by the Statute in this respect.[75] As any student of administrative law knows, there is a spectrum of error, ranging from unreasonable to clearly erroneous to outrageous. And a decision not to prosecute or an acquittal judgment can be incompetent, mistaken, or poorly reasoned and supported, without necessarily constituting a decision to shield, or sham proceedings. The *travaux préparatoires* show that the phrase 'principles of due process recognised by international law' was added to restrict ICC discretion.[76] The phrase refers to the principles on treatment of aliens in the administration of justice and to human rights law on fair trial, to the extent that has passed into custom.[77] Some guidance on the matter can be drawn from case-law of arbitral tribunals (which is mainly old), the work of special rapporteurs of the UN's Human Rights Commission and Sub-Commission and the decisions of the Human Rights Committee (to the extent these can be seen as reflecting customary rules). However, the phrase still leaves a great deal of scope for ICC discretion. The rules of procedure allow a State against which an investigation is initiated, to provide the ICC with information 'showing that its courts meet internationally recognised standards for the independent and impartial prosecution of similar conduct'.[78] The sources of such material are presumably the same as that available to the prosecutor under Article 15(2). So, an indirect result of the adoption of the Statute is that the reports of UN special country rapporteurs and Commission and Sub-Commission theme rapporteurs on the administration of justice may well receive closer reading in the future.

[75] Art 17(2) provides that the court shall, having 'regard to the principles of process recognised by international law' consider whether, '(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice and (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice'. Art 17(3) provides that, 'In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'. For a discussion of the *travaux préparatoires* to Art 17(2) and (3) see Holmes, above n 68 at 48–49.

[76] UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC, Committee of the Whole, 42d Meeting, A/CONF 183/C 1/L 76, add 1–14 (July 17, 1998), available at <www.un.org/icc/journal/717joue.htm>

[77] See eg, D Weissbrodt, *The Right to a Fair Trial under the UDHR and the ICCPR — Background, Development and Interpretation* (Nijhoff, London, 2001).

[78] Rule 51.

Are US fears about the prosecutor totally unwarranted? No, not totally. Unlike most prosecutors in civil law systems, which operate according to the principle of legality (obligatory prosecution) the issue of prosecutorial discretion in the ICC is going to be pivotal. As Cassesse puts it, Article 17 gives the Prosecutor:

> the role of an independent and impartial organ responsible for seeing to it that the interests of justice and the rule of law prevail.[79]

The Prosecutor, for example, is supposed to gather evidence both for and against the accused (Article 67(2)). However, common law countries, particularly the US, have considerable experience of ambitious prosecutors, determined to make a name for themselves. It is not overly cynical to note that the ICC has already started costing money, and will, when properly up and running have to show that it is doing something for its likely annual budget, estimates of which vary from $60M to $115M. Moreover, it is not overly speculative to believe that the ICC will be strongly influenced by a desire to appear even-handed. That is what justice is all about. It is precisely because international society is not even-handed and that proceedings before international tribunals are one of the few areas in which the principle of sovereign equality operates more or less fully that powerful States have shown a reluctance to accept compulsory judicial settlement of disputes. At the same time, it is naïve to believe that the ICC is above politics.[80]

A prosecutor which is heavily dependent on State complaints, or incapable of acting without Security Council authorisation would not have been so problematic for the US. This is why the independence of the prosecutor was one of the most bitterly contested features of the Statute. As already mentioned, States are not keen to bring applications against each other for violations of human rights, as shown by the relative lack of such cases before the European Court of Human Rights and the complete lack of inter-state cases before the Human Rights Committee. A weak State can be browbeaten or cajoled by a powerful one — witness the at least partial success of the US pressure on Serbia to hand over suspected war criminals to the ICTY. The ICC Prosecutor, however, cannot show the slightest susceptibility to pressure as he or she stands or falls on his or her perceived impartiality and competence.

But while it is not totally unwarranted for the US to be worried about prosecutions, it is impossible to give the US what it seems to want — a cast-iron guarantee that its own interpretations of the laws of war, and its own assessment of the facts, will never be called into question.[81] To do so would mean abandoning the

[79] A Cassesse, 'The Statute of the ICC, Some Preliminary Reflections' (1999) 10 *EJIL* 144 at 162.
[80] 'Tribunals are pushed and pulled by the same forces that shape most other foreign policy decisions — interests, ideals, mandarin opinion, public outrage and private pressure', TW Smith, 'Moral Hazard and Humanitarian Law: the ICC and the Limits of Legalism' (2002) 39 *International Politics* 175 at 178.
[81] As Koskenniemi has remarked, Empires tend to prefer their own laws over international law, M Koskenniemi, *The Gentler Civiliser of Nations* (CUP, Cambridge, 2001) at 231.

flexibility of interpretation which is necessary to counter the ingenuity of the 'bad' government (to paraphrase Justice Holmes) in its attempts to shield bad men. One can say that, as regards mistakes of law in particular, it is very difficult to see a good faith interpretation of the laws of war resulting in an acquittal as an attempt to 'shield' a person from prosecution, or a 'sham' trial.[82] But in the event of a dispute over jurisdiction or admissibility, the Court has *kompetenz kompetenz* (Article 119). And it must be allowed to develop its own interpretations of 'unwilling or unable to prosecute' over time.[83]

However, the horizontal nature of the international order none the less means that a State which considers that the prosecutor and Court have exceeded their competence under the statute may choose not to comply with an order to transfer an offender to the Court for trial, notwithstanding their general and specific duties to do so (Article 86). In such a situation, it is the Security Council (acting under Chapter VII UN Charter) and the Assembly of the State Parties (acting under Article 112 of the Statute) which will determine, through action or non-action, not what the law says, because the Court has already laid that down, but whether or not it should be applied.[84]

9. COMPLEMENTARITY AND AMNESTIES

There are a number of other questions relating to complementarity, but in this chapter I only have space to deal with one of these: the question of amnesties.[85] Many States emerging from a period of bitter internal conflict have chosen to enact more or less comprehensive amnesties, excusing past crimes during the conflict. Often the amnesty will be 'lopsided' in law or in fact, excusing largely the crimes of the ruling élite. On the other hand, this may well have been the price which was necessary to get the conflict in question stopped, or to secure a more or less orderly transition to democratic rule, or to avoid a risk of a coup d'état in the future from disgruntled officers. In other words, there can be very good political reasons for issuing an amnesty. Thus, this issue can be expected to cause particular headaches for the prosecutor and well illustrates both the limits of what the law can accomplish and the movement against impunity.

[82] Cf Gurule, see above n 29 at 27.

[83] Art 21(2) expressly provides that it can apply principles and rules of law as interpreted in its previous decisions.

[84] An inadmissible prosecution can be seen as a matter outwith the competence of the office of the prosecutor, which like all international organisations, has only such functions as it has been explicitly or implicitly given by the States in the constitutive treaty. I will not here go deeper into the complicated issue of who or what can 'absolve' the perpetrator of an *erga omnes* violation of international law.

[85] There are already a large number of articles on the subject. See eg, MP Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 *Cornell ILJ* 507 and J Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the ICC' (2002) 51 *ICLQ* 91.

Can the texts of Articles 17 and 53 of the Rome Statute be read so as to permit amnesties? An amnesty can clearly be an expression of 'unwillingness' and/or 'inability' as provided for by Article 17.[86] Other such types of inability/unwillingness will include immunities of foreign heads of State or foreign ministers, prescription rules (statutes of limitation),[87] an international peace treaty providing for (mutual or unilateral) non-prosecution of war criminals,[88] and a deliberate or negligent failure to investigate either all alleged offenders, or a category of them. Where the failure to investigate is general and deliberate, it comes very close to a de facto amnesty. All these examples share something in common with amnesties in that they relate to legislative, executive or judicial action or inaction which occur after the commission of alleged offences and have a general character. But inability or unwillingness can obviously also be in the form of a permission to commit an act set out in Articles 6–8 of the Statute, issued before, or during, the commission of the act in question.[89] The case of the East German Border Guards shows that such an authorisation may not even be linked to a public emergency. The pre-permission can thus be express or implied, de jure or de facto, general, or limited to lower ranks (in the form of a defence of superior orders). The law may provide X, but the interpretative ordinances, or officially sanctioned practice, may provide Y.[90]

Amnesties are not specifically mentioned in the Statute, but then neither are statutes of limitation or any of the other grounds mentioned above. But it cannot be claimed that the lack of mention of amnesties was due to an oversight. The issue of amnesties was a controversial one at Rome, and before, at the preparatory conference.[91] That an amnesty should preclude prosecution was pushed strongly by some delegations, several of whom came from States that had recently experienced, or were experiencing, crimes within ICC jurisdiction and which had passed, or contemplated passing, amnesties. The main arguments advanced in favour of amnesties were their supposed value for national reconciliation, and for establishing and maintaining peace and democracy. On the other hand, many delegations feared with good reason that explicitly allowing an amnesty to be an exception to admissibility would totally undermine the struggle against impunity.

[86] The Collins English dictionary defines an amnesty, inter alia, as 'a general pardon, especially for offences against the government'. Thus, the characteristics of an amnesty on this definition are its general and formal character, that it is issued by the competent authorities of the State, that it postdates the commission of an offence and that it justifies or excuses it.

[87] Under Art 29, the parties accept that the offences within ICC jurisdiction should not be subject to statutes of limitation, but again, this does not mean that they accept such an obligation in their national legal systems.

[88] For an analogous case, one can mention the termination, by mutual agreement, of the case brought before the ICJ by Pakistan against India relating to the trial (for war crimes and genocide) of Pakistani soldiers for acts committed in (then) East Pakistan, ICJ Rep (1973), 328.

[89] *Quaere*, is the moral blameworthiness of the actors more or less in the circumstances?

[90] For a discussion, see R Geiger, 'The German Border Guard Cases and International Human Rights' (1998) 9 *EJIL* 540.

[91] See eg, O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos, Baden-Baden, 1999) commentary by S Williams at 389–91.

One can thus argue on the basis of the *travaux préparatoires* that, as the issue was raised at the conference, but the wording of Article 17 was not explicitly changed to take this into account, then an amnesty should not be seen as falling within Article 17. One can also argue, textually, that the reference to 'the case' and 'the person' in Article 17(1)(b) means that an individual decision not to prosecute is necessary and that an amnesty per se cannot fall within Article 17.[92] However, the variety of types of amnesty, and the variety of conditions applying to them, mean that the answer is not as clear as it might at first appear.

In any event, it would appear that the legal reasons for inability or unwillingness, and whether these stem from legislative, judicial or executive action or inaction, are not relevant under Article 17. A failure to investigate or prosecute could be quite blameless in the sense that the State judicial apparatus has partially or totally collapsed (as already mentioned, a possibility explicitly envisaged by Article 17(3)). Or there may be insurmountable national legal problems to annulling or altering an amnesty already granted. Equally, the moral or political factors behind inability or unwillingness would also seem to be irrelevant under this article.

On the other hand, as already mentioned, the ICC Prosecutor has the power under Article 53 to refrain from bringing, or to abandon an investigation or prosecution. This appears to be framed so widely as to allow the prosecutor to take an amnesty into account. Thus, although the issue can be debated,[93] it would appear that amnesties can fall within this article. But should they? There are many arguments, political, legal and moral, for not granting amnesties, or respecting amnesties previously granted, and I will not go into these here.[94] However, there may exceptionally be situations in which the Prosecutor is justified in not 'bickering about who killed who's auntie'.[95] Indeed, depending on the case-load, he or she may accept less gross amnesties with some relief. Bearing in mind the almost unique context of each amnesty, the precedent effect of a decision not to prosecute can be kept low.

10. CONCLUSION

After analysing the impressive, and complicated, system of checks and balances set out in this chapter to regulate issues of jurisdiction and admissibility, it would be wrong not to say something about whether the system will only exist on paper. To put it another way, if the ICC is not going to work, what purpose is served by all these safeguards?

[92] See eg, Ntanda Nsereko, above n 2 at 119.
[93] See above n 85.
[94] For an excellent discussion, see C Nino, *Radical Evil on Trial* (Yale UP, New Haven, 1996) chs 3–5. See also SP Huntingdon, *The Third Wave: Democratisation in the Late Twentieth Century* (University of Oklahoma Press, Oklahoma, 1991) 215–31. For a more recent contribution to the debate from a radically different perspective see MJ Osiel, 'Why Prosecute: Critics of Punishment for Mass Atrocity' (2000) 22 *HRQ* 118.
[95] To quote M Palin in his masterly blackly comic role as the Baron in *Monty Python and the Holy Grail*.

The ICC is a reality now, after many years of struggle. The court is being built, the judges and the Prosecutor have been elected. So, people are certainly working already. The NGO coalition and the many individuals and State officials who have worked hard for many years to make the ICC a reality can congratulate themselves. However, as one commentator has pointed out, the purpose of the ICC is not to make us feel good, but to succeed.[96] But what is meant by success here? As mentioned, success in one sense would be no cases prosecuted. But no one really expects this. On a simple level, then, public opinion will measure success on obtaining custody of offenders and sufficient evidence to try them from the States with most information on the alleged perpetrators' alleged offences. But these States are, obviously, often going to be very reluctant to assist the ICC. The principle of complementarity means that the Prosecutor is in the paradoxical situation of usually having to show first that the State is not acting in good faith ('unable or unwilling') and then, under Article 86 to seek the co-operation of that same State in amassing evidence ('it's a fair cop guv'). There will rarely be even a half-reluctant peacekeeping force available which can be nagged or embarrassed into arresting suspects, as the ICTY was occasionally able to do with SFOR. In the absence of military means, non-co-operating States will need to be pressurised with the help of economic carrots and sticks into handing over offenders and evidence. But, without the support of powerful States, the tribunal will easily become 'an array of wigs and gowns pontificating in emptiness'[97] and the Prosecutor 'less of a prosecutor and more of a protester at large'.[98] Bearing in mind the US efforts to ensure that US troops and decision-makers will never be brought before the ICC it is difficult to see how anything other than lukewarm support can be expected from the US in the job of pressurising non-co-operating States.

But, even assuming that custody over offenders can be obtained, the ICC will, as such, not succeed in deterring the commission of the core crimes. There is relatively little support amongst criminologists and criminal lawyers for the proposition that general deterrence works at all.[99] In particular, as far as war crimes are concerned, peer group pressure, exhaustion, stress, fear of the enemy and fear of immediate disciplinary and other punishment for refusing to carry out an order all tend to encourage the commission of atrocities. The prospect of perhaps being subject to a trial many years later in The Hague will not realistically operate to restrain junior ranks, or even, probably, more senior ranks. As Rubin has remarked, when people are willing to kill and die for something, and send their children to kill and die for it, it is hard to see how an umpire in The Hague will

[96] Blakesley, above n 2 at 234.
[97] A prescient remark of A Zimmerman, in *The League of Nations and the Rule of Law, 1918–1935* (McMillan, London, 1936) 125, as quoted in Smith, above n 80.
[98] B Griffin, 'A Predictive Framework for the Effectiveness of International Criminal Tribunals' (2001) 34 *Vand JTL* 405 at 452.
[99] For a discussion of general deterrence in the context of ICTY sentencing see Griffin, *ibid*. See also TJ Farer, 'Restraining the Barbarians: Can International Criminal Law Help?' (2000) 22 *HRQ* 90; I Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *EJIL* 562.

stop this. He concludes, regretfully, that the 'attempts to build a superstructure of legal governance on the existing system using the tools of positive international law', have obtained only a 'superficial success'.[100] Worse than a superficial success, of course, is that the ICC may encourage non-action. The argument is occasionally made that the existence of the ICC may actually give the Security Council the excuse not to intervene to stop on-going conflicts.[101]

I certainly hope this is not so. But then, again, one cannot be an international lawyer without possessing some degree of optimism and a belief that there is some integrity in international institutions. Certainly, there is no incompatibility whatsoever between a subsequent trial and an intervention. But I do feel that we should be very careful as regards what we feel can be achieved by the ICC. I think that Tallberg is correct when she argues that a belief in 'international criminal justice' is more an act of faith than a rational act, and that, like all religious belief, it can provide a refuge from horror, but risk blinding us to reality. The ICC will not prevent conflicts, and it should not provide an excuse for not taking more proactive (and expensive) long-term action to prevent conflicts from arising, such as reform of the international economic system geared at reducing poverty. Still, the success of the ICC should not be measured solely in terms of deterrence. Although it is undoubtedly naïve to believe that a post-hoc 'umpire' will prevent or ameliorate significantly violent conflicts the ICC Statute is an important statement that certain acts are not acceptable to the majority of States in the world. The symbolic value of condemnation that a prosecution and conviction entails is important for the victims who call tell their appalling stories in the solemnity of the court room, and be recorded for history. And if one believes that war is inevitable, if the human race is always 'two meals and 24 hours from barbarism'[102] then what would seem to be needed from a social anthropological perspective is a ritualisation of conflict in order to channel male aggression and avoid the horrors of total war.[103] In the circumstances, even on a cynical level, the post-ritual ritual is also important.[104]

But an investigation and prosecution, even if custody is not obtained, will also serve to insert a little bit more (legalised) morality into international relations. Certain politicians and military leaders will no longer be 'clean'. The room for maneuver for governments in other States to carry on with business as usual with those who are marked by the ICC will be much less. The scope will be correspondingly greater for NGO pressure, and internal, ethical influence, on governments, financiers and business people, resulting (hopefully) in an array of diplomatic,

[100] A Rubin, 'The US and the ICC: Possibilities for Prosecutorial Abuse' (2001) 64 *Law and Contemporary Problems* 153 at 153, and 162 (albeit a 'remarkable superficial success').
[101] See Smith, above n 80 at 184–86.
[102] N Gamien and T Pratchett, *Good Omens* (Corgi, London, 1991).
[103] The need for ritualisation of modern conflict is strongly stressed in, inter alia, J Keegan, *A History of Warfare* (Hutchison, London, 1993).
[104] Cf 'International criminal law carries this kind of a religious exercise of hope that is stronger than the desire to face everyday life. Focusing on the idea of international criminal justice helps us forget

financial and economic measures against the people identified. This might not sound much but it is an important step forward. And where, as is likely in many cases, the case never comes to trial, then this placing of the mark of Cain[105] on people will only be legitimate if it is preceded by scrupulous adherence to the safeguards for the rights of the accused and States set out in the jurisdiction and admissibility provisions of the Statute.

that an overwhelming majority of the crucial problems of the societies concerned are not adequately addressed by the criminal law', Tallgren, above n 99 at 593.

[105] The God of the Old Testament punished Cain who had murdered his brother Abel, 'And the Lord said, "What have you done? The voice of your brother's blood is crying to me from the ground. And now you are cursed from the ground, which has opened its mouth to receive your brother's blood from your hand. When you till the ground, it shall no longer yield to you its strength; you shall be a fugitive and a wanderer on the earth." Cain said to the Lord, "My punishment is greater than I can bear. Behold, thou hast driven me this day away from the ground; and from thy face I shall be hidden; and I shall be a fugitive and a wanderer on the earth, and whoever finds me will slay me". Then the Lord said to him, "Not so! If any one slays Cain, vengeance shall be taken on him sevenfold". And the Lord put a mark on Cain, lest any who came upon him should kill him'. The mark the God of the Old Testament placed upon Cain thus served both as stigmatisation and protection.

4

The Peace and Justice Paradox: The International Criminal Court and the UN Security Council

DAN SAROOSHI*

1. INTRODUCTION

THE ENTRY INTO force of the Statute of the permanent International Criminal Court[1] (hereafter 'the Statute')[2] marks an important milestone in the quest for an international criminal justice system.[3] However, the effectiveness of the ICC will likely depend to a large extent on its developing relationship with the Security Council.[4] The handling of this complex relationship by the ICC judges will require a considerable degree of judicious caution, especially in the early years of the Court's existence if it is to gain the trust of the Security Council and, in particular, its Permanent Members. The relationship is complicated due to the fact that on the one hand the Court's decisions may involve issues of a high political sensitivity for the Security Council and its Members; while, on the other, the ICC may need to rely on the Council to ensure that it can operate effectively in practice. This tension may be exacerbated by the differing mandates that the Security Council and the ICC may seek to achieve in a specific case. In the case of the ICC the mandate is relatively clear, the achievement of justice by means

* This chapter draws on the following contribution: D Sarooshi, 'Aspects of the Relationship between the International Criminal Court and the United Nations' (2001) 32 *Netherlands Yearbook of International Law* 27.

[1] The Statute was adopted by the UN Sponsored Diplomatic Conference in Rome on 17 July 1998 by 120 States voting in favour, seven States voting against and 21 States abstaining in the vote. The Statute entered into force on 1 July 2002, in accordance with Art 126.

[2] The words 'the Court' and 'ICC' are used interchangeably hereafter to refer to the permanent International Criminal Court.

[3] See more generally L Caflisch, 'Toward the Establishment of a Permanent International Criminal Jurisdiction' (1998) 4 *International Peacekeeping* (No 5) 110; and on the work of the International Law Commission in this area, see J Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal' (1994) *AJIL* 88 140 at 141, and citations contained therein.

[4] As Berman has observed: 'In my view far and away the most important of them [the Court's relationships] will prove to be the developing relationship with the Security Council', F Berman, 'The Relationship between the International Criminal Court and the Security Council', in HAM von Hebel, JG Lammers, and J Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (TMC Asser Press, The Hague, 1999) 173. The separate treaty basis of establishment of the ICC means that it is clearly not part of the UN Organisation which consists of the six principal organs specified in Art 7(1) of the Charter and their subsidiary organs.

of an international criminal process in relation to the crimes within the Court's jurisdiction; while in the case of the Security Council its overriding objective under the UN Charter is the maintenance or restoration of peace and security, which may or may not include in a particular case the achievement of justice.

The provenance of the sources of law and obligation that governs the relationship between the Security Council and the ICC is twofold. First is the UN–ICC Relationship Agreement;[5] while the second is the constituent treaties of the UN and the ICC, the UN Charter and the ICC Statute respectively.

In order to examine a number of the issues which arise in this context, it is proposed to focus on four main areas: the referral of cases by the Security Council to the ICC, the problem of the enforcement of ICC decisions, the issue of what happens when there are conflicting decisions of the ICC and the Security Council, and the issue of the crime of aggression which raises the further issues of whether the ICC will be able to judge the legality of Security Council action or Member State action taken pursuant to a Security Council resolution. The various elements contained in these issues will then be applied, almost as a type of case-study, to consider the important, and controversial, legal consequences of Security Council resolution 1422.

2. SECURITY COUNCIL REFERRAL OF CASES TO THE ICC

Article 13(b) of the Statute gives the Security Council an express power to refer cases to the Prosecutor in a 'situation in which one or more of such crimes appears to have been committed'. This is one of the ways in which the Prosecutor may be seized of a case under the Statute.[6] There are three matters that deserve consideration in this context.

[5] Art 2 of the ICC Statute provides that '[t]he Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf'. For the *Draft Relationship Agreement between the Court and the United Nations* see *Report of the Preparatory Commission for the International Criminal Court (continued), Preparatory Commission for the International Criminal Court*, PCNICC/2001/1/Add1, 8 Jan 2002. According to the ICC's web-site, this relationship agreement 'has been approved by the Assembly of States Parties and will be concluded by the President of the Court on its behalf', <http://www.icc-cpi.int/php/show.php?id=history>

[6] The other two ways, contained in Art 13, are where a reference to the Prosecutor has been made by a State Party in accordance with Art 14 or where the Prosecutor has initiated an investigation at his or her own discretion in accordance with Art 15 of the Statute. These ways in which the Prosecutor can be seized of a case are, however, a separate question from that of the preconditions which must be met before the Court can exercise its jurisdiction in a case. These are contained in Art 12 of the Statute. However, in the case of a Security Council referral there is no requirement under Art 12 that the State or States whose territories are involved in the 'incident' must have accepted the jurisdiction of the Court by becoming States Parties or accepting the Court's jurisdiction on an ad hoc basis in the particular case (Art 12(3) of the Statute). As such, a Security Council referral can have the effect of extending the jurisdiction of the Court to include non-States Parties. On the ICC's jurisdiction see Cameron in this volume.

The first is to understand the difference between a Security Council referral to the Prosecutor and an investigation by the Prosecutor at his or her own initiative. The terms of Article 13 make it clear that a reference by the Security Council may be in respect of 'a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed'; while the case that can be brought by the Prosecutor is much more narrowly defined in terms of a specific crime and cannot thus be as a result of a general investigation of a 'situation'. On the one hand this position reflects the general concern expressed by States that the Statute should not give over-broad powers to the Prosecutor,[7] and yet on the other it does not allow the Council to refer an individual case of alleged criminal activity to the Prosecutor. The latter represents an important limitation on the Council's competence in this area. This limitation does not of course constrain the Council from deciding *under the UN Charter* that a particular case of alleged criminal activity should be referred to the ICC. This is clearly within the mandate of the Council under Chapter VII. The point is that such a decision has no binding effect on the ICC, since, as explained in detail below, the Security Council cannot, even by using its Chapter VII powers, obligate the ICC as an international organisation to act in a certain way.[8]

There is, however, an opposing view of the legal consequences that flow from Article 13(b) of the Statute. Former US Ambassador Scheffer uses the provision to come to an entirely different conclusion from that just stated when he observes:

> The power of the Security Council to refer situations enables the Council to shape the ICC's jurisdiction in any particular situation provided sufficient support is found in the Council to refer the situation under a Chapter VII resolution. This means that if the Council seizes the opportunity, particularly in a situation that has already engaged the Council as a threat to international peace and security, to refer a situation to the ICC, then such referral can be tailored to minimise the exposure to ICC jurisdiction of military forces deployed to confront the threat. The Chapter VII resolution would define the parameters of the Court's investigations in the particular situation. The Security Council also could use the power of referral to insulate domestic amnesty arrangements from the reach of the ICC by specifying in a referral, for example, that those individuals who have received or will receive amnesty in accordance with domestic procedures fall outside the scope of the referral. This may be particularly relevant for amnesties of low and mid-level personnel who normally would be of little interest to an ICC Prosecutor anyway.[9]

[7] This concern is reflected further in Art 15 which contains the powers of the Prosecutor. Although Art 15(1) gives the Prosecutor the competence to initiate investigations '*proprio motu*' in respect of crimes within the jurisdiction of the Court, it is clear, however, that this is not without constraint: the Prosecutor must make, under Art 15(3) & (4), representations before a Pre-Trial Chamber of the Court and obtain an authorisation for an investigation to proceed.

[8] See nn 45, 46 below and corresponding text.

[9] D Scheffer, 'Staying the Course with the International Criminal Court' (2001–2002) 35 *Cornell International Law Journal* 47 at 90.

The reason why this view of Article 13(b) is inaccurate in general terms is that Security Council decisions cannot, as just stated, bind the ICC such that it can disregard the terms of its Statute. More specifically, as explained below, it is for the Prosecutor to decide what should be investigated and even prosecuted from the 'situation' that has been referred and not the Council,[10] and in the further case of amnesties it is the Court that has been given the power of authoritative interpretation pursuant to Article 17 of the Statute to decide the issue of admissibility, not the Security Council. As such, the Security Council cannot seek to exclude matters from the jurisdiction of the Court by use of its power of referral.

The Security Council can, however, enhance considerably the jurisdictional reach of the ICC by using its power of referral in relation to situations involving non-States Parties. Such referrals would in effect allow the ICC to exercise its jurisdiction in relation to non-States Parties, a jurisdiction that would not exist but for the Security Council's referral.[11] This facility will likely prove of considerable importance to the Prosecutor in practice,[12] especially in the early years of the Court.

The second issue that arises in the case of a Security Council referral is the way in which the referral will be treated by the Prosecutor. The Statute does not provide for any special treatment to be accorded a Security Council referral as opposed to the other two ways in which the Prosecutor can be seized of a case. As Crawford stated in respect of the same feature of the earlier International Law Commission (hereafter 'ILC') Draft Statute:

> Once a crime has been referred by the Security Council, the normal requirements of the statute will apply, including independent prosecution, and the principle of legality (*nullum crimen sine lege*) … In other words, although the Security Council may initiate proceedings, the source of law to be applied will be the same as if the complaint were lodged by a State.[13]

To put this differently, a Security Council referral to the Prosecutor does not necessarily mean the Prosecutor will actually prosecute a case. The reason for this is the independence and impartiality that the ICC organs enjoy vis-à-vis States and other international legal persons, including thereby the UN and its Security Council. A grouping of States (known as the Non-Aligned Countries) had declared prior to the Rome Conference that they placed considerable importance on the ICC being independent as a judicial institution from political influence of

[10] On the independence of the Prosecutor's discretion from the Security Council, see nn 14–16 below and corresponding text.
[11] On this consequence of a Security Council referral, see above n 6.
[12] See L Arbour and M Bergsmo, 'Conspicuous Absence of Jurisdictional Overreach' in von Hebel, Lammers, and Schukking, above n 4, 129 at 139–40.
[13] J Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal' (1994) 88 *AJIL* 140 at 147. Note that under the ICC Statute, as opposed to the ILC Draft Statute, there is the third way of the Prosecutor, subject to certain constraints, being able to bring a case: see above n 7.

any kind, including that of UN organs and in particular the Security Council.[14] More specifically, Article 42 of the Statute requires that the:

> Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

This provision is given further meaning when regard is had to the considerable discretion that the Prosecutor enjoys in the exercise of his or her functions.[15]

The Prosecutor possesses a discretionary competence to decide whether to proceed with either an investigation pursuant to Article 53(1)[16] or a prosecution in a particular case pursuant to Article 53(2) of the Statute. This competence is largely unaffected even where the Prosecutor has become involved as a result of a Security Council referral. This remains the case even taking into account the Statute's two procedural safeguards that are designed to ensure that the Prosecutor has given sufficiently serious consideration to commencing an investigation or prosecution in the case of a Security Council referral. The first procedural safeguard provides that where the Prosecutor decides not to prosecute a case taking into account the interests of justice (which includes such factors as the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime) pursuant to Article 53(2)(c), then the Prosecutor is required to inform the Pre-Trial Chamber and the Security Council of his or her conclusions and the reasons for these conclusions. The second safeguard is that the Pre-Trial Chamber can review, pursuant to Article 53(3), a Prosecutor's decision not to proceed either with an investigation or prosecution in the case of a Council referral. The less problematic provision here is Article 53(3)(a) which only gives a Pre-Trial Chamber the competence, after its review, to request the Prosecutor to reconsider its decision not to proceed with an investigation or prosecution where this decision is based on grounds other than the 'interests of justice'. Despite the pressure such a request for reconsideration may exert on a Prosecutor to bring a prosecution, this provision leaves wholly

[14] This was reiterated by eg, Italy and Indonesia at the Rome Conference: see G Hafner, K Boon, A Rubesame, and J Huston, 'A Response to the American View as Presented by Ruth Wedgwood' (1999) 10 *EJIL* 108 at 114–15.

[15] As Berman, Head of the UK delegation to the Rome Conference, has stated: '[T]he reference by the Council is made to the *Prosecutor*, not to the judicial arm direct, thus preserving intact the independence of the Prosecutor's functions. As the International Law Commission had originally foreseen, it remains the exclusive responsibility of the Prosecutor "to determine which individuals should be charged with crimes" (now subject of course to the approval of the Pre-Trial Chamber where that is provided for in the Statute)', Berman, above n 4 at 174.

[16] In the case where the Prosecutor decides not to initiate an investigation having taken into account the gravity of the crimes and the interests of the victims as provided for in Art 53(1)(c), then he or she must inform the Pre-Trial Chamber.

untouched the broad discretion in law that the Prosecutor enjoys in this regard. What is more problematic, however, is Article 53(3)(b) which gives a Pre-Trial Chamber the competence to initiate a review of the Prosecutor's decision not to proceed with an investigation or prosecution where this decision is at the outer limit of the Prosecutor's discretion under the Statute.[17] This somewhat curious provision goes on to state that in such a case the Prosecutor's decision not to proceed 'shall be effective only if confirmed by the Pre-Trial Chamber'. Surely this provision, no doubt the outcome of a compromise at Rome, cannot in practice mean that the Prosecutor will have to prosecute a case in such circumstances. Not only would the legitimacy of such a trial be open to question, affecting thereby the ICC's credibility, but there is a good chance the prosecution may not be particularly effective in the case, especially since the Prosecutor had earlier decided that it was not in the interests of justice to proceed with a prosecution.[18] What may happen in practice in such cases is that the Prosecutor may re-open an investigation, and then decide subsequently not to bring a prosecution based on grounds other than in the 'interests of justice' which means, as explained above, that the Pre-Trial Chamber only has the competence to ask the Prosecutor to reconsider its decision.

The third issue in relation to this power of referral is that Article 13(b) of the Statute requires that the Council resolution making the referral has to be adopted under Chapter VII of the Charter. In order to adopt a Chapter VII resolution, the Security Council must make an Article 39 determination that a particular situation constitutes a threat to, or breach of, the peace or act of aggression.[19] What this means is that the Security Council must make an Article 39 determination that the commission of these crimes — either in themselves or as part of a broader situation — constitutes a threat to, or breach of, the peace or act of aggression, and as such that a referral to the Prosecutor is necessary. This links the peace and security mandate of the Security Council to the justice mandate of the ICC. As such, this constitutes a potentially serious impediment to the independent functioning of the ICC.[20] In fact it is unclear why Article 13(b) obligates the Security Council to have to adopt a Chapter VII resolution, as opposed to a non-Chapter VII resolution, in order to make a referral to the Prosecutor. If it was to ensure that the referral decision would be subject to the power of veto of the

[17] This is where the Prosecutor, in accordance with Art 53(1)(c), having taken into account 'the gravity of the crime and the interests of victims, [decides that] there are none the less substantial reasons to believe that an investigation would not serve the interests of justice'; or where the Prosecutor has decided not to prosecute a case pursuant to Art 53(2)(c) because he or she has decided that it is 'not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the crime'.

[18] See above n 17.

[19] See Judge Weeramantry in the *Lockerbie* case, (1992) *ICJ Reports* 66 at 176; J-P Cot and A Pellet (eds), *La Charte des Nations Unies* (2nd edn) (Economica, Paris, 1991) at 645; and B Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn) (OUP, Oxford, 2002) at 726–27.

[20] See text that precedes and follows n 22 below.

Permanent Members, then it was not required as a matter of United Nations law. The power of veto over Security Council decisions pertains to all 'non-procedural' matters, in accordance with Article 27(3) of the Charter.[21] It is inconceivable that a non-Chapter VII decision by the Council to refer a situation to the Prosecutor for consideration for prosecution could be characterised as a matter of Security Council procedure, and thus not be subject to a veto.

The reason why this Chapter VII requirement is being questioned by this writer is that it raises the spectre of whether the Security Council will be willing simply to accept a decision by the Prosecutor or even possibly the Court not to proceed with a trial of at least one person from the situation that has been referred. The ICC Statute has raised the stakes by requiring a Chapter VII decision and thus, arguably, raised the expectation of Security Council Members that effective action in the form of a prosecution or at the very least an investigation will follow. There is the added risk that the Council may consider that it needs to take effective action to ensure that its Chapter VII determination is not without effect. In such a case the Council may decide to establish an ad hoc war crimes tribunal as a UN subsidiary organ — the progeny of the ICTY and ICTR — to prosecute persons or even possibly the leadership who are alleged to have committed war crimes in the situation concerned. The Security Council retains, of course, its competence to establish such ad hoc criminal tribunals, since its competence flows from Chapter VII of the UN Charter and this is in no way affected by the ICC Statute.[22] However, such a practice of establishing ad hoc tribunals can only serve to undermine the ICC. The Prosecutor being keen to avoid such a practice may be tempted to apply differing standards when reviewing a matter for potential prosecution depending on whether it was a referral from the Security Council. This would be highly regrettable if it did occur, since the ICC, including, of course, the Prosecutor as one of its organs, is based on the twin pillars of impartiality and independence from all States as well as the Security Council.

It may be for this reason that some States at the Rome Conference opposed any involvement of the Council in the operations of the ICC.[23] In the case of the power of referral, India, for example, stated at the Conference:

> The power to refer is now unnecessary. The Security Council set up *ad hoc* tribunals because no judicial mechanism then existed to try the extraordinary crimes committed in the former Yugoslavia and in Rwanda. Now, however, the ICC would exist and States

[21] See on the veto power eg, Cot and Pellet, above n 19 at 495; and Simma, above n 19 at 480.

[22] On the competence of the Security Council under the UN Charter to establish such ad hoc criminal tribunals, see D Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs' (1996) 67 *BYIL* 413 at 422 et seq.

[23] As Arsanjani observed: '… some States opposed granting such a right to the Security Council. In their view, such a role would reduce the credibility and moral authority of the Court, undermine its independence and impartiality and open a possibility for exerting political influence on the Court', M Arsanjani, 'Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court', in von Hebel, Lammers, and Schukking, above n 4, 57 at 65. See also E Wilmshurst, 'Jurisdiction of the Court', in R Lee (ed), *The International Criminal Court: The Making of the Rome Statute*

> Parties would have the right to refer cases to it. The Security Council does not need to refer cases, unless the right given to it is predicated on two assumptions. First, that the Council's referral would be more binding on the Court than other referrals; this would clearly be an attempt to influence justice. Second, it would imply that some members of the Council do not plan to accede to the ICC, will not accept the obligations imposed by the Statute, but want the privilege to refer cases to it. This too is unacceptable.[24]

Although there may be a limited degree of cogency in the points made by the Indian government, this writer holds a differing view of the broader question. It was one of the achievements of the Rome Conference that the Security Council's involvement in the exercise by the Court of its jurisdiction is limited to a mere power of referral to the Prosecutor,[25] but to have dispensed with any Security Council involvement in the Court's jurisdiction would have gone too far.[26] The ICC needs the enforcement powers of the Security Council, and if there had been no jurisdictional link the Council may have been tempted to ignore the ICC. The importance of this not occurring is illustrated in our next section.

3. THE PROBLEM OF THE ENFORCEMENT OF ICC DECISIONS

There is a serious potential problem with the enforcement of decisions of the ICC which the Security Council could remedy. Let us consider, for example, the issue of States co-operating with, and providing judicial assistance to, the ICC.

There is a general obligation on ICC States Parties under Article 86 to co-operate fully with the Court, which includes of course the Prosecutor, in its investigation and prosecution of crimes within the jurisdiction of the Court. In the event of non-compliance by a State Party with its obligations under Part 9 of the Statute and where this has the effect of preventing the Court from exercising its powers and functions under the Statute, then the Court may, pursuant to Article 87(7) of the Statute, make a finding to that effect and refer the matter to the Assembly of States Parties or, in the exceptional case where the Security Council had referred the matter to the Court, to the Security Council.[27] The Assembly of States Parties is, however, unlikely to be able to deal effectively with such enforcement issues

(Kluwer, The Hague, 1999) 127 at 137; and M Bergsmo, 'Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council' (2000) *69 Nordic Journal of International Law* 87 at 93.

[24] As quoted in Bergsmo, *ibid.*

[25] Cf the earlier position taken by the ILC in its Draft Statute that 'No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides', Art 23(3), Draft Statute for an International Criminal Court, *ILC Report*, UN Doc A/49/10 (1994), II, B, I, 85.

[26] P Kirsch, 'Introduction', in von Hebel, Lammers, and Schukking, above n 4, 1 at 5.

[27] On Pt 9 more generally, see B Swart and G Sluiter, 'The International Criminal Court and International Criminal Co-operation' in von Hebel, Lammers, and Schukking, above n 4, 91 *et seq.*

due to its size and low frequency of meetings.[28] This position can be contrasted with the case of the ICTY/ICTR where there is provision for recourse to the Security Council in all cases of non-compliance by a State with a warrant of arrest or transfer order.[29] This recourse to the enforcement authority of the Security Council in all cases of non-compliance is lacking in the case of the ICC, and yet it is a function ideally suited to the Council.

A solution to this potential enforcement problem of the ICC is for the Security Council to use its Chapter VII powers creatively and to develop a consistent practice of making Article 39 determinations that the failure by a State to co-operate with the ICC constitutes a threat to peace and security and thus constitutes a basis for the imposition of Chapter VII sanctions against the recalcitrant State. There are two points to make in support of this controversial approach.

The first is that the Security Council does not require a request from the ICC pursuant to Article 87(7) of the Statute in order to exercise its Chapter VII powers. The competence of the Security Council to make an Article 39 determination that a threat to, or breach of, the peace or act of aggression has occurred does not in any way depend on another organisation being authorised under its constituent treaty to make a request for such a determination by the Council. Neither does the Charter limit the reasons on which the Council can base an Article 39 determination. In fact the Security Council has over time decided that a threat to peace and security exists in a number of cases with differing causes that have included human rights violations,[30] large-scale human suffering occurring within a State,[31] and the restoration of democracy in a State,[32] as well as the more traditional situations of an international or internal armed conflict. The Council enjoys a broad political discretion to make an Article 39 determination, and as such the only barrier to the Council making such a determination is the lack of political will on the part of its Members. There is, accordingly, no legal barrier to the Council developing a consistent practice of linking a threat to the peace to non-compliance by States with ICC orders.

The second point in favour of this approach is that the Council has in fact already made a similar type of determination in its response in the *Lockerbie* case where the Council made an Article 39 determination that required, inter alia, the transfer by Libya of the two Libyan security personnel to a State with jurisdiction to try them for the bombing.[33] This represented in effect the Security Council

[28] A Zimmerman, 'The Creation of a Permanent International Criminal Court' (1998) 2 *Max Planck Yearbook of United Nations Law* 169 at 223.
[29] Eg, in the case of the ICTY this is in accordance with r 59 and r 61(E) of the ICTY Rules of Procedure and Evidence. On procedural and evidential issues more generally, see MN Shaw, 'The International Criminal Court — Some Procedural and Evidential Issues' (1998) 3 *Journal of Armed Conflict Law* 65; and Gray in this volume.
[30] D Sarooshi, 'The United Nations Collective Security System and the Establishment of Peace' (2000) 53 *Current Legal Problems* 621 at 627.
[31] *Ibid* at 627–28.
[32] *Ibid* at 628–32.
[33] On the eventual trial in this case, see A Aust, 'Lockerbie: The Other Case' (2000) 49 *ICLQ* 278.

enforcing the principle of *aut dedere aut judicare*,[34] and this arguably constitutes a (political) precedent for the Council being able to enforce ICC decisions relating to the arrest and extradition of indicted war criminals against a recalcitrant State or States.

In addition to this role of the Council enforcing ICC decisions in relation to States Parties, there is a crucial role the Council can also play in relation to non-States Parties. This will be particularly important in those cases where the Security Council has referred a situation to the Prosecutor that involves non-States Parties or where a non-State Party is harbouring an indicted war criminal or important documentary evidence relevant to a prosecution. The Statute does attempt to address this situation, but it is of course constrained by the *pacta tertiis nec nocent nec prosunt* principle embodied in Article 34 of the 1969 Vienna Convention on the Law of Treaties which states that '[a] treaty does not create either obligations or rights for a third State without its consent'.[35] This is recognised by the Statute when it provides in Article 87(5) that the Court may:

> [I]nvite any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis. [and that] Where a State not party to this Statute, which has entered into an *ad hoc* arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

In cases where non-States Parties do not comply with their obligations under these ad hoc agreements, then the Security Council can take the same course of action, as suggested above in the case of States Parties, in order to assist the Court. However, an additional issue that arises here is what happens when a non-State Party refuses to agree to conclude such an agreement with the ICC? This is where active Security Council involvement will, once again, prove vital for the effective functioning of the ICC. More specifically, the Security Council could decide that compliance by all UN Member States with a particular ICC decision is a measure necessary for the maintenance of peace and security pursuant to Article 41 of the UN Charter,[36] and, as such, bind all UN Member States under Article 25 of the Charter[37] to comply with specific ICC decisions.[38]

[34] See M Plachta, 'The *Lockerbie* case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*' (2001) 12 *EJIL* 125 at 136.

[35] On this principle, see R Jennings and A Watts, *Oppenheim's International Law* (Longman, London, 1996) at 1260–63.

[36] Art 41 of the UN Charter gives the Security Council the competence to 'decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures'.

[37] Art 25 of the Charter provides: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. On Art 25, see n 43 below and corresponding text.

[38] Such a case may also have the consequence that a non-State Party will, pursuant to Art 103, have to ignore in a particular case its treaty obligations that conflict with the specific ICC decision that has been effectively adopted by the Council. On Art 103, see n 47 below and corresponding text.

To conclude, a very active role for the Security Council may prove necessary in order to ensure the effective enforcement of ICC decisions vis-à-vis both States Parties and non-States Parties — a role that goes considerably beyond that which is envisaged in the ICC Statute which limits Council involvement to those cases where it has referred a case to the Court.

4. THE POTENTIAL CLASH BETWEEN PEACE AND JUSTICE: THE SECURITY COUNCIL VERSUS THE ICC STATUTE

It is somewhat simplistic to counterpose the achievement of justice as being a distinct matter from the achievement of peace in a war-torn society. This can be well-illustrated by the approach of the Security Council to the conflict in the Former Yugoslavia where it decided in resolution 827 to establish the ICTY as a contribution to the restoration of peace. The achievement of peace by the Security Council may, however, come at a high price. For example, the Council may well decide in a particular case that the achievement of peace, and the consequential saving of lives, is more important than the investigation or prosecution of a leader or other person by the ICC. It is largely for this kind of reason that the Security Council has been given the competence under Article 16 of the Statute to require the Prosecutor to defer an investigation or prosecution, whether pending or ongoing, of a specific case.[39] However, a different type of purported usage by the Security Council of this power of deferral has already occurred in the case of Council resolution 1422. This resolution and its consequences are considered in more detail in Section 6 below.

A purported deferral by the Security Council must be by means of a resolution adopted under Chapter VII, and it will last for a period of 12 months. There is no limitation on the Council making subsequent determinations every 12 months, and it can in effect postpone an investigation or prosecution indefinitely if a resolution is passed every year.[40]

The requirement that the Security Council adopt the resolution under Chapter VII is a clear indication that this power of deferral represents a concession to the peace and security mandate of the Council.[41] As a key participant at the Rome Conference observed:

> Article 16 of the ICC Statute … *does* provide the appropriate vehicle for the future balancing of interests of international peace and justice mandates, and recognises that

[39] Art 16 of the Statute, entitled 'Deferral of investigation or prosecution', provides that: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'.

[40] On the separate question whether the Security Council can seek to override this temporal limitation and defer an investigation or prosecution by passage of only one Chapter VII resolution, see text following n 46 below.

[41] As Lee states in relation to the power of deferral under Art 16: '[i]n this way, the Security Council's responsibility for the maintenance of peace and security is recognised and balanced with the Court's

> the Security Council is the proper forum. The article can be used by the Council to postpone ICC investigations and prosecutions when the Council 'assesses that the peace efforts need to be given priority over international criminal justice', in the interest of international peace and security. It recognises a Council power to 'request the Court not to investigate or prosecute when the requisite majority of its members conclude that judicial action — or the threat of it — might harm the Council's efforts to maintain international peace and security pursuant to the Charter'.[42]

The postponement of an investigation or prosecution is, however, a very different matter from the Security Council trying to intervene in a particular ICC case where the trial of an indicted war criminal has been completed and the judgment is pending or the case where a person has been convicted of war crimes but has not yet been sentenced. In such cases the Security Council could not invoke Article 16 to defer either the judgment or sentencing since the investigation and prosecution have clearly finished. The question thus arises in such cases: can the Security Council, in the pursuit of its peace and security mandate, seek to influence a decision of the Court in a particular case? For example, in return for an accused's assistance with implementing a peace plan could the Security Council require the release of the accused or, in the even more extreme case, could the Council require a convicted war criminal to be given a limited sentence? Both these cases raise the question of whether the Security Council can seek to use its Chapter VII powers to influence or override ICC decisions.

It is generally accepted that the Council can, pursuant to Article 25 and Chapter VII, impose a binding obligation on UN Member States.[43] When this is combined with Article 103 of the Charter,[44] an argument may be made that the Council has the competence to overrule in effect the provisions of the ICC Statute in a particular case. However, such an approach in relation to the exercise by the ICC of its powers under the Statute represents a misunderstanding of the nature of the legal obligation involved. The Security Council cannot impose a binding obligation on a distinct international organisation such as the ICC to act in a certain way nor can the Council authorise the ICC to act beyond the scope of its powers as set out in the Statute. This follows from the principle of attribution: that an international organisation cannot act beyond those powers attributed to it

role as an instrument for justice', R Lee, 'Introduction: The Rome Conference and its Contributions to International Law', in Lee, above n 23, 1 at 36. See also Scheffer, above n 9, at 91. On the negotiating history of this provision, see M Bergsmo and J Pejić, 'Article 16', in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft, Baden Baden, 1999) 373.

[42] Bergsmo, above n 23 at 112–13.

[43] See the commentary on Art 25 in Simma, above n 19 at 452; N White, *The Law of International Organisations* (Manchester University Press, Manchester, 1996) 90–91; and Cot and Pellet, above n 19 at 471.

[44] Art 103 of the UN Charter provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail', On Art 103, see n 47 below.

by Member States as set out in its constituent treaty.[45] In the case of the ICC, this means, for example, that the Security Council cannot expand the jurisdiction of the Court to include crimes not set out in the Statute, since if the Court were to exercise this expanded jurisdiction then it would be acting ultra vires its Statute.[46] It also means that a Security Council resolution purporting to dispense with the temporal requirement in Article 16 that a Council deferral must be renewed every 12 months would not bind the Court.

It is certainly true that an obligation imposed by the Council on UN Member States pursuant to Articles 25 and 103 should prevail over conflicting obligations a Member may have under another treaty. This is the clear meaning of Article 103.[47] This only means, however, that the Council has the competence to impose a binding obligation on UN *Member States* to act in a certain way which may, in the case of a conflict with the ICC Statute or ICC decisions, require them to ignore the latter set of obligations.[48] This is confirmed by the text of Articles 25 and 103 that refer only to the obligations of UN Member States. However, this does not take us far in our enquiry: the problem still remains that the Council cannot per se bind another international organisation with separate legal personality from its Member States.[49] Article 48(2) provides assistance, at least in theory, to the Security Council in this context: it obligates UN Member States to carry out decisions of the Security Council 'directly and through their action in the appropriate international agencies of which they are members'. What this requires, *in casu*, is that UN Member States when acting as States Parties to the ICC Statute are under

[45] See HG Schermers and NM Blokker, *International Institutional Law: Unity Within Diversity*, (3rd edn) (Nijhoff, The Hague, 1995) at 141.

[46] Cf however, in the case of the Court's jurisdiction the express competence of the Council pursuant to Art 13(b) of the Statute to make referrals to the Prosecutor thereby potentially extending the jurisdiction of the Court to encompass non-States Parties: see above n 6.

[47] See Schermers and Blokker, above n 45 at 1068–69; Cot and Pellet, above n 19 at 1381; and Simma, above n 19 at 1295. See as an example of how Art 103 operates in practice, the *Lockerbie* case, *Provisional Measures Phase*, (1992) *ICJ Reports* 3, *et seq*.

[48] For possible examples of such a Security Council decision, see text corresponding to n 52 and Pt 6 below.

[49] Cf however, the attempt by ICTY Trial Chamber III in the *Todorović* case to order the North Atlantic Treaty Organisation (NATO) to disclose to the Defence for Stevan Todorović all documentary evidence relating to his detention and arrest by NATO forces (*in casu*, the Stabilisation Force in former Yugoslavia known as SFOR) per its Decision of 18 Oct 2000. This case is of present interest, since the ICTY as a subsidiary organ of the Security Council was exercising powers delegated by the latter, and as such it raises the issue of the Council's power to issue binding orders to international organisations. There are, none the less, serious legal difficulties in the opinion of this writer with the approach by Trial Chamber III. In particular, the ICTY only has the competence under Art 29 of its Statute to make decisions that bind UN Member States: it does not possess the competence to make decisions that bind international organisations that possess a legal personality distinct from their members. The Security Council did not even purport to delegate such a power to the ICTY, and as such this case does not change the conclusion in the text. In the event, the appeal against this order was not heard by the Appeals Chamber, since the challenge by Todorović to the legality of his arrest and detention, initially by SFOR, before the ICTY was dropped when he pleaded guilty to a reduced number of counts. On the full procedural history of this case, see *Prosecutor v Stevan Todorović*, Sentencing Judgment, 31 July 2001, paras 1–22 (available at ICTY's web page: <www.un.org/icty/todorovic/judgement/tod-tj010731ehtm?>

an obligation to seek to ensure that the ICC follows the binding decision of the Council. This does not, however, assist the Council in requiring the Court or indeed the Prosecutor to carry out or to refrain from carrying out certain activities or in the case of the Court from making certain decisions or orders, since under the Statute both the Court[50] and Prosecutor[51] enjoy a large measure of independence from ICC Member States and it is the Statute which alone governs the activities of the Court and the Prosecutor.

The only way the Council can seek to influence the Court's decision is by imposing an obligation on States not to comply with their treaty obligations under the ICC Statute, and thus to seek to render ineffective the Court's decision in a particular case. This exists as an option for the Security Council since the effective implementation of a Court's judgement and sentencing decision will in the last resort depend on State participation. One need only consider, for example, the case where the Security Council imposes a binding obligation on UN Member States under Chapter VII that in the interests of peace and security a convicted war criminal sentenced to 20 years imprisonment by the ICC should receive a reduced sentence of say five years in return for his participation in assisting the Security Council implement a peace agreement.[52] Such a Security Council decision represents a direct challenge to the authority of the Court under the Statute which is given the sole competence under Article 110(2) to make a determination in relation to the reduction of the sentence of a convicted person.[53] Moreover, it would seek to overrule a number of conditions that the Statute itself sets on the reduction of sentences.[54] None the less, by adopting a decision under Chapter VII the Council could require that all UN Member States release the prisoner after he had served five years incarceration, and this obligation would prevail over those flowing from the ICC Statute.

[50] Art 40(1) of the Statute provides that the ICC judges 'shall be independent in the performance of their functions'.

[51] On the independence of the Prosecutor from ICC Member States, see above nn 14–16 and corresponding text.

[52] See also operative para 3 of Council resolution 1422 as set out in Pt 6 below.

[53] Art 110(2) of the ICC Statute states: 'The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person'.

[54] The first of these is contained in Art 110(3) of the Statute which provides: 'When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time'. The real difficulty, however, lies in the conditions set out in Art 110(4) which clearly indicate that the Court is to consider the interests of the ICC when it provides: 'In its review under para 3, the Court may reduce the sentence if it finds that one or more of the following factors are present: (a) The early and continuing willingness of the person to co-operate with the Court in its investigations and prosecutions; (b) The voluntary assistance of the person in enabling the enforcement of the judgments and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence'. These are of course directed at the 'justice' mandate of the ICC which is very different to the 'peace and security' mandate of the Council.

The case where the Security Council seeks to grant in effect an amnesty to a person whose trial has finished but who has not yet been convicted is also problematic under the Statute.[55] The ICC system of the enforcement of sentences of imprisonment depends on (1) States Parties accepting the incarceration of prisoners on their territory, and (2) the Court having the right to designate a State under Article 103(1) to accept a sentenced person in accordance with a State's earlier acceptance.[56] The Council could seek to make its decision effective by imposing an obligation on UN Member States to refuse to accept the prisoner for incarceration. There will arise in such a case a particular difficulty for the Netherlands as the ICC host State,[57] a difficulty that is located, somewhat ironically, in Article 103 of the ICC Statute. Article 103(4) of the Statute provides that:

> If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in Article 3, paragraph 2.

In the scenario being discussed, the Netherlands would still, however, be bound to follow the obligation imposed on it by the Security Council under the UN Charter to the detriment of its obligation flowing from Article 103(4) of the ICC Statute. None the less, this is what Article 103 of the UN Charter requires.

The discussion so far has addressed those types of cases where the achievement by the Council of its peace and security mandate may require a different approach from that being pursued by the ICC as part of its justice mandate.[58] In a number of cases, however, the achievement of these mandates will be complementary: that is, the ICC prosecuting an indicted war criminal may assist the Council to restore or maintain peace in a particular country or region. In such cases the use by the Council of its Chapter VII powers can assist considerably the ICC in its work. The important role that the Council can play by making referrals to the Prosecutor in accordance with Article 13(b) of the Statute thereby potentially extending the jurisdiction of the Court to non-States Parties,[59] and by requiring non-States Parties to comply with ICC decisions has already been explained above.[60]

[55] A more likely type of Security Council decision here may be that the Council decides that a sentenced person should be able to serve out his sentence in the State of his nationality.
[56] On the general system of the Statute relating to the acceptance of prisoners for incarceration, see TP Chimimba, 'Establishing An Enforcement Regime' in Lee, above n 23, 345 at 350–54; and GAM Strijards, 'Part 10: Enforcement' in Triffterer, above n 41, 1159 *et seq*.
[57] On the ICC–Netherlands relationship more generally, see H Corell, 'The Relationship between the International Criminal Court and the Host Country' in von Hebel, Lammers, and Schukking, above n 4, 181.
[58] See also Security Council resolution 1422 considered in Pt 6 below.
[59] See above n 6 and corresponding text.
[60] See above nn 36–38 and corresponding text.

5. THE ISSUE OF THE CRIME OF AGGRESSION AND THE POTENTIAL FOR REVIEW OF SECURITY COUNCIL DECISIONS

The possibility of the ICC being able to review Security Council decisions was a matter of considerable controversy at the Rome Conference. There was concern in particular that a future definition of aggression should not be applied by the ICC to Security Council decisions or to action that was being carried out by States pursuant to such decisions.[61] In order to prevent such an eventuality, the Statute sought to provide two safeguards. First, the Council was given the competence to defer, indefinitely if necessary,[62] the investigation or prosecution of a particular case by the ICC.[63] Secondly, the Statute stipulates in Article 5(2) that a future provision adopted by States Parties defining the crime of aggression 'shall be consistent with the relevant provisions of the Charter of the United Nations'. By requiring the future ICC definition of aggression to defer to the primary responsibility of the Security Council for the maintenance of peace, Article 5(2) clearly deprives the ICC of a primary jurisdiction to review a Council decision that an act of aggression has occurred.[64] But there is a cogent argument that Article 5(2) as presently formulated does not prevent either the Court from reviewing the legality of State action that is arguably being carried out pursuant to a Security Council resolution or the Court from reviewing, as part of its *compétence de la compétence*, the legality of adoption of a Council resolution where the resolution is a trigger for the exercise of the Court's jurisdiction.

5.1. The Potential for ICC Review of State Action Pursuant to Security Council Resolutions

The inclusion of the concept of aggression in the Statute clearly should not impinge on the Council's competence under Chapter VII to maintain or restore

[61] Wedgwood, eg, has stated that 'The worry of Washington is that the category of aggression may be misused by some states to discourage the necessary deployment of military forces in peace enforcement, peacekeeping, freedom of navigation and anti-terrorist exercises', R Wedgwood, 'The International Criminal Court: An American View' (1999) 10 *EJIL* 93 at 105. On the purported exemption from ICC investigation or prosecution by Council resolution 1422 of troops from non-state parties to the Statute who are carrying out Council authorised peacekeeping operations or military enforcement action, see Pt 6 below.

[62] See above n 40 and corresponding text.

[63] The possibility of ICC review of Council decisions was an important reason underlying the inclusion by the ILC in its Draft Statute of a consent limitation in respect of the proposed Court's jurisdiction. As Crawford stated after the adoption by the ILC of its Draft: 'Where the Council taking action under chapter VII, a prosecution "arising from" that situation may not be commenced without the Council's prior authorisation. This proviso is intended to avoid "collateral challenges" to Security Council action that is under way', J Crawford, 'The ILC Adopts a Statute for an International Criminal Court' (1995) 89 *AJIL* 404 at 413. This was not in the end, however, the approach taken at the Rome Conference which instead adopted Art 16 of the Statute which gives the Council the competence to defer, by adoption of a resolution, an investigation or prosecution by the ICC. See above n 39 and corresponding text.

[64] Arsanjani makes the point that Art 5(2) is 'intended to take account of the concerns of the permanent members of the Security Council that the statute must not be used to amend the Charter by infringing on the competence of the Council to determine acts of aggression', M Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *AJIL* 22 at 30. See also L Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16', in Lee, above n 23, 143 at 145.

international peace and security. As the German government stated in a proposal to the Preparatory Committee on the Establishment of the International Criminal Court, prior to the Rome Conference:

> It must be avoided that the definition [of aggression] somehow negatively affects the legitimate use of armed force in conformity with the Charter of the United Nations.[65]

But it is precisely this issue of whether the use of armed force has been 'legitimate' or not in a particular case that may, depending on the final definition of aggression adopted, be the subject of consideration by the Court. The point here is that Article 5(2) does not per se prevent the exercise of this jurisdiction where State action itself is not consistent with the UN Charter.

Consider, for example, possible cases referred to the ICC by a State Party that alleges a State had consistently acted beyond the scope of military measures authorised by the Council in the case of military enforcement action or in the case of UN peacekeeping that the State had instructed its troops that were part of a peacekeeping force to act outside the chain-of-command and to use proactive military force. Either of these scenarios involving the use of force against a State in circumstances that do not allegedly fall within the scope of a Security Council authorisation may, depending on the final definition of aggression that is adopted, lead at the very least to a prosecutorial investigation, if this is not deferred by the Council. If such a case were ever brought to the ICC, it would almost certainly lead to the Court having to consider the scope of the Security Council authorisation on which a State's actions were arguably based in order to determine the legality of the State's actions, and as such there would be indirect review by the ICC of Security Council decisions.

Such an exercise by the ICC of its jurisdiction should not preclude concerned States from ratifying and adopting the ICC Statute, in fact the contrary approach is required to ensure that they have the requisite degree of participation to ensure their armed forces will not be subject to the jurisdiction of the ICC. Article 121(5) of the Statute affords States Parties the right effectively to opt out of the exercise of jurisdiction by the ICC over the crime of aggression when it provides that if a Party has not accepted a proposal for amendment to Article 5, the provision dealing with the crimes within the jurisdiction of the Court, then the:

> Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

This constitutes a significant safeguard for States Parties who are wary of the future exercise of jurisdiction by the Court in relation to the crime of aggression, since

[65] Proposal by Germany concerning Art 20 of the draft Statute of the ICC to the Preparatory Committee on the establishment of an International Criminal Court, Working Group on Definitions and Elements of Crime, A/AC249/1997/WG1/DP20, 11 Dec 1997, 1 at 2.

they have the legal right to exclude their armed forces from the jurisdictional purview of the ICC.

In any case, the Court will most likely be prevented, as a matter of procedure, from exercising its potential jurisdiction in relation to aggression in the circumstances set out above. There was already at the Rome Conference a text adopted by the Preparatory Committee which set out as one of the options on the definition of aggression that the Security Council must first determine that a State has committed an act of aggression before the ICC can exercise its jurisdiction in a case.[66] This was followed up by statements of the US, UK, and Russian governments at the plenary session of the Rome Conference on the adoption of the Statute that such a prior Council determination under Article 39 of the Charter would be a necessary precondition for the exercise by the ICC of its jurisdiction over an individual for the crime of aggression.[67] This was also the position adopted earlier by the International Law Commission in its draft Statute.[68] If this is the future position adopted in relation to the crime of aggression before the ICC, then it will be highly unlikely that the Council will make a finding of aggression against a State that is participating, albeit not in accordance with the law in the area, in nominal fashion as part of a UN peacekeeping operation or a military enforcement operation pursuant to a Council authorisation. The reticence of the Security Council to make such findings may be based on a variety of reasons that include the self-interest of one or more Permanent Members in a particular case as well as the more general concern to avoid establishing a precedent in this controversial area.

If the precondition of a Council determination of aggression is required for the exercise by the ICC of its jurisdiction, then it will require a marked change in

[66] This option 3, adopted by the Preparatory Committee, reflected the outcome of negotiations between the Permanent Members of the Security Council on 'acceptable language on the crime of aggression', D Scheffer, 'The United States and the International Criminal Court' (1999) 93 *AJIL* 12 at 14. The German government also supported the requirement that the Security Council must first determine that a State has committed an act of aggression before the ICC can hear a case involving the crime of aggression: Proposal by Germany concerning Art 20 of the Draft Statute of the ICC to the Preparatory Committee on the establishment of an International Criminal Court, Working Group on Definitions and Elements of Crime, A/AC249/1997/WG1/DP20, 11 Dec 1997, 1 at 2.

[67] This approach was not, however, universally accepted at the Rome Conference. As Arsanjani observed: 'While many states preferred a fixed and independent definition of aggression insusceptible to review by the Security Council, other states, including the five permanent members, took the position that the court could exercise jurisdiction with respect to this crime only after the Council determined that an act of aggression had occurred', Arsanjani, above n 64 at 29.

[68] In the words of Crawford, the ILC Special Rapporteur concerned, 'Because aggression is the paradigmatic crime of state, there may be a problem in seeking to try individuals for aggression in the absence of a finding against the state. But there is a converse problem: it is primarily within the competence of the Security Council under Chapter VII of the Charter to determine whether an act of aggression has occurred, and such determinations by the Council are capable of having independent legal effects. The [ILC] Draft Statute seeks to resolve the problem by providing that a charge of, or directly related to, an act of aggression may not be brought unless the Security Council has first determined that the state concerned "has committed the act of aggression which is the subject of the charge" (Art 27)', J Crawford, 'The ILC's Draft Statute for an International Criminal Court' (1994) 88 *AJIL* 140 at 147.

the recent approach by the Council to making such determinations if the Court's jurisdiction is not to be rendered irrelevant. The Council has applied the label of 'aggression' very sparingly in the majority of recent cases where it has made a determination under Article 39 of the Charter.[69] A possible reason for this may be to avoid the stigmatism that accompanies such a label being applied to a State. In any case, the Court's competence to exercise its jurisdiction over the crime of aggression will only come into existence, according to Article 5(2), once a provision is adopted in accordance with Articles 121 and 123 adding to the Statute a definition of the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.[70] The political sensitivities involved in relation to the crime of aggression means that it will likely be some time before a definition is adopted.[71]

5.2. The Potential for ICC Review of Security Council Resolutions

If there is a requirement for a Security Council resolution to trigger the Court's jurisdiction in relation to aggression, then it should be noted that Article 5(2) does not necessarily prevent the ICC from reviewing the legality of the trigger resolution. In fact making a Council resolution a precondition to the exercise of the Court's jurisdiction leads arguably to the opposite conclusion, since it gives the Court the competence to wrap up with the question of its jurisdiction the issue of whether a Council resolution has been adopted in accordance with the

[69] Despite having made a number of early determinations that 'aggressive acts' had been committed by Southern Rhodesia (UN Secretariat Study, 'Historical Review of Developments Relating to Aggression', PCNICC/2002/WGCA/L1, paras 383–88) and South Africa (*ibid* paras 389–98), and a few such additional determinations in incidents concerning Benin (*ibid* para 399), Tunisia (*ibid* paras 400–2), and Iraq (*ibid* paras 403–4), the Security Council has not made a determination using the term aggression since 1990. The latter was in resolution 667 of 16 Sept 1990 where the Council, as part of its response to Iraq's invasion of Kuwait, strongly condemned 'aggressive acts perpetrated by Iraq against diplomatic premises and personnel in Kuwait, including the abduction of foreign nationals who were present in those premises', but it failed, however, to characterise more generally Iraq's invasion of Kuwait as an act of aggression.

[70] Annex 1(F)(7) of the Rome Final Act states that the Preparatory Commission, 'shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute'.

[71] On this, Bergsmo states: 'It [the ICC] will probably have competence to investigate aggression sometime in the future, provided agreement is reached on the definition of the crime and the conditions under which the Court may exercise jurisdiction over this crime. Judging from the history of attempts to define aggression and the preliminary work of the Working Group on the Crime of Aggression in the Preparatory Commission, the process is going to be very difficult and time-consuming', Bergsmo, above n 23 at 98. For a brief description of some of the difficulties in reaching agreement on the definition of aggression at the Rome Conference, see HAM von Hebel and D Robinson, 'Crimes within the Jurisdiction of the Court' in Lee, above n 23, 79 at 82–83. On the US view of this crime, see 'US View of Crime of Aggression' (2001) 95 *AJIL* 400. See also Schabas in this volume.

UN Charter and thus that its jurisdiction has been triggered in a particular case. It may prove difficult for the Court to refuse to consider the arguments of the defendant who challenges the Court's jurisdiction on the basis that the Security Council's resolution that triggered this jurisdiction was not passed lawfully.

The reason why it would be difficult for the Court to refuse to consider such issues of vires is the well-established inherent jurisdiction that a judicial tribunal possesses to determine its own jurisdiction in a case: the *compétence de la compétence* of a judicial institution. As the ICTY Appeals Chamber in the jurisdiction phase of the *Tadić* case stated:

> This power, known as the principle of 'Kompetenz-Kompetenz' in German or '*la compétence de la compétence*' in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction'. It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals … [72]

Both the International Court of Justice in the *Namibia* case[73] and the ICTY Appeals Chamber in the *Tadić* case[74] have used this inherent jurisdiction to review, in effect, the legality of Security Council resolutions. There would seem to be no legal barrier to the ICC also conducting such a review where it was strictly

[72] *Tadić* case (2 Oct 1995), Case No IT–94–1–AR72, (1996) 35 *ILM* 32 at para 18. See also B Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (CUP, Cambridge, 1953) at 275–301.

[73] In the *Namibia* case the ICJ stated that it did not possess a power of judicial review over Security Council resolutions as a matter of its 'primary' jurisdiction, but it then proceeded to examine as a matter of its 'incidental' jurisdiction the question of the validity of the Security Council resolutions that had been questioned in the case by South Africa since their legality was a precondition to the Court having jurisdiction in the case. As the Court stated: '[T]he question of the validity or conformity with the Charter of General Assembly Resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced, the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those Resolutions', *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, (1971) *ICJ Reports* 16, as contained in 49 ILR2 at 35.

[74] The Appeals Chamber in the *Tadić* case stated: 'There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own "creator". It was not established for that purpose, as is clear from the definition of the ambit of its "primary" or "substantive" jurisdiction in Arts 1 to 5 of its Statute. But this is beside the point. The question before the Appeals Chamber is whether the International Tribunal, in exercising this "incidental" jurisdiction, can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own "primary" jurisdiction over the case before it', *Tadić* case, above n 72 at para 20. The Appeals Chamber in *Tadić* went on to review the validity of Security Council resolution 827 which established the Tribunal, and in so doing discussed the limits of the powers of the Council. Nonetheless, the Appeals Chamber did find that the adoption of resolution 827 was within the powers of the Security Council, *ibid* at para 36, and that the Tribunal had been lawfully established as a measure under Chapter VII of the Charter. *Ibid* at para 40.

limited to the question of determining its jurisdiction in a case. A possible way around this, however, may be to stipulate as part of the ICC concept of aggression that the ICC must accept a Security Council resolution as being validly adopted, and as such that it cannot enquire into the legality of adoption of a Security Council resolution conferring jurisdiction on the ICC. Such a limitation would not violate the test of the ICTY Appeals Chamber which stipulates that any limitations being imposed on the jurisdictional powers of an international tribunal should 'not jeopardise its "judicial character"',[75] since it will arguably clarify rather than detract from the ICC's jurisdiction in a case.

Having established the contours of the legal relationship between the Security Council and the ICC, it is now appropriate to consider the legal consequences that flow from Security Council resolution 1422.

6. THE LEGAL CONSEQUENCES OF SECURITY COUNCIL RESOLUTION 1422

The Security Council in operative paragraph 1 of resolution 1422, acting under Chapter VII of the Charter:

> Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.

The Council continued on in operative paragraph 2 of the resolution to express 'the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary'; and in operative paragraph 3 '[d]ecides that Member States shall take no action in consistent with paragraph 1 and with their international obligations'. The terms of resolution 1422 were renewed by indentical language contained in Security Council resolution 1487 adopted on 12 June 2003. Due, however, to the extensive discussion in the Security Council preceding the adoption of resolution 1422 this is the resolution that is cited in the discussion that follows.

[75] The Appeals Chamber stated: 'A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralised structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralised or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). *Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardiizse its "judicial character"*, as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself', *Tadić* case, above n 72 at para 11. (Emphasis added).

Resolution 1422 purports to exempt from investigation or prosecution those troops from non-state parties to the Statute who are carrying out Council authorised peacekeeping operations or military enforcement action.[76] It seeks to achieve this objective by imposing different obligations on two different entities. First, the resolution, in operative paragraph 1, purports to impose an obligation on the ICC to defer an investigation or prosecution involving troops from a UN established or authorised operation pursuant to Article 16 of the ICC Statute. Secondly, the resolution, in operative paragraph 3, imposes an obligation on UN Member States to refrain from assisting the ICC to act contrary to operative paragraph 1.

As to the first purported obligation, it has been established above that the Security Council cannot per se bind the ICC or its constituent organs — *in casu*, the Court and the Prosecutor.[77] The one exception to this position is contained in Article 16 of the Statute which provides that:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Recognition that Article 16 provides the Council with the sole way in which it can bind the ICC is of practical import, since it means in the context of resolution 1422 that for the ICC to be bound by the resolution it must be in conformity with, and thereby trigger the effect of, Article 16 of the Statute. This legal position was recognised by a number of States in the Council debate preceding the adoption of resolution 1422, most of whom challenged the legal basis of the resolution by arguing that it did not fall within the scope of Article 16. The main contention here was that Article 16 was intended to give the Council a power of deferral on a case-by-case basis and not a blanket exemption. As, for example, the representative of Canada states:

> The negotiating history makes clear that recourse to Article 16 is on a case-by-case basis only, where a particular situation — for example the dynamic of a peace negotiation — warrants a 12-month deferral. The Council should not purport to alter that fundamental provision.[78]

[76] Importantly, the scope of the resolution is broader than simply trying to exempt UN peacekeepers from investigation or prosecution: it extends also to States participating in military enforcement action authorised by the Council. Cf the statement by the representative of Canada in the Security Council debate preceding the adoption of the resolution: S/PV4568, 2.

[77] See above nn 45–46 and corresponding text.

[78] S/PV4568, 4. In addition to the negotiating history, it has been contended that the specific context of Art 16 within the Statute is such that the Council may only bar the exercise of jurisdiction by the Court once a concrete investigation or prosecution is taking place. As Stahn argues: 'Arts 13, 14, and 15 of the Statute determine that investigations may be initiated by the Prosecutor upon the referral of a situation either by a state party to the Statute or the Security Council, or by a *proprio motu* action of the Prosecutor. The fact that Art 16 was inserted after, and not before Arts 14 and 15, illustrates that the deferral request was not conceived as an instrument of preventive action for the Council, but requires instead the initiation of specific ICC proceedings. Any action of the Prosecutor presupposes, at least, the

Similarly, for example, the representative of New Zealand stated in the Council debate:

> Attempts to invoke the procedure laid down in Article 16 of the Rome Statute in a generic resolution, not in response to a particular fact situation, and on an ongoing basis, are inconsistent with both the terms and purpose of that Article. While Article 16 undoubtedly allows the Security Council to stop investigations and prosecutions for a 12-month period, its wording as well as its negotiating history — and I can say that I was one of those who was involved in negotiating this among other provisions of the Statute — make clear that it was intended to be used on a case-by-case basis by reference to particular situations, so as to enable the Security Council to advance the interests of peace where there might be a temporary conflict between the resolution of armed conflict, on the one hand, and the prosecution of offences, on the other. Here, no conflict between the two arises. The Article might also be used as a protection of last resort against frivolous or political prosecutions. Again, that does not arise here. But it certainly provides no basis for a blanket immunity to be imposed in advance. Again, I would reiterate, as one who participated in the negotiations on Article 16, that this was a long and drawn-out compromise. There were concerns expressed by members of the Security Council, which were taken into account. There were concerns by non-members of the Security Council, who wished to ensure that a balance be retained; and this balance was the outcome.
>
> It would be most unfortunate, to say the least, if Article 16 were to be misused in this particular way. To purport to provide a blanket immunity in advance in this way would in fact amount to an attempt to amend the Rome Statute without the approval of its States parties. It would represent an attempt by the Council to change the negotiated terms of a treaty in a way unrecognised in international law or in international treaty-making processes. Member States would have to question the legitimacy and legality of this exercise of the role and responsibility entrusted to the Council were that to occur.[79]

The US representative responded to this contention in the Council debate by stating:

> We respectfully disagree with analyses that say that our approach is inconsistent with the Rome Statute. Article 16 contemplates that the Security Council may make a renewable request to the ICC not to commence or proceed with investigations or prosecutions for a 12-month period on the basis of a Chapter VII resolution. We believe that it is consistent both with the terms of Article 16 and with the primary responsibility of the Security Council for maintaining international peace and security for the Council to adopt such a resolution with regard to operations it authorises or establishes, and for the Council to decide to renew such requests.[80]

existence of a situation, which may give rise to investigations or prosecutions. The logical sequence underlying the functioning of the Court under Arts 13 to 16 of the Statute is that such a situation must exist before the Council may make a request under Art 16', C Stahn, 'The Ambiguities of Security Council Resolution 1422', available on *EJIL* web-site: <http://wwwejilorg/journal/new/new0210pdf, 7-8>

[79] S/PV4568, 5–6. See also the statements by the representatives of Costa Rica (S/PV4568, 14), Liechtenstein (S/PV4568, 20), Brazil (S/PV4568, 22), Mexico (S/PV4568, 26–27), and Germany (S/PV4568 (Resumption 1), 9).

[80] S/PV4568, 10.

This response does not, however, adequately address the specific — and in the view of this writer cogent — argument made by other States that the language of Article 16 cannot be stretched to provide a basis for a blanket — that is, non-specific — exemption to the Court's jurisdiction. Since resolution 1422 does not fall within the scope of Article 16 of the Statute, then it is not binding per se on the ICC. It should be emphasised, however, that the decision as to whether resolution 1422 is outside the scope of Article 16 is a decision within the sole competence of the Court. This approach is supported by Article 119 of the Statute, relating to the settlement of disputes, which provides, '[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court'. Accordingly, if an ICC investigation or prosecution were initiated against a person whom resolution 1422 seeks to exempt from the ICC's jurisdiction,[81] then not only has the Security Council provided the Court with the mandate to review resolution 1422 in order to ascertain whether it falls within the scope of Article 16 of the Statute,[82] but the Court has also been given the mandate to consider whether particular action by a non-State Party falls within a specific 'UN established or authorised operation' such that the actions of the person concerned can be said to enjoy the purported exemption afforded by the resolution. This latter enquiry would almost certainly be the first step in an ICC Chamber's decision in such a case, since it would be important to establish that a particular person fell within the scope of resolution 1422 — that is, that the operation the person was participating in was 'UN established or authorised' — before the Court could go on to examine what effect, if any, resolution 1422 would have on the exercise of the ICC's jurisdiction in the case. The Court has the competence to conduct such an enquiry since it is part of its *compétence de la compétence* as discussed above.[83]

The mandate for this separate, preliminary, enquiry by the ICC is of such importance that it deserves further illustration. Consider, for example, the military action taken against Iraq by a coalition of States in 2003, some of whom were not Party to the ICC Statute. If the ICC Prosecutor does subsequently decide to initiate an investigation against a person from a non-State Party and this investigation is inevitably challenged by the State concerned on the basis of Council resolution 1422, then it will provide the Court with a mandate to consider whether the military action by the State or States concerned can be considered as being part of a UN 'established or authorised operation' in order to determine in the first instance whether the indictee enjoys the purported exemption afforded by the

[81] This presumes, however, that it falls within the Prosecutor's discretion to initiate an investigation set out in Art 13 of the Statute: on Art 13, see above n 6. It should, however, be said that the likelihood of such an investigation being brought is highly unlikely, and even then it will require the authorisation of a Pre-Trial Chamber of the ICC pursuant to Art 15(3) of the Statute.

[82] A number of States in the Security Council debate preceding the adoption of resolution 1422 questioned whether there was a 'threat to the peace' such that the adoption of the resolution under Chapter VII of the Charter was justified. See eg, the statements by the following States representatives in the Council: Canada (S/PV4568, 3), New Zealand (S/PV4568, 5), and Germany (S/PV4568 (Resumption 1), 9). These arguments are appropriate within the context of the Security Council. However, it would seem unlikely that the Court would be able — or inclined — to review the substance of a decision by the Council using its broad discretionary (political) power under Art 39 of the Charter.

[83] See 'The Potential for ICC Review of Security Council Resolutions', above Pt 5(2).

resolution. More specifically, in the Iraq example, the Court can examine whether any military action taken is indeed authorised by Security Council resolutions 678, 687, and 1441 or any subsequent resolution passed by the Council. This type of review is no doubt one that a number of powerful States would wish to avoid, yet it is precisely what resolution 1422 requires. Whether a particular operation was 'established or authorised' by the UN is precisely the issue that the ICC will have to decide in order to ascertain whether the troops from the non-State Party or Parties concerned enjoy the purported exemption afforded by the resolution.

The second obligation contained in resolution 1422 (operative paragraph 3) is that UN Member States shall not take any action inconsistent with operative paragraph 1 which means in practice that ICC States Parties must refrain from assisting the ICC in any way to act in contravention of operative paragraph 1.[84] As discussed in more general terms in Part 4 above, a Council decision attracts the application of Articles 103 and 25 of the Charter and as such prevails over States Parties obligations under the ICC Statute.[85] More specifically, resolution 1422 overrides the general obligation of States Parties contained in Article 86 of the Statute to 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. This has the effect of paralysing the operation of the ICC in relation to those persons specified in operative paragraph 1 of resolution 1422, since the effective implementation of the Court's decisions depends in practice on States Parties affording assistance and co-operation to the ICC[86] as well as enforcing the ICC's sentences of imprisonment.[87]

[84] This second obligation contained in resolution 1422 is not directed at the ICC but at UN Member States. This has the important consequence that even if an ICC Chamber were to decide that the obligation contained in operative para 1 was not within the scope of Art 16 of the Statute and was not as such binding on the ICC, this decision would not affect the separate obligation on UN Member States under operative para 3 of the resolution.

[85] See above nn 47–48 and corresponding text.

[86] These include eg, States Parties arresting and surrendering indicted persons to the ICC (Arts 89–92 of the Statute) as well as the other forms of cooperation that the Court can require of States Parties, including eg, the following (stipulated in Art 93 of the Statute):

> 1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: (a) The identification and whereabouts of persons or the location of items; (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court; (c) The questioning of any person being investigated or prosecuted; (d) The service of documents, including judicial documents; (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court; (f) The temporary transfer of persons as provided in para 7;
>
> (g) The examination of places or sites, including the exhumation and examination of grave sites; (h) The execution of searches and seizures; (i) The provision of records and documents, including official records and documents; (j) The protection of victims and witnesses and the preservation of evidence; (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

[87] These obligations of States Parties relating to the enforcement of ICC sentences are contained in Pt 10 of the Statute. Moreover, Art 88 of the Statute stipulates that 'States Parties shall ensure that there

This approach by the Council is the antithetical type of approach that needs to be adopted by the Council in order to allow the Court to become an effective institution. The Council will need to trust the Court and support its decisions by use of its Chapter VII powers,[88] not to seek to limit the effective exercise by the ICC of its jurisdiction and powers by imposing obligations on UN Member States that obligate them to refuse to assist and cooperate with the Court. Moreover, such an approach by the Council fails to appreciate the important contribution that the ICC has to make to an international order based on the rule of law. This contribution is not limited to prosecuting crimes of international concern, but also includes, importantly, a contribution to the establishment of peace by dispensing impartial justice for acts committed in times of conflict, often an essential precondition for formerly warring ethnic factions or other groupings to begin a process of reconciliation. As Gowlland-Debbas has perceptively stated:

> The relationship between the Court and the Council cannot be seen in isolation, but must be analysed within the context of the broad, diffused and largely unsystematic efforts at the international level directed to the creation and expansion of a domain of general or public interest and the development of what can broadly be viewed as an *ordre public* of the international community. The establishment of a permanent international criminal court can be seen as a logical development of such a process, that is the creation of international institutional responses to violations of core norms forming the substance of such an *ordre public*. In the preamble to the Statute, it is emphasised that the ICC is only intended to exercise 'jurisdiction over the most serious crimes of concern to the international community as a whole'.[89]

are procedures available under their national law for all of the forms of cooperation which are specified under this Pt [Pt 9]'. Resolution 1422 will also obligate States Parties to enact an express exception in their national law implementing the ICC Statute to ensure that they do not act inconsistently with operative para 1.

[88] See Pt 3 above.

[89] V Gowlland-Debbas, 'The Relationship between Political and Judicial Organs of International Organisations: The Role of the Security Council in the New International Criminal Court' in L Boisson de Chazournes, CP Romano, R Mackenzie, (eds), *International Organisations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, New York, 2002) 195 at 196.

PART III

The Crimes

5

The Unfinished Work Of Defining Aggression: How Many Times Must The Cannonballs Fly, Before They Are Forever Banned?

WILLIAM A SCHABAS*

1. INTRODUCTION

THE INTERNATIONAL MILITARY Tribunal, at Nuremberg, in phrases that have haunted discussions about prosecution of aggression ever since, described the planning and waging of aggressive war as a crime 'of the utmost gravity':

> War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[1]

Even at the time, there was a ring of uncertainty to these eloquent words. Unlike war crimes, there was no real precedent to justify prosecution. When the defendants invoked the principle of legality, known by the Latin dictum *nullum crimen sine lege*, the judges answered:

> To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.[2]

Many were unconvinced,[3] and have remained so. In an interview many years later, RVA Röling, who had been a judge at the Tokyo Trial, told Antonio Cassese: '[I]n

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[1] *United States of America et al v Goering et al*, International Military Tribunal, Judgment, 30 Sep–1 Oct 1946 (1947) 41 *AJIL* 172.

[2] *Ibid.*

[3] *Ibid.* For a discussion of the principle of legality as applied by the International Military Tribunal, see Q Wright, 'Legal Positivism and the Nuremberg Judgment' (1948) 42 *AJIL* 405; Q Wright, 'The Law of the Nuremberg Trial' (1947) 41 *AJIL* 62.

my view, aggressive war was not a crime under international law at the beginning of the war'.[4] According to Yoram Dinstein, 'it seems only fair to state that when the London Charter was concluded, Article 6(a) [providing for prosecution of war] was not really declaratory of preexisting customary international law'.[5] When it came to sentencing, the judges themselves implicitly revealed their own doubts about whether crimes against peace was really the 'supreme crime'. Those found guilty of crimes against peace alone, like Rudolf Hess, were only sentenced to life imprisonment, whereas others convicted of crimes against humanity but not crimes against peace, like Nazi propagandist Julius Streicher, were condemned to death and subsequently executed.[6]

2. HOW AGGRESSION BECAME THE SUPREME CRIME

In 1943, when the Allies first convened the United Nations War Crimes Commission, after pledging to pursue Nazi criminals to the ends of the earth, the very idea of prosecuting crimes against peace did not even figure in their plans. It was called the 'War Crimes Commission' for good reason, in that there was a general view that international law allowed prosecution only for violations of the laws and customs of war, by then largely codified in the 1907 *Hague Regulations*[7] and developed in the post-World War I work of the Commission on Responsibilities.[8] At the 1919 Paris Peace Conference, Lloyd George had said that '[t]here was also a growing feeling that war itself was a crime against humanity …'.[9] But the Commission on Responsibilities argued against prosecution of 'premeditation of a war of aggression',[10] although adding that '[i]t is desirable that for the future *penal sanctions* should be provided for such grave outrages against the elementary principles of international law'.[11]

According to the official history of the United Nations War Crimes Commission, '[b]y far the most important issue of substantive law to be studied by the Commission and its Legal Committee was the question of whether aggressive

[4] RVA Roling and A Cassese, *The Tokyo Trial and Beyond* (Polity Press, Cambridge, 1993) 98.
[5] Y Dinstein, *War, Aggression and Self-Defence* (CUP, Cambridge, 2001) 109.
[6] The President of the Tokyo Tribunal, in a separate opinion, noted Nuremberg's uncertainty on the issue, and said that 'no Japanese accused should be sentenced to death for conspiring to wage, or planning and preparing, or initiating, or waging aggressive war'. *United States of America et al v Araki et al*, Judgment, 12 Nov 1948, in RVA Roling and C Ruter (eds), *The Tokyo Judgment*, Vol II (APA-University Press Amsterdam, Amsterdam, 1977) 478.
[7] *Convention (IV) Respecting the Laws and Customs of War by Land*, [1910] UKTS 9, annex.
[8] *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919* (Clarendon Press, Oxford, 1919).
[9] D Lloyd George, *The Truth About the Peace Treaties* (vol I) (Victor Gollancz, London, 1938) 96.
[10] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office, London, 1948) 237.
[11] *Ibid* 238 (emphasis in the original).

war amounts to a criminal act'.[12] Whether or not 'aggression' might fit within the overall mandate of the Commission appears to have been raised for the first time in March 1944 during the first sessions of the Legal Committee, by Bohuslav Ecer of Czechoslovakia.[13] Ecer's proposal to include aggressive war within the overall scope of war crimes was favourably received by the Legal Committee of the United Nations War Crimes Commission when it met in March 1944. The concept was included in its draft resolution on the 'Scope of the Retributive Action of the United Nations', where it was defined as '[t]he crimes committed for the purpose of preparing or launching the war, irrespective of the territory where these crimes have been committed'.

But the Legal Committee's submission to the Plenary Commission in June 1944 was returned to it for further study. Opponents were apparently concerned that the proposal would be too radical for member governments.[14] The British expert Arnold McNair, in views reflecting those of his government, advised the Commission that aggressive war, though reprehensible, did not constitute a crime under international law.[15] A majority of the Legal Committee accepted McNair's opinion, and said so in its report: '[A]cts committed by individuals merely for the purpose of preparing for and launching aggressive war, are, *lege lata*, not "war crimes"'.[16]

Within the United States government, the debate about whether aggressive war should be punishable only surfaced in November 1944. As Bradley Smith's study demonstrates, the possibility of prosecution for 'aggressive war' bitterly divided American officials and policy-makers. A memorandum prepared by William C Chanler, a War Department official and protégé of Secretary of War Henry Stimson, argued that the Kellogg-Briand Pact of 1928 had operated a major change in the applicable law.[17] A somewhat more ingenious strategy was being devised by Murray Bernays, who sought to fold everything under the rubric of 'conspiracy'. As he explained, lawful acts might nevertheless be steps in a conspiracy, although they would not necessarily be war crimes. Bernays explained that violating the Kellogg-Briand Pact might not in itself be a crime, but it could be considered conspiratorial and thereby 'lend support to the theory of group criminality'.[18] The record suggests that this was not a matter of high principle, over whether or not and how to codify the 'supreme crime', but rather more a question of prosecutorial tactics. The appeal of prosecuting aggression, or conspiracy to commit it, was that there would be little doubt that the Nazi leaders would be convicted.

[12] *Ibid* 180.
[13] A Kochavi, *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment* (University of North Carolina Press, Chapel Hill and London, 1998) 97.
[14] *Ibid* 97; United Nations War Crimes Commission, see above n 10 at 180–81.
[15] See A Kochavi, above n 13 at 97–98; United Nations War Crimes Commission, above n 10 at 140.
[16] 'Report of the Sub-Committee appointed to consider whether the preparation and launching of the present war should be considered "war crimes"', Doc C 55, 27 Sept 1944.
[17] B Smith, *The Road to Nuremberg* (Basic Books, New York, 1990) 95.
[18] See A Kochavi, above n 13 at 207.

Ultimately, the United Nations War Crimes Commission did not resolve the question, at least, not until after the London Conference of the four powers — the United States of America, the United Kingdom, France and the Soviet Union — had decided that 'crimes against peace' should be part of the subject-matter jurisdiction of the International Military Tribunal. By May 1945, the United States Department of Justice was already making detailed preparations of the case against the Nazi leaders. Justice Robert Jackson's staff pushed for a prosecutorial strategy built around the claim that prior to 1 September 1939, the Nazi leaders had 'entered into a common plan or enterprise' to establish 'complete German domination of Europe and eventually the world'.[19] Aggressive war conspiracy was to become, notes Bradley Smith, 'the transcendent theme of Nazism'.[20]

By 31 July 1945 the United States had reformulated the provision as 'The Crime of War'.[21] The draft text included a specific reference to the Kellogg-Briand Pact. At the 2 August session,[22] Britain pointed out that the Soviet specialist, Professor Trainin, had treated aggression not as a 'crime of war' but a 'crime against peace', and agreement was quickly reached on this minor change in terminology. Crimes against peace were defined in Article VI(a) of the Charter of the International Military Tribunal as follows:

> namely, planning, preparation, initiation and waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[23]

A year later, the judges were calling it the 'supreme crime'.

Scrutiny of the *travaux préparatoires* of this initial debate about prosecuting aggression suggests it was driven by concern that the highest leaders of the Nazi regime might go unpunished. Focusing on war crimes as they had been defined traditionally ran the risk that soldiers at the lowest level and their immediate commanders would become the targets of prosecution, but that it would be difficult to follow the chain up to the higher levels. The defendants at the Leipzig trials were commanders of U-boats and prisoner-of-war camps, not admirals and generals. Contemporary international criminal law has developed techniques to facilitate the conviction of those in the upper level of the hierarchy of evil, such as the concept of command or superior responsibility[24] and that of 'joint criminal enterprise' complicity.[25] Although the origins of the two techniques can be traced

[19] See B Smith, above n 17 at 233.
[20] *Ibid.*
[21] 'Revision of Definition of "Crimes" Submitted by American Delegation, July 31, 1945', in *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials* (US Government Printing Office, Washington, 1949) 395.
[22] 'Minutes of Conference Session of Aug 2, 1945', *ibid* 416–17.
[23] *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)*, 8 Aug 1945, (1951) 82 UNTS 280 annex Art VI (a).
[24] Eg, *Rome Statute of the International Criminal Court*, UN Doc A/CONF 183/9, Art 28.
[25] *Prosecutor v Tadić*, Judgment, (15 July 1999), Case No IT–94–1–A, para 677.

to the post-Second World War jurisprudence, little or no thought had been given to them by the experts assembled in London in 1944 and 1945. The prospect of tracing a chain of criminal liability for war crimes up through the ranks from an SS commander in Normandy to the high command in Berlin must have seemed daunting indeed, although in the end it did not prove to be too great a problem for prosecutors.

3. FROM NUREMBERG TO ROME

In the aftermath of the Nuremberg judgment, the United Nations General Assembly affirmed the principles of international law recognised by the judgment of the Nuremberg Tribunal.[26] Subsequent work by the International Law Commission on the *Draft Code of Offences Against the Peace and Security of Mankind* explored a possible definition of the crime of aggression.[27] General Assembly Resolution 599(VI), adopted in January 1952, said it was 'possible and desirable, with a view to ensuring international peace and security and for the development of international criminal law, to define aggression by reference to the elements which constitute it'. Unable to make significant progress, due essentially to the political tensions accompanying the Cold War, in 1954 the General Assembly decided to establish a special committee charged with studying the definition of aggression.[28] In practice, it amounted to shelving the matter, and with it, progress in developing both the *Code of Offences* and the preliminary work on establishment of a permanent international criminal court.

Only two decades later, in 1974, did the General Assembly finally endorse the work of its committee, adopting Resolution 3314(XXIX), which contained in an annex a proposed definition of aggression: 'use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'. This general provision was supplemented with a list of acts that qualify as clear-cut acts of aggression.[29] The enumerated acts of direct aggression must be committed by the armed forces of a State against another State, and include invasion, occupation or annexation, bombardment or the use of any weapons, blockade, attack, and the use of armed forces by a State in violation of a status of forces agreement regarding these forces or the extension of their stay beyond the end of such agreement.[30]

[26] 'Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal', GA Res 95(I) (1946).
[27] See eg, 'Question of Defining Aggression', UN Doc A/1858, pp 8–14.
[28] See GA Res 897(IX). This was reiterated in GA Res 898(IX).
[29] See J Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression' (1977) 71 *AJIL* 224.
[30] B Ferencz, *Defining International Aggression: The Search for World Peace*, Vol II (Oceana, New York, 1975) 33–37; A Rifaat, *International Aggression*, (Almqvist and Wiksell International, Stockholm, 1979) 269–71; UN Doc A/2087.

The International Court of Justice has referred to portions of Resolution 3314 as being a reflection of customary international law.[31]

In 1981 the General Assembly asked the International Law Commission to resume its work, suspended since 1954, on the *Draft Code of Offences Against the Peace and Security of Mankind*.[32] Only completed in 1996, what in the meantime had been renamed the *Draft Code of Crimes Against the Peace and Security of Mankind* established individual criminal responsibility for any individual who 'as leader or organiser, actively participates in or order the planning, preparation, initiation or waging of aggression committed by a State'.[33] According to the Commentary, the crime is aimed at 'leaders' or 'organisers', that is, individuals who hold a position of authority or power enabling them to play a decisive role in committing aggression.[34] This is consistent with the definition of crimes against peace in the Nuremberg Charter, and with judicial decisions by the post-war tribunals requiring that offenders be 'individuals at the policy-making level'.[35] The Commentary indicates that the act of aggression committed by a State is a '*sine qua non* condition' for the attribution of individual criminal responsibility in relation to the crime of aggression.[36]

In the meantime, the draft statute for an international criminal court, submitted by the International Law Commission to the United Nations General Assembly in 1994, included aggression within the list of punishable crimes, alongside genocide, war crimes and crimes against humanity.[37] None of the crimes was defined. Moreover, the draft statute flagged a special issue concerning aggression that set it apart from the other crimes:

> A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.[38]

[31] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, [1986] ICJ Reports 14, 103.
[32] GA Res 36/106.
[33] 'Draft Code of Crimes Against the Peace and Security of Mankind', in *Yearbook of the International Law Commission*, 1996, vol II (2), UN Doc A/51/10, Art 2(2). See M Ortega, 'The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind', (1997) 1 *Max Planck Y B United Nations Law* 283; J Allain and JRWD Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind' (1997) 8 *EJIL* 100; R Rayfuse, 'The Draft Code of Crimes Against the Peace and Security of Mankind: Eating Disorders at the International Law Commission' (1997) 8 *Criminal Law Forum* 52.
[34] 'Draft Code of Crimes Against the Peace and Security of Mankind', *ibid* Art 16, Commentary, para 2: These would include persons occupying high-level posts in the military, the diplomatic corps, political parties and industry.
[35] *United States v von Leeb* ('German High Command Trial'), (1949) 11 TWC 1, 15 ILR 376.
[36] 'Draft Code of Crimes Against the Peace and Security of Mankind', see above n 33, Art 16, Commentary, para 4.
[37] 'Draft Statute of the International Criminal Court', in *Report of the International Law Commission to the General Assembly on the work of its forty-sixth session*, UN Doc A/CN 4/SER A/1994/Add 1 (Pt 2), Art 20. See J Crawford, 'The ILC Adopts a Statute for an International Criminal Court' (1995) 89 *AJIL* 404; J Crawford, 'The ILC's Draft Statute of an International Tribunal' (1994) 88 *AJIL* 140.
[38] *Ibid* Art 23(2).

Although the International Law Commission felt aggression should be included in the draft statute, it quickly became evident, when negotiations began under the authority of the General Assembly, in 1995, that there was considerable division on this issue, even among the academic commentators and non-governmental organisations.[39] The Ad Hoc Committee established by the General Assembly, which met during 1995, took note of an expert meeting held that year under the auspices of the International Association of Penal Law, the International Institute of Higher Studies in Criminal Sciences and the Max Planck Institute for Foreign and International Criminal Law that had reacted to attempts to exclude aggression, nearly 50 years after the Nuremberg judgment, as being 'retrogressive'.[40] Although the precedent of the Nuremberg and Tokyo trials was compelling,[41] it was undeniable that the more contemporary international tribunals, established by the Security Council to deal with the former Yugoslavia and Rwanda, had steered clear of the crime of aggression. Their jurisdiction was limited to the other core crimes, that is, genocide, crimes against humanity, and war crimes. The apparent explanation was that this would protect the ad hoc tribunals from 'the political issues surrounding the conflict'.[42] This argument was, of course, just as valid for a permanent tribunal as it was for a temporary one.[43]

Those delegations opposed to including aggression invoked several practical arguments. They said that agreement on the matter would be difficult, and might delay the entire project. The Nuremberg precedent was of limited significance, they said, because it dealt with a war of aggression that had already been waged. The new court would need a definition applicable to future conflicts, and would have to address such difficult concepts as self-defence and humanitarian intervention. Endorsement of the 1974 General Assembly definition was not a realistic solution because it had been drafted so as to assist the Security Council, and not for the purposes of defining individual criminal responsibility.[44]

The International Law Commission had proposed that any prosecutions for aggression be subordinated to the authority of the Security Council, but this solution troubled some participants in the Ad Hoc Committee. There were objections to the idea of letting the Council make a determination of aggression that would bind subsequent judicial decision-making. How could an accused undergo a fair trial if the central factual issue had been determined elsewhere, it was asked.[45]

[39] LN Sadat, *The International Criminal Court and the Transformation of International Law, Justice for the New Millenium* (Transnational, Ardsley, New York, 2002) 135.
[40] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN Doc A/50/22 p 13, para 63.
[41] *Ibid.*
[42] J O'Brien,'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 87 *AJIL* 640, 645.
[43] *Contra* C Tomuschat, 'Crimes Against the Peace and Security of Mankind and the Recalcitrant Third State' (1994) 24 *Israel Y B Hum Rts* 41 at 52.
[44] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', see above n 40, pp 13–14, para 64.
[45] *Ibid* p 15, para 70.

Moreover, it had never been suggested that the International Court of Justice, which was already in a position to rule on cases of aggression,[46] was dependent upon or bound by Security Council decisions, so there was nothing inherently objectionable in letting a judicial body consider the matter.[47] Some also pointed out that there had never been a prohibition on national courts prosecuting aggression (although very few national legal systems allow such prosecutions); consequently, why should the new international court be forbidden to do what could be carried out by national courts?

The debate resumed in sessions of the Preparatory Committee held during 1996 and 1997, with essentially the same arguments being raised for and against including aggression within the court's subject-matter jurisdiction.[48] By 1996, a variety of texts had been submitted as proposed definitions of the crime, although they were said to be presented only 'for illustrative purposes', associated with a menacing footnote: 'Some delegations believe that they are all inadequate. Some delegations are for and some are against the inclusion of "aggression" in the crimes covered by the International Criminal Court'.[49] One suggestion was simply to include the definition in the Nuremberg Charter, but critics said it was too imprecise, as well as being too restrictive and outdated.[50] Many considered the 1974 resolution of the General Assembly as the best reference.[51] Still others argued that it would be preferable not to define the crime, leaving determination to the court itself.[52]

The role of the Security Council remained central to the problems of addressing aggression within the draft statute. Concern was expressed that leaving the determination with the Council would expose prosecutions to the veto by one of the permanent members, effectively excluding the court when the interests of one of these great powers was directly threatened.[53] It was also remarked that the Security Council had never seemed particularly eager to qualify an act as 'aggression', despite the authorisation to do so in Article 39 of the *Charter of the*

[46] See eg, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* above n 31.
[47] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', see above n 40, p 15, para 71.
[48] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/10, Vol I, paras 65–69, pp 18–19. See A Carpenter, 'The International Criminal Court and the Crime of Aggression' (1995) *Nordic J Int'l L* 223; G Dawson, 'Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression' (2000) 19 *NYL Sch J Int'l and Comp L* 413; J Hogan-Doran and B Van Ginkel, 'Aggression as a Crime under International Law and the Prosecution of Individuals by the Proposed International Criminal Court' (1996) 43 *Netherlands Int'l L R* 321.
[49] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/10, Vol II, p 58, at n 7.
[50] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol I, see above n 48, paras 65–69, pp 18–19, para 71, p 19.
[51] *Ibid* para 72, p 19.
[52] *Ibid.*
[53] *Ibid.*

United Nations.[54] In fact, in its entire history it had done this precisely once, in 1976, when it denounced 'South Africa's aggression against the People's Republic of Angola'.[55] More recently, when Iraq had invaded Kuwait in 1990, the Council spoke of a 'breach of the peace'.[56]

Meanwhile the more general debate about the role of the Security Council evolved somewhat, and the original scheme of the International Law Commission by which the work of the court was in effect subordinated to the Council, in a rather neat hierarchical relationship, began to unravel. Article 23 of the International Law Commission draft of 1994 allowed the Security Council to block prosecutions when matters were being considered by it, and this went a long way to solving any potential conflicts with the new court. But by 1997, consensus was building around a proposal from Singapore that only allowed for Security Council intervention by resolution, and this meant that one or more permanent members could not automatically veto prosecution. The 'Singapore compromise', as it was known, became Article 16 of the final text adopted at Rome in July 1998.[57]

In preparation for the 1998 Rome Diplomatic Conference, the various proposals were consolidated into a virtual compendium.[58] The square brackets, of course, indicated that no consensus had yet been reached. As can be seen, the entire draft provision — or rather provisions, for there were three distinct options — was in square brackets, along with all of its components:

> [[5] Crime of aggression[6]]
>
> **NB See also Article 23 (Individual criminal responsibility).**
> Note: This draft is without prejudice to the discussion of the issue of the relationship of the Security Council with the International Criminal Court with respect to aggression as dealt with in Article 10.
>
> Option 1
> [For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]:
> (a) planning, The Preparatory Committee considered this crime without prejudice to a final decision on its inclusion in the Statute.

[54] Also para 139, pp 32–33.
[55] SC Res 387 (1976).
[56] SC Res 661 (1990).
[57] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol I, see above n 48, para 143, p 33. See L Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16', in RS Lee (ed), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer, The Hague, 1999) 143–52 at 149–52.
[58] 'Draft Statute for the International Criminal Court', UN Doc A/CONF 183/2/Rev1, pp 14–16. See also 'Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 February 1997', UN Doc A/AC 249/1997/L 5, 1997, pp 14–15; 'Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands', UN Doc A/AC 249/1998/L 13, pp 19–20.

(b) preparing,
(c) ordering,
(d) initiating, or
(e) carrying out
[an armed attack] [the use of armed force] [a war of aggression,] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council].]

Option 2

1. [For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.]

[2. [Acts constituting [aggression] [armed attack] include the following:][7]
[Provided that the acts concerned or their consequences are of sufficient gravity, acts constituting aggression [are] [include] the following:]
   (a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
   (b) bombardment by the armed forces of a State against the territory of another State [, or the use of any weapons by a State against the territory of another State];
   (c) the blockade of the ports or coasts of a State by the armed forces of another State;
   (d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
   (e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond their termination of the agreement;
   (f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
   (g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.]

Option 3

[1. For the purpose of the present Statute [and subject to a determination by the Security Council referred to in article 10, paragraph 2, regarding the act of a State], the crime of aggression means either of the following acts committed by an

individual who is in a position of exercising control or capable of directing the political or military action of a State:

(a) initiating, or

(b) carrying out

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in [manifest] contravention of the Charter of the United Nations [with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.]

2. Where an attack under paragraph 1 has been committed, the

(a) planning,

(b) preparing, or

(c) ordering thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.]

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[5] This square bracket closes at the end of paragraph 2.

[6] The proposal reflects the view held by a large number of delegations that the crime of aggression should be included in the Statute.

[7] Paragraph 2 of the text reflects the view held by some delegations that the definition should include an enumeration of the acts constituting aggression.

The German delegation attempted to generate some consensus around the most narrow of the three proposals, 'Option 3'. It did not garner 'general support', but was said to be 'the most widely supported' prior to the Rome Conference.[59]

At Rome, in June–July 1998, Tanzania took the lead in coordinating discussions on the subject. These were not held openly, in one of the many working groups, but rather on the margins of the Diplomatic Conference. With respect to the definition itself, the German approach was felt by some States to be too restrictive. A new proposal from several Arab and Islamic States included situations 'depriving other peoples of their right to self-determination, freedom and independence' and 'by resorting to armed force to threaten or violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those people'.[60] Defenders of Germany's narrower definition warned of the danger of politicising the court. But it was not so much the definition of aggression as the question of the role of the Security Council that brought out the geo-political divisions and tensions. States from the non-aligned movement were increasingly open in their calls to exclude entirely any role for the Security Council in the prosecutorial process. Along these lines, a Mexican amendment simply removed any reference to the Security Council in the Statute.[61] On the other side were the permanent members

[59] H von Hebel and D Robinson, 'Crimes Within the Jurisdiction of the Court', in RS Lee, see above n 57, 79–126, at 83.

[60] UN Doc A/CONF 183/V 1/L 37/Corr 1 (10 July 1998).

[61] UN Doc A/CONF 183/C1/L 81 (15 July 1998).

of the Security Council, several of them lukewarm about the whole idea of the court, and determined to preserve the role of the Council as a *sine qua non* if there was to be any question of aggression falling within the subject matter jurisdiction. The so-called 'like-minded group', which drove so much of the agenda during the Rome Conference, kept a wide berth of the entire issue of aggression.

The impossibility of consensus on both a definition and on the conditions of prosecution became increasingly evident. In a proposal dated 9 July, barely a week before the Conference was scheduled to conclude, the Bureau urged delegations to reach agreement on a definition by 13 July or else 'the Bureau will propose that the interest in addressing these issues be reflected in some other manner, for example, by a Protocol or review conference'.[62] Insisting that it was essential to include aggression within the court's jurisdiction, the non-aligned States made a last-ditch proposal, on 14 July, by which the crime of aggression would be included within the Statute, but its precise definition left to a subsequent stage of negotiation. Accordingly, until agreement was reached on defining the crime, the court would be unable to prosecute such cases.[63] Some members of the Bureau answered this with an unofficial proposal by which the Conference would adopt a resolution noting the importance of the crime and mandating further work on the subject,[64] a solution that was eventually adopted in the *Final Act* to deal with other controversial categories of crimes, such as drug offences and terrorism.

Early in the morning of the final day of the Conference, 17 July 1998, at a point when there was really no further room to negotiate, the Bureau submitted its 'take it or leave it' compromise draft statute. The Bureau had artfully finessed the issue, largely adopting the recent proposal of the non-aligned States with a direct mention of the crime of aggression, but appeasing those who were concerned about the position of the Security Council, including the five permanent members, by adding that the definition 'shall be consistent with the relevant provisions of the Charter of the United Nations'. Matthias Schuster has described the resulting provision, Article 5 of the Rome Statute, as a 'codified impasse'.[65]

According to Darryl Robinson and Herman Von Hebel, '[t]he result of this compromise is that the Court's jurisdiction over the crime is recognised, at least theoretically, but that jurisdiction cannot be exercised until the definition and appropriate preconditions are developed and agreed upon'.[66] For Andreas Zimmermann, Article 5(2) is even more demanding, although his conclusion can at best only be implied by the provision:

> Any such amendment must contain safeguards that the Court will not prosecute an individual for the crime of aggression without a prior determination by the Security

[62] UN Doc A/CONF 183/C 1/L 59 (5 July 1998) and Corr 1.
[63] UN Doc A/CONF 183/C 1/L 75.
[64] H von Hebel and D Robinson, see above n 59 at 85.
[65] M Schuster, 'The Rome Statute of an International Criminal Court and the Crime of Aggression: A Gordian Knot in Search of a Sword' (2003) 14 *Criminal Law Forum* 1.
[66] H von Hebel and D Robinson, see above n 59 at 85.

> Council under Chapter VII of the Charter that the underlying action by the State concerned amounted to an act of aggression.[67]

But Leila Nadya Sadat says the Statute is 'less clear', noting that the United States Ambassador-at-Large for War Crimes, David J Scheffer, referred to the Statute's 'opacity' on this point as one of the reasons why the United States voted against the treaty.[68]

4. A WAY FORWARD?

Resolution F, adopted as part of the *Final Act* of the Rome Diplomatic Conference, mandated the establishment of a Preparatory Commission for the International Criminal Court, to be created formally by the United Nations General Assembly. It was given special responsibility with respect to the crime of aggression:

> The Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Statute.[69]

This may have been another piece in the jigsaw of compromise, or perhaps only one of the inevitable inconsistencies in a complex package of documents prepared by exhausted diplomats. Article 5(2) of the Statute had imposed an important technical condition, requiring that the definition of aggression be 'adopted in accordance with Articles 121 and 123', presumably meaning that the work can only be concluded at the Review Conference to be held seven years after the entry into force of the Statute, although there has been some debate about this.[70] Yet according to Article 8 of Resolution F, the Preparatory Commission was to conclude its activities with the entry into force of the Statute, and not seven years after.

[67] A Zimmermann, 'Article 5', in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden, 1999) 97–106, at 106. On the interpretation of Art 5(2), see also G Gaja, 'The Long Journey Towards Repressing Aggression', in A Cassese, P Gaeta and JRWD Jones, *The Rome Statute of the International Criminal Court, A Commentary* (OUP, Oxford, 2002) 427–41.

[68] LN Sadat, see above n 39, at 137 n 38.

[69] UN Doc A/CONF 183/10 (1998).

[70] Some have argued that the seven-year time limit does not apply to the crime of aggression. See eg, T Slade and RS Clark, 'Preamble and Final Clauses', in RS Lee, above n 57, 433. According to O Triffterer, 'the reference in Article 5 para 2 to Articles 121 and 123 […] is limited to the *ways of adoption* mentioned therein but not to the time limit contained in these articles' (O Triffterer, 'Preliminary Remarks: The Permanent ICC — Ideal and Reality', in O Triffterer, see above n 67, at 40 (emphasis in the original).

But when the Preparatory Committee wound up its activities in September 2002, as the first meeting of the Assembly of States Parties convened, the whole process was barely closer to agreement than it had been at Rome, four years earlier.

At its first session, in February 1999, the Preparatory Commission undertook what was prudently described as 'a preliminary consideration of the modalities of discussion' for a definition of the crime of aggression.[71] In August 1999, the Chair of the Commission, Philippe Kirsch, expressed regret that considerable time had been spent on organisational issues relating to the definition of aggression, to the detriment of substantive discussions, and that there were 'persistent differences' among delegations on the principle and timing of establishing the working group.[72] There was clearly much concern that the non-aligned States who had grudgingly accepted the compromise in Article 5 would begin to view it as little more than legal subterfuge, a cynical charade with no substance. This could compromise the pace of ratification, which at the time few of the Court's promoters expected to move as quickly as it actually did over the next few years. The Commission agreed to establish the working group[73] which began meeting in December 1999. An initial discussion paper set out essentially definitional options as well as various proposals on how the jurisdiction would be exercised.[74] The work proceeded under the leadership of Tubako Manongi of Tanzania and then, subsequently, of Argentine diplomat Sylvia Fernandez de Gurmundi (who in 2003 was appointed chief of staff of the Prosecutor of the International Criminal Court).[75]

The Preparatory Commission released a new version of its proposals for a definition of aggression at its ninth and penultimate session in April 2002.[76] At the Tenth Session of the Preparatory Commission, in July 2002, Fernández de Gurmendi issued yet another discussion paper,[77] incorporating a proposal on the 'Elements' of aggression submitted by Samoa.[78] In September 2002, the Assembly of States Parties decided to establish a Special Working Group on the Crime of Aggression whose membership is open not only to States Parties but also to all

[71] 'Proceedings of the Preparatory Commission at its First Session (16–26 Feb 1999), Summary', UN Doc PCNICC/1999/L 3/Rev1, para 11.
[72] UN Press Release L/2932, 9 Aug 1999.
[73] UN Doc PCNICC/1999/L 4/Rev 1, para 8, p 8; UN Doc PCNICC/1999/L 5/Rev 1, para 16, p 3.
[74] UN Doc PCNICC/1999/L 5/Rev 1, p 26.
[75] S Fernandez de Gurmendi, 'The Working Group on Aggression at the Preparatory Commission for the International Criminal Court' (2002) 25 *Fordham Int'l LJ* 589; R Pierce, 'Which of the Preparatory Commission's Latest Proposals for the Definition of the Crime of Aggression and the Exercise of Jurisdiction Should be Adopted into the Rome Statute of the International Criminal Court' (2001) 15 *BYUJ Pub L* 281; T Meron, 'Defining Aggression for the International Criminal Court' (2001) 15 *Suffolk Transnat'l L Rev* 1.
[76] 'Proceedings of the Preparatory Commission at its Ninth Session (8–19 April 2002)', UN Doc PCNICC/2002/L 1/Rev 1, pp 19 *et seq.*
[77] 'Discussion Paper Proposed by the Coordinator', UN Doc PCNICC/2002/WGCA/RT 1/Rev 2.
[78] 'Elements of the Crime of Aggression, Proposal Submitted by Samoa', UN Doc PCNICC/2002/WGCA/DP 2.

member States of the United Nations and specialised agencies.[79] It is to meet during the annual sessions of the Assembly of States Parties, beginning September 2003. The Assembly has not closed the door on 'inter-sessional' meetings of the Working Group, on the proviso that funding be provided by a sympathetic government.

With respect to the definition of aggression, there have really been no significant developments since Rome. There are still three basic approaches: a general definition of aggression, a definition based on the result of occupying or annexing the territory of an attacked State, a general definition followed by a list of acts derived from the 1974 General Assembly resolution, and a definition taken from Article 6 of the Nuremberg Charter. A proposal originating from the Russian Federation sets the threshold at a rather low level, referring to 'any of the following acts: planning, preparing, initiating, carrying out a war of aggression'. It encompasses acts of aggression falling short of war.[80] At the other end of the spectrum are the Germans, whose proposal requires that the 'armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State'.[81]

An important aspect of the definition of the crime concerns the relevance of the provisions of the Rome Statute governing general principles of criminal law.[82] There is widespread support for the idea that aggression can only be committed by political or military leaders. Article 25 of the Rome Statute sets no such threshold *ratione personae* on prosecutions, and it will therefore be necessary to exclude the application of these general principles with respect to prosecutions for the crime of aggression. This might well have the consequence of excluding accomplices from liability under the Statute, such as powerful allies of a small State that might encourage it to attack another country in what might be little more than a proxy war. For example, the occupation of East Timor by Indonesia in 1974 might readily meet the proposed definition of aggression. It is widely believed to have been conducted at the instigation of United States President Gerald Ford and Foreign Secretary Henry Kissinger, who visited Jakarta only hours before the attack and, in effect, authorised it to proceed. It would be a shame if the International Criminal Court was foreclosed from addressing similar cases of incitement or abetting of aggression, which is ordinarily punishable with respect to the other crimes within the Court's jurisdiction.

Other issues of concern include difficulty in applying the Statute's complementarity provisions to prosecutions for aggression. The Statute is predicated on the idea that national courts have the primary responsibility for dealing with

[79] 'Continuity of Work in Respect of the Crime of Aggression', ICC-ASP/1/Res 1.
[80] UN Doc PCNICC/1999/DP 12.
[81] UN Doc PCNICC/1999/DP 13.
[82] See 'Preliminary List of Possible Issues Relating to the Crime of Aggression, Discussion Paper Proposed by the Coordinator', UN Doc PCNICC/2000/L 1/Rev 1, pp 42–43, at p 43.

impunity, and that only when they are unwilling or unable to bring perpetrators to book may the International Criminal Court step in.[83] Commentators have argued about whether this requires States to actually introduce the text of Articles 6, 7 and 8 into their national criminal codes or whether it is sufficient for them to ensure that the underlying crimes — murder, rape, torture and so on — are addressed. Either solution seems viable with respect to genocide, crimes against humanity and war crimes, as well as with the as-yet-uncodified 'treaty crimes', such as drug offences and terrorism, but the logic breaks down entirely in cases of aggression. Germany is one of the rare States to have provided for the crime of aggression in its national law, although there have been few prosecutions.[84] Yet even Germany, in adopting its new code of international crimes, has remained silent on the crime of aggression so as not to jeopardise the ongoing discussions within the International Criminal Court.[85]

The Rome proposals concerning exercise of jurisdiction have evolved somewhat, partly because the original model of the International Law Commission, by which the court was subordinated to the Security Council, no longer applies. Several options are now being considered. A distinction can be made between Article 5 of the Rome Statute, which speaks of the 'crime of aggression', and Article 39 of the *Charter of the United Nations*, which gives the Security Council responsibility for establishing the existence of an 'act of aggression'. The Samoan proposal on 'Elements' attempts to introduce this distinction into the definition. Many hold to the view that an 'act of aggression' is a prerequisite for commission of the 'crime of aggression', and that any trigger mechanism for prosecution of aggression must acknowledge the primary responsibility of the Security Council. In 2000, the United States made the distinction between an 'act of aggression' and a 'war of aggression', arguing that only the latter was clearly criminal according to the 1974 General Assembly Resolution, and that the same principle should apply to the International Criminal Court.[86]

Antonio Cassese has argued that the Court should be able to act without any interference whatsoever from the Security Council, in order to 'break the [Council's] stranglehold on the notion of aggression'.[87] In his view, '[j]udicial review of aggression might prove a useful counterbalance to the monopolising power of the Security Council'.[88] It seems unlikely that a broad constituency can be built upon this view. Some imagination has gone into dealing with the likely scenario of a failure to act by the Security Council. According to one opinion,

[83] *Rome Statute of the International Criminal Court*, above n 24, Art 17(1). See Turns in this volume.
[84] A Zimmermann, 'The Creation of a Permanent International Criminal Court' (1998) 2 *Max Planck YB United Nations L* 198.
[85] G Werle and F Jessberger, 'International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law' (2002) 13 *Criminal Law Forum* 191.
[86] 'US Statement on the Crime of Aggression, Submitted to the Preparatory Commission for the International Criminal Court', 26 June 2000.
[87] A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (2000) 10 *EJIL* 146 at 147.
[88] *Ibid.*

Security Council inertia simply means that the Court will have its hands tied. But in 1950, invoking an impasse in the Security Council, the General Assembly adopted the 'Uniting for Peace Resolution',[89] which recognised that the Security Council had the primary, but not exclusive responsibility for maintaining international peace and security. On the basis of this authority, one option being considered allows the Court to proceed without Security Council authorisation after a period of time has elapsed.

There is also a proposal to involve the International Court of Justice, which would be requested to provide the International Criminal Court with an advisory opinion on the existence of an act of aggression in specific cases.[90] But a request for an advisory opinion is not without some legal difficulties. The determination of an act of aggression is a factual question, and the Court has already indicated that if a question is not a legal one, it must decline to give the requested opinion. Furthermore, the Court always has discretion to refuse to give an advisory opinion on a legal question.[91] Of course, it may only do so it if has compelling reasons.[92] Accordingly, the Court must always determine the underlying legal questions that are really at issue in a request made to it.[93] This would avoid the politicisation of the ICJ in the determination of aggression.

5. THE CHANGING CONTEXT OF THE DEBATE

All of these questions about defining and prosecuting aggression under the *Rome Statute* took on a new dimension with the armed attack on Iraq in March 2003. Two of the active belligerents, the United Kingdom and Australia, were parties to the Rome Statute at the time. Had the aggression issue already been resolved, it is easy to see how the matter might have come before the Court. French academic Alain Pellet penned an 'op-ed' in *Le Monde* describing the attack as an 'act of aggression'. Had the crime been punishable by the Court, it is not difficult to imagine Iraq deciding to ratify the Statute, during the days prior to the outbreak of hostilities, in an eleventh-hour attempt to respond to the threat of invasion.

But whether we like it or not, it is a fact that there is today more uncertainty about the prohibition on the use of force than there was in mid-1945 when, literally within weeks of each other, the San Francisco Conference adopted Article 2(4) of the *Charter of the United Nations* and the London Conference adopted Article 6(i) of the *Charter of the International Military Tribunal.* After decades in which legal doctrine insisted that there were only two exceptions to the

[89] GA Res 377(A) (VI).
[90] 'Discussion Paper Proposed by the Coordinator', UN Doc PCNICC/2002/WGCA/RT 1/Rev 2.
[91] *Certain Expenses of the United Nations, Advisory Opinion*, [1962] ICJ Reports 155.
[92] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against Unesco, Advisory Opinion*, [1956] ICJ Reports 86.
[93] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, [1980] ICJ Reports 88.

use of force, both of them provided for in Chapter VII of the *Charter* itself, a breach was opened during the 1990s in the name of 'humanitarian intervention'. Now, citing the precedent of the 1999 Kosovo war, American academics are venturing arguments that Article 2(4) of the *Charter of the United Nations* is obsolete, and that it no longer states good law. These are highly controversial propositions, of course, and it is not my attempt here to even begin to suggest that they are reasonable or justifiable. But the ongoing debate certainly helps to account for the current difficulties that exist with respect to codifying the crime of aggression.

The problems with codifying aggression stand in marked contrast to stunning progress in defining the three other core crimes of the *Rome Statute*, where consensus was reached at the Rome Conference, with perhaps the exception of a few details in the war crimes provision. It is reasonable to speak of Articles 6, 7 and 8 as representative of customary international law, even if in some respects they may fall somewhat short of the best contemporary standards, for example in the area of prohibited weapons. The definition of genocide in Article 6 is identical to the one adopted in the 1948 *Genocide Convention*, proof of its universal acceptance. Those of crimes against humanity and war crimes have evolved since the 1940s, but in an expansive direction, so as to cover a broader range of acts as well as applicable situations, including peacetime (for crimes against humanity) and non-international armed conflict (for war crimes). How striking it is to compare this progressive development with the stagnation on the subject of aggression.

Work within the United Nations in the field of international criminal law was virtually stalled for nearly three decades, from the early 1950s until the early 1980s. There are no doubt many factors to account for this, but first and foremost are the difficulties in defining the crime of aggression. Should there be any doubt, this ought to help remind enthusiasts for the codification of aggression of the potential this issue has to unhinge the whole process. It might have done it at Rome, were it not for the skilled diplomacy of the Bureau in finding a compromise acceptable to all sides. The debate about aggression sits within the *Rome Statute* like a time bomb, capable of transforming the Court and even jeopardising its future.

At Nuremberg, aggressive war was a kind of prosecutorial magic bullet capable of ensuring the conviction of those at the very top. Even today, we remain perplexed by the due process issues involved in concluding that aggressive war has taken place because it appears to mean a more or less automatic finding of guilt for an entire stratum of senior officials. That the decision may be taken by a political body (such as the Security Council) and not be reviewable in any genuine sense by a court of law is particularly disturbing. But in 1944 and 1945, plans for prosecution were an unembarrassed mixture of the political and the judicial. The goal of the United Nations War Crimes Commission and of the London Conference was to punish the Nazis, and criminalisation of aggressive war seemed the most secure way for this to take place. The mood was very different from that of the Rome Conference in 1998, which renounced any possibility of prosecuting

past crimes,[94] and sought only to create a scheme that would govern conduct in the future, although it would be an overstatement to claim there were no political agendas at Rome.

The conclusion that the 'supreme international crime' jargon of the judges at Nuremberg may have been a bit of judicial hyperbole should not in any way trivialise the importance of punishment of aggression. But it is certainly striking to observe that the uncertainty about the role of aggression within the overall system of international criminal law is not only characteristic of the debate that immediately preceded Nuremberg, it is also manifested in the approach to the issue in the decades that were to follow the landmark trial. The failure of the United Nations War Crimes Commission to even take a position on whether or not aggressive war should be a crime[95] seems remarkably like the hesitations at the Rome Conference, more than half a century later. After haunting the corridors of the Food and Agriculture Organisation's building for weeks, aggression was finally slipped in to the final package submitted by the Bureau to the Committee of the Whole of the Diplomatic Conference on 17 July 1998, but only barely. There is still no guarantee that its presence in Article 5(1) may not only be pure symbolism.

There is perhaps one major difference between the 1944 debate and today's discussions. In 1944–1945 the experts were clear about whom they wanted to punish, but unsure whether this was consistent with principles of international law and the general maxim *nullum crimen sine lege*. At the dawn of the twenty-first century, there is less concern with the latter, and rather more with the potential targets of prosecutions for aggression. We live at a time when one super-power dominates international relations in both a political and a military sense. It possesses the most powerful armed force in history, one that dwarfs those of its nearest rivals and friends, and it is undaunted in its determination to use force or its threat in the pursuit of national policy. Such a context makes it difficult indeed to reach a consensus definition of the crime of aggression and on the conditions under which it may be prosecuted. During previous attempts at codification, in 1944–1945 as well as in 1919, context was of paramount significance. Perhaps the most useful historical lesson is that we should not lose sight of the fact that this is as true today as it was then.

[94] *Rome Statute of the International Criminal Court*, see above n 24, Art 11.

[95] Eventually, the United Nations War Crimes Commission did take a position on the subject, but only after the London Conference. A resolution adopted on 30 Jan 1946 declared that 'crimes against peace and crimes against humanity, as referred to in the Four Power Agreement of August 8th, 1946 (ie the Nuremberg Charter), were war crimes within the jurisdiction of the Commission'. See United Nations War Crimes Commission, above n 10 at 187.

6

The Crime of Genocide

CHRISTINE BYRON*

1. BACKGROUND TO THE CRIME OF GENOCIDE

THE WORD 'GENOCIDE' was developed by Raphael Lemkin as 'a hybrid consisting of the Greek *genos* meaning race, nation or tribe; and the Latin suffix *cide* meaning killing'.[1] He created it in order to formulate a 'legal concept of the destruction of human groups' in response to the Nazi atrocities of the Second World War,[2] although genocide 'as a manifestation of human behaviour … is of far greater vintage'.[3] As Fawcett comments, these actions 'were not newly constituted as crimes by the mere fact that a collective name was given to them in the Convention'.[4] Indeed, in 1946, in General Assembly Resolution 96(I), genocide was described as being 'a denial of the right of existence of entire human groups', which had occurred in many instances and was now 'affirmed' as a 'crime under international law'.[5]

Although crimes against humanity, rather than genocide, were charged under the Charter of the International Military Tribunal at the Nuremberg Trials,[6] the latter is recognised as an important development of part of the former offence.[7]

* The text is based in part on an internal memorandum written during an internship at the ICTY in 1998.

[1] R Lemkin, 'Genocide as a Crime under International Law' (1947) 41 *AJIL* 145 at 147 and see R Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace, Washington, 1944) especially ch 9, 'Genocide', 79–95.

[2] R Lemkin, *ibid* and I Charny (ed), *Encyclopedia of Genocide Vol I* (ABC-CLIO, Inc, Santa Barbara, 1999), entry 'The Holocaust' 296–332.

[3] M Shaw, 'Genocide and International Law', in Y Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff, Dordrecht, 1989) 797–820 at 797. See UNOR 3rd Session of the GA 1948, Pt I, Summary Records of the Sixth Committee Discussions on Art II of the Draft Convention on Genocide, (hereinafter Sixth Committee), 74th Meeting, comments of Mr Messina, at 100. See also I Charny (ed), 'Genocide in Antiquity' above n 2 at 272–79; *Ibid* 'The Armenian Genocides', 61–105; V Dadrian, 'Genocide as a Problem of National and International Law: the World War I Armenian Case and its Contemporary Legal Ramifications' (1989) 14 *Yale JIL* 221.

[4] J Fawcett, 'The Eichmann Case' (1962) 38 *BYIL* 181–215 at 205.

[5] GA Resolution 96(I), 11 Dec 1946.

[6] See T Simon, 'Defining Genocide' (1996) 15 *Wisconsin ILJ* 243, and *Trial of Ulrich Greifelt and Others*, 13 LRTWC 1–69 at 2, and *Trial of Amon Leopold Goeth*, 7 LRTWC 1–10 at 7.

[7] B Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 2 July 1985 (E/CN4/Sub2/1985/6), (hereinafter 'Whitaker Report') 11; ECOSOC, 'Report

Together they have been called crimes which 'shock the collective conscience',[8] but genocide especially has been called the 'crime of crimes'[9] and the 'gravest violation of human rights it is possible to commit'.[10]

Despite the seriousness of this crime, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[11] only provided for jurisdiction by the State in which the crime was committed,[12] or by 'such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.[13] Owing to the lack of an international criminal court in the twentieth century this second head of jurisdiction was rendered 'legally irrelevant'.[14] This situation was to some extent remedied by the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda, which may, inter alia, prosecute for genocide within their respective territorial jurisdiction.[15] However, as ad hoc tribunals their temporal jurisdiction is limited and will expire upon completion of their mandate.[16]

The prohibition on genocide, acknowledged by the International Court of Justice as being 'binding on States, even without any conventional obligation'[17] and 'having the status not of an ordinary rule of international law but of

of the Ad Hoc Committee on Genocide', 24 May 1948, E/794, (hereinafter 'ECOSOC Report'), 7 and 1996, ILC Commentary on the Draft Code of Crimes against the Peace and Security of Mankind, GAOR 51st Session Supp No 10 (A/51/10), (hereinafter 'ILC Commentary') 87 and see *The Justice Trial*, 6 LRTWC at 32 and 48 and *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 89.

[8] *Kambanda*, Trial Judgment, Case No ICTR–97–23, para 14.
[9] *Ibid* para 16 and *Rutaganda*, Trial Judgment, ICTR–96–3, para 451.
[10] Whitaker Report, 5.
[11] For a drafting history see M Lippman, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide' (1985) 3 *Boston Uni ILJ* 1.
[12] For genocide and universal jurisdiction see L Steven, 'Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations' (1999) 39 *Va JIL* 425 and P Akhavan, 'Enforcement of the Genocide Convention: A Challenge to Civilisation' (1995) 8 *Harv HRJ* 229 at 234. For accounts of national genocide trials see: C Ferstman, 'Domestic Trials for Genocide and Crimes Against Humanity: the Example of Rwanda' (1997) 9 *RADIC* 857; W Schabas, 'Justice, Democracy and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems' (1996) 7 *Crim LF* 523, and J Fawcett, above n 4.
[13] Art 6, 1948 Convention on the Prevention and Punishment of the Crime of Genocide, (Genocide Convention).
[14] J Kunz, 'The United Nations Convention on Genocide' (1949) 43 *AJIL* 738 at 745. See Anon, 'Genocide: A Commentary on the Convention' (1948–49) 58 *Yale LJ* 1142 at 1147–50 and L Bruun, 'Beyond the 1948 Convention: Emerging Principles of Genocide in Customary International Law' (1993) 17 *Maryland JIL & Trade* 193.
[15] Art 4, ICTY Statute and Art 2, ICTR Statute and see P Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) 90 *AJIL* 501; Lawyers Committee for Human Rights, 'Prosecuting Genocide in Rwanda: The ICTR and National Trials', July 1997 and T Coonan, 'Prosecuting and Defending Violations of Genocide and Humanitarian Law, the International Tribunal for the Former Yugoslavia' (1994) 88 *ASIL Proceedings* 239–58.
[16] See SC Res 827 of 1993 on the ICTY and SC Res 955 of 1994 on the ICTR and M Roberge, 'Jurisdiction of the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda over Crimes Against Humanity and Genocide' (1997) 321 *IRRC* 651.
[17] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, (1951) ICJ Rep 15–69 at 23.

jus cogens',[18] will finally be enforceable before a permanent International Criminal Court. With the prospect of true international accountability for this crime, it is more important than ever to determine the precise legal meaning of genocide within the context of Article 6 of the Rome Statute and the Elements of Crimes.

2. ANALYSIS OF ARTICLE 6 OF THE ROME STATUTE

The definition of the crime of genocide in Article 6 of the Rome Statute reproduces exactly the definition of genocide in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.[19] Although the wording of this offence has not altered for more than 50 years, it suffers from a level of generality and ambiguity often inherent in international treaties, and furthermore has lain unused and uninterpreted in courts of law for much of that time. Therefore it is important to trace its origins, in the *travaux préparatoires* of the Genocide Convention,[20] and its development, in particular in cases before the ICTY and ICTR, in order to arrive at a precise understanding of this offence today as it will be interpreted by the ICC in the light of the Elements of Crimes.

2.1 The *Mens Rea* of Genocide — the 'Intent to Destroy, in Whole or in Part, a National, Ethnical, Racial or Religious Group, as Such'

'Intent to Destroy in Whole or in Part'

2.2 Origins

The crime of genocide requires that the accused perform the *actus reus* with a specific intent or *dolus specialis*, which is the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. Whilst the meaning of 'intention' was not spelt out in the discussions on the Draft Convention on Genocide in 1948 by the Sixth Committee, the majority were agreed, that premeditation was not a necessary part of the *mens rea*,[21] and indeed this is not

[18] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v Yugoslavia) (1993) ICJ Rep 325–465, Separate Opinion of Judge Ad Hoc Lauterpacht, 440.

[19] Except that the original words 'In the present Convention', are replaced by the words 'For the purpose of this Statute', see, H von Hebel and D Robinson, 'Crimes within the Jurisdiction of the Court', in R Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer, The Hague, 1999) 79–126 at 123.

[20] The analysis of the *travaux préparatoires* of the Genocide Convention will take into account the Secretariat's Draft Convention, the Draft Convention of the Ad Hoc Committee and the debates on this Convention in the Sixth (Legal) Committee of the General Assembly. See W Schabas, *Genocide in International Law* (CUP, Cambridge, 2000) 51–81.

[21] Sixth Committee, 72nd Meeting, at 88 but see ECOSOC Report, at 13 and M Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later' (1998) 15 *Ariz JICL* 415, at 455.

the ordinary meaning of 'intention'.[22] As regards the meaning of 'destroy', it is clear from the later exclusion of 'cultural genocide' from the treaty, that 'to destroy', means to destroy physically.[23]

A more contentious issue was the relationship between 'intent' and 'in whole or in part'. As LeBlanc comments:

> the ordinary meaning of its words convey — that the intent could be to destroy a group *either* in whole or in part.[24]

However, this question caused great debate in the Sixth Committee. It must be recalled that the General Assembly Resolution regarding genocide was framed in terms of the 'denial of the right of existence of *entire* human groups … '.[25] Whilst the Sixth Committee were agreed that the entire group need not be destroyed before the crime of genocide would be committed,[26] many of their statements are ambiguous on the issue of whether the crime can be committed if there is only an intention to destroy part of the group.[27]

Given the ambiguity of the *travaux préparatoires* on this issue, the ordinary meaning of the text in the light of the object and purpose of the treaty should be considered as decisive.[28] This has been taken to mean by most commentators, including Robinson, that 'it suffices if the purpose is to eliminate portions of the population'.[29] Drost also confirms that:

> Acts aimed not at the total but merely at the partial extermination of a protected group fall likewise under the scope of Article II.[30]

2.3 Development[31]

In the *Akayesu* Trial Judgment the *dolus specialis* of genocide was explained as demanding that 'the perpetrator have the clear intent to cause the

[22] *Jelisić*, Appeal Judgment, Case No IT–95–10, para 49.
[23] Sixth Committee, 83rd Meeting, at 200 and 206.
[24] L LeBlanc, *The United States and the Genocide Convention* (Duke University Press, USA, 1991) 34, original emphasis.
[25] GA Res 96(I), 11 Dec 1946, emphasis added and see ECOSOC Report, at 13.
[26] Sixth Committee, 73rd Meeting, at 93.
[27] Sixth Committee, 73rd Meeting, at 96 and see L LeBlanc, 'The Intent to Destroy Groups in the Genocide Convention: The Proposed US Understanding' (1984) 78 *AJIL* 369, at 371–72.
[28] See Arts 31 and 32, 1969 Vienna Convention Law of Treaties. Although, by its terms the Vienna Convention does not apply to the Genocide Convention, these Arts are understood to represent customary international law on interpretation of treaties.
[29] N Robinson, *The Genocide Convention, A Commentary* (Institute of Jewish Affairs, New York, 1960) 63 and see B Bryant, 'The United States and the 1948 Genocide Convention, Part I: Substantive Scope of the Convention' (1975) 16 *Harv ILJ* 683, at 692.
[30] P Drost, *Genocide* (A W Sythoff, Leyden, 1959) 84.
[31] The period referred to is that between the creation of the treaty in 1948, and the start of the deliberations for the International Criminal Court in 1993 (the first International Law Commission draft). Yugoslavia and Rwanda Tribunal cases are within this period, despite being decided after 1993.

offence charged'.[32] Therefore an accused is only liable if he commits the *actus reus* with a 'clear intent to destroy, in whole or part, a particular group', and is culpable 'because he knew or should have known that the act committed would destroy, in whole or in part, a group'.[33]

The issue of pre-meditation has been touched upon by both the ICTR and ICTY. The ICTR in *Kayishema and Ruzindana* confirmed that a 'specific plan' did not constitute an element of genocide, although they added that 'it is not easy to carry out a genocide without such a plan or organisation'.[34] The ICTY in *Jelisić* concurred with this view. Whilst they did not discount the possibility of 'a lone individual seeking to destroy a group as such', they observed that 'it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or system'.[35]

With regard to the relationship between 'intent' and 'in whole or in part', Whitaker, in his 1985 report, put forward the now orthodox view that the intention necessary for genocide must be 'to destroy a designated group wholly or partially'.[36] This interpretation was supported by the Commission of Experts for Yugoslavia, who affirmed that 'it is not necessary to aim at killing all the members of the group'.[37] The ILC also reiterated this point in the Draft Code of Crimes, stating that '[i]t is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe'.[38]

However, the definition of 'part' of the group is contentious. Although this issue was not tackled in the *travaux préparatoires* of the Genocide Convention, Robinson's Commentary suggested that 'in part' should mean the intention to kill a 'substantial' number of the group.[39] This interpretation was followed by the ILC, which stated that:

> the crime of genocide by its very nature requires the intention to destroy at least a *substantial* part of a particular group.[40]

[32] *Akayesu*, Trial Judgment, Case No ICTR–96–4, paras 517–18 and *Rutaganda*, Trial Judgment, Case No ICTR–96–3, para 59.
[33] *Akayesu*, Trial Judgment, *ibid* para 520 and see *Public Prosecutor v Djajić*, Supreme Court of Bavaria, 23 May 1997, reported by C Safferling, 'International Decisions, Public Prosecutor v Djajić', (1998) 92 *AJIL* 528, at 529.
[34] *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 94.
[35] *Jelisić*, Trial Judgment, Case No IT–95–10, paras 100–1 and *Jelisić*, Appeal Judgment, para 48.
[36] Whitaker Report, para 38 and see J Webb, 'Genocide Treaty-Ethnic Cleansing — Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia' (1993) 23 *Georgia JICL* 377 at 392.
[37] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, para 93.
[38] ILC Commentary, 89, a view supported by the ICTY in the *Jelisić*, Trial Judgment, Case No IT–95–10, para 80 and *Krstić*, Trial Judgment, Case No IT–98–33, para 584.
[39] N Robinson, above n 29 at 63.
[40] ILC Commentary, at 89, emphasis added.

Furthermore, the Trial Judgment in *Kayishema and Ruzindana* confirmed that *'in part'*, 'requires the intention to destroy a considerable number of individuals who are part of the group'.[41]

The interpretation of 'in part' as meaning 'in substantial part', was adopted by the United States in their interpretative declaration when ratifying the Genocide Convention in 1988.[42] The US implementing legislation for the Genocide Convention, the Proxmire Act, defines 'substantial part' as meaning:

> a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such a group is a part.[43]

The US and ICTR interpretation of 'substantial' suggests that to be liable for the crime of genocide an accused must have intended to destroy a large number of individuals in the group. LeBlanc comments that this issue has:

> often degenerated into a numbers game: Is a part or a substantial part of a group 1 out of 5, 5 out of 20, 1,001 out of 2,000, 100,001 out of 200,000?

He suggests that the answer cannot be found in a mathematical formula, but 'calls for a judicial construction'.[44] The ICTY in the case of *Krstić*, however, opined that a campaign to kill all the members of the group in a small geographic area would amount to genocide of the 'part' of the group in that area.[45]

The meaning of an intention 'to destroy … in part', however, is a more sophisticated issue than simply a matter of numbers. Whitaker suggested that an intention to destroy a 'significant section of a group such as its leadership', would amount to an intention to destroy 'in part'.[46] The Yugoslavia Commission of Experts supported this approach, stating that '[i]f essentially the total leadership of a group is targeted, it could also amount to genocide'.[47] This was also the interpretation of the *Jelisić* Judgment, which emphasised that the intention must be to destroy 'a significant portion of the group from either a quantitative or qualitative standpoint'.[48]

[41] *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 97.
[42] USA Understanding (1) to the Convention on the Prevention and Punishment of the Crime of Genocide, entered on ratification on 25 Nov 1988, available on the ICRC website at <http://www.icrc.org/>.
[43] The Genocide Convention Implementation Act of 1988, (Proxmire Act) para 1093(8), reprinted in L LeBlanc, above n 24 at 255–56 (hereafter the Proxmire Act) and see W Korey, 'The United States and the Genocide Convention: Leading Advocate and Leading Obstacle' (1997) 11 *Ethics and International Affairs* 271.
[44] L LeBlanc, above n 24 at 48.
[45] *Krstić*, Trial Judgment, Case No IT–98–33, para 590.
[46] Whitaker Report, para 29.
[47] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, para 94.
[48] *Jelisić*, Trial Judgment, Case No IT–95–10, para 82 and see *Sikirica, Dosen, and Kolundzija*, Trial Judgment on Defence Motions to Acquit, Case No IT–95–8, paras 77–78 and *Stakić*, Trial Judgment, Case No IT–97–24–T, paras 523–25.

2.4 The Rome Statute

Whilst the meaning of 'intent' is not explicitly discussed within the context of the crime of genocide in Article 6, nevertheless, applying the default mental element of Article 30 a person has intent where '[i]n relation to conduct, that person means to engage in the conduct', and '[i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events'. It is clear that under this definition, an accused does not have to desire a consequence in order to intend it.

Regarding the meaning of 'in part', the text produced following the first two Preparatory Committee sessions, included in brackets a suggestion that the intent to destroy, be 'in whole or in [substantial] part'.[49] This wording had been dropped by the report of the third PrepCom, but at that stage the text was given a footnote to explain that the specific intention must be 'to destroy more than a small number of individuals who are members of a group'.[50] This footnote remained on the final text of the sixth PrepCom, sent to the Rome Conference,[51] and drew criticism from NGO and academic commentators as being 'unnecessarily limiting'.[52] Nevertheless, the overwhelming majority of interpretations of the Genocide Convention have suggested that the intention must be to destroy at least a substantial or significant part of the group. In view of this, the PrepCom's understanding seems to be a relaxation of the earlier interpretation of the *mens rea*.

The final wording of Article 6 was unchanged from the Genocide Convention text and so does not assist in the elucidation of any ambiguities in the meaning of the *mens rea* of genocide. The Elements of Crime do not expand upon the meaning of 'intent to destroy in whole or in part',[53] but they include an important contextual element, that defendant's acts 'took place in the context of a manifest pattern of similar conduct directed against that group' or that his conduct 'could itself effect such destruction'.[54] This contextual element essentially rules out the jurisdiction of the ICC over a lone individual seeking to destroy a group (because there would be no contextual pattern of similar conduct), except in the extreme situation where

[49] UN Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol II, (Compilation of Proposals March–April and Aug 1996), GAOR 51st Session, Supp No 22A (A/51/22), at 58.
[50] Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 Feb 1997, A/AC 249/1997/L 5, n 1 at 3.
[51] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, 14 April 1998, A/CONF 183/2/Add 1, at 13.
[52] International Commission of Jurists, 'Definition of Crimes', Brief No 1 to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 1998, para B 2 and J Paust, 'Commentary on Parts 1 and 2 of the Zutphen Intersessional Draft: Art 5 [20], Crimes Within the Jurisdiction of the Court, and Arts 19 [C] and 26 [M], Leader Responsibility and Superior Orders', in L Wexler, (special ed) (1998) 13 *bis Nouvelles Études Pénales* 27–42.
[53] Assembly of States Parties to the Rome Statute of the ICC, Official Records, First Session, ICC–ASP/1/3, 3–10 Sept 2002, (hereinafter EOC) 113–15.
[54] EOC, at 113–15.

that individual had access to the type of weapons which could feasibly destroy the group (and so the conduct could effect such destruction itself).

This contextual element raises the question as to whether an accused must have been aware that his actions took place against the background of 'a manifest pattern of similar conduct' directed against the group. Subjective knowledge on the part of the accused of the context in which his crime takes place or the likely effect of his actions does not appear necessary, given that the introduction to the Elements of genocide state that the term 'manifest' is 'an objective qualification'.[55] However, this introduction leaves open the possibility of requiring some *mens rea* in respect of this Element by stating that:

> the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.[56]

Therefore, under Article 6 it would appear that the prosecution have to prove that the defendant had a clear and specific intention, (they would not need to prove pre-meditation) to destroy a group either in whole or in part. If the prosecution is to show that the defendant's intention was to destroy part of the group, they must prove that he intended to destroy more than a small number of group members, or better a substantial or significant part of the group. Finally the prosecution must show that the defendant was acting in the context of a 'manifest pattern of similar conduct directed against that group' or that his or her conduct 'could itself effect such destruction'.

2.5 Can the Intent to Destroy be Inferred from the Actions of the Accused?

An important issue, not addressed by the *travaux préparatoires* of the Genocide Convention, is whether the *dolus specialis* may be implied by the actions of the accused. Many academic commentators and both the ICTY and ICTR Trial Chambers contend that the specific intention may be implied. However, the evidence necessary to imply a genocidal intent has been an issue of concern. Sartre, when discussing the alleged genocide of the Vietnamese by the USA argued that the genocidal intent was 'apparent *on the battlefield* in the racism of the American soldiers'.[57] At the other end of the spectrum Shaw warned that '[t]oo facile an imputation of intent and thus genocide may unduly broaden that special concept and thus weaken it'.[58] Another consideration is that the prosecution must prove the specific intent beyond reasonable doubt, and therefore such an

[55] *Ibid* at 113.
[56] *Ibid* and see R Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, New York, 2001) at 47.
[57] J Sartre, *On Genocide* (Beacon Press, Boston, 1968) at 78–79, original emphasis, but see H Fein, 'Discriminating Genocide from War Crimes: Vietnam and Afghanistan Re-examined' (1993–94) 22 *Denver JIL & Pol* 29 at 62 and H Bedau, 'Genocide in Vietnam' (1975) 53 *Boston Uni LR* 574 at 622.
[58] M Shaw, above n 3 at 805.

intention should only be inferred where the supporting evidence is strong. The ICTY in the *Karadžić and Mladić* Rule 61 review suggested that the:

> uniform methods used in committing the said crimes, their pattern, their pervasiveness throughout all of the Bosnian Serb-held territory, the movements between the various camps, and the tenor of some of the accused's statements were strong indications of a genocidal intent.[59]

The ICTR in the case of *Kayishema and Ruzindana* added to this 'the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing', and commented that a high number of victims was also evidence of intent to destroy the group.[60] In view of this jurisprudence, the ICC is likely to accept imputed genocidal intent in the absence of a confession. However, in order to satisfy the burden of proof, the prosecutor will probably need to adduce evidence of several of the above examples.

An example of the difficulties of inferring intent is found in the ICTY case of *Jelisić*, who pled guilty to war crimes and crimes against humanity, whilst pleading not guilty to genocide.[61] The accused had presented himself as the 'Serbian Adolf' and claimed that he had gone to the Brcko camp to kill Muslims.[62] Indeed, he admitted to killing 13 people there.[63] Despite this evidence the Trial Chamber held that it was not proven beyond a reasonable doubt that he had the *mens rea* for genocide. The Court found that the accused had a 'disturbed personality' and performed executions randomly, even allowing some Muslims to leave the camp.[64] Therefore, 'although he obviously singled out Muslims, [Jelisić] killed arbitrarily rather than with the clear intention to destroy a group'.[65]

3. 'GROUP, AS SUCH'

3.1 Origins

One of the most important aspects of the crime of genocide is that it is an offence against groups, not individuals. Lemkin explained that '[t]he acts are directed

[59] *Karadžić and Mladić*, Rule 61 Review, Case No IT–95–5–R61 and IT–95–18–R61, para 84.
[60] *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, paras 93 and 533; *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 523 and *Musema*, Trial Judgment, Case No ICTR–96–13, paras 166–67; *Bagilishema*, Trial Judgment, Case No ICTR–95–1, paras 62–63 and *Jelisić*, Appeal Judgment, Case No IT–95–10, para 47.
[61] *Jelisić*, Trial Judgment, *ibid* para 24.
[62] *Ibid* para 102.
[63] *Ibid* para 36.
[64] *Ibid* paras 105–6.
[65] *Ibid* para 108. The Appeal Chamber, however, found that the evidence discussed could have been sufficient basis to infer the *mens rea* of Genocide but declined to order a retrial, *Jelisić*, Appeal Judgment, paras 68 and 77.

against *groups, as such*, and individuals are selected for destruction only because they belong to these groups'.[66] Nevertheless, the *travaux préparatoires* of the Genocide Convention neglected to clarify the ambit of the 'group'. Is a 'religious' group, for example, the members of that religion in the world, in a particular country, in a region, or in a town or village? The definition of the group in such terms would impact upon the question of what a significant part of that group was.[67] Robinson suggests that:

> the intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide even if these persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial.[68]

Another important issue is the meaning of 'as such'. This was the cause of much debate in the Sixth Committee and its origins lay in a compromise on the issue of whether an enumeration of the motives should be required for the offence of genocide. Although the Ad Hoc Committee's Draft Convention had listed specific motives as part of genocide, such an inclusion was opposed by many in the Sixth Committee, because the offence already required intent and no provision for motives was made in any penal code.[69] The UK delegate in the Sixth Committee also stressed that '[o]nce the intent to destroy a group existed, that was genocide, whatever reasons the perpetrators of the crime might allege'.[70] Opponents to this theory, such as the delegates of Iran, Egypt and the USSR argued that the motivation of destroying because of the national, ethnical, racial origin or religion of the group was indispensable.[71]

The amendment to replace the enumeration of motives with the words 'as such' was proposed by the Venezuelan delegate. He explained that this would specify that the group would have to be destroyed '*qua* group',[72] and suggested that motives were 'implicitly included in the words "as such" '.[73] The amendment was adopted, but confusion remained; as the explanations of vote demonstrated, delegates held conflicting views as to whether Article 2 now demanded motives for the crime of genocide or not.[74] Despite this confusion in the *travaux*

[66] R Lemkin, above n 1 at 147, emphasis added.
[67] See B Bryant, above n 29 at 693.
[68] N Robinson, above n 29 at 63.
[69] See ECOSOC Report, at 13–14; Sixth Committee, 75th Meeting, at 118 and N Ruhashyankiko, 'Study on the Question of the Prevention and Punishment of the Crime of Genocide', UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 4 July 1978, E/CN 4/Sub 2/416, (hereafter N Ruhashyankiko, 'Study on Genocide') para 104.
[70] Sixth Committee, 75th Meeting, 118.
[71] Sixth Committee, 75th Meeting, at 118 and 119.
[72] Sixth Committee, 77th Meeting, at 131.
[73] Sixth Committee, 76th Meeting, at 124–25.
[74] Sixth Committee, 77th Meeting, at 130–33.

préparatoires, the ordinary meaning of the text is that the group must be destroyed '*qua* group' and that motives need not be proven and that the addition of the words 'as such', simply emphasises that it is the group itself which is the target of genocide.[75]

3.2 Development

In recent Judgments on the crime of Genocide the ICTY and ICTR have continued to stress that the target of genocide is the 'group' not the individual.[76] The ILC comments that:

> the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group.[77]

According to the Yugoslavia Commission of Experts the group targeted need not be a minority 'it might as well be a numerical majority'.[78] In this respect Whitaker went further and suggested that there is nothing to prevent the perpetrator committing 'auto-genocide' as 'the definition [of genocide] does not exclude cases where the victims are part of the violator's own group'.[79] Nevertheless, in such a situation it may be almost impossible to prove the specific intent of the crime of genocide as opposed to politically based violence.[80]

The actual definition of the 'group', has not been addressed by the ICTR. However, in the case of *Jelisić*, the ICTY supported the argument that the 'group' may consist of the members of that national, ethnical, racial or religious group in just one town or region by noting that 'genocide may be perpetrated in a limited geographic zone'.[81] In arriving at this conclusion, the Trial Chamber commented that the General Assembly characterised the massacres at Sabra and Shatila as genocide,[82] and noted that the *Nikolić* Rule 61 decision held that a charge of genocide could be based solely on events which took place in one region.[83] To conclude, the *Jelisić* Judgment stated that 'international custom admits the

[75] See Whitaker Report, 19. See also H Hannum, 'International Law and Cambodian Genocide: The Sounds of Silence' (1989) 11 *HRQ* 82 at 108 and G Finch, 'Editorial Comment, The Genocide Convention' (1949) 43 *AJIL* 732 at 734.
[76] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 521; *Rutaganda*, Trial Judgment, Case No ICTR–96–3, para 60 and *Jelisić*, Trial Judgment, Case No IT–95–10, paras 66–67.
[77] ILC Commentary, 88.
[78] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, para 95 and see W Schabas, above n 20 at 108.
[79] Whitaker Report, 16; H Hannum, above n 75 at 105 and see Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, UN Doc S/1999/231, para 65.
[80] B Saul, 'Was the Conflict in East Timor 'Genocide' and Why does it Matter?' (2001) 2 *Mel JIL* 477 at 500.
[81] *Jelisić*, Trial Judgment, Case No IT–95–10, para 83.
[82] GA Res 37/123 D, 16 Dec 1982, although the Trial Chamber noted that this may have been more of a political assessment than a legal one.
[83] *Nikolić*, Rule 61 Review, Case No IT–94–2–R61, para 34.

characterisation of genocide even when the exterminatory intent only extends to a limited geographic zone'.[84]

Drost, in his work on the Genocide Convention, also accepted that the group may be characterised as one within a small geographic region. He stated that:

> Acts perpetrated with the intended purpose to destroy various people as members of the same group are to be classified as genocidal crimes although the victims amount only to a small part of the *entire group present within the national, regional or local community*.[85]

In contrast, however, the US Proxmire Act refers to destroying the group 'as a viable entity within the *nation* of which such a group is part'.[86] This appears to demonstrate an understanding that the group must be considered in terms no smaller than the State, or the entire collectivity of that people.

These apparently conflicting interpretations may be reconciled if the approach of the ICTY in *Krstić* is taken into account. The Trial Chamber accepted that one cannot create an artificial group by limiting its scope to a geographical area.[87] Therefore the Muslims in Srebrenica could not be considered a separate group from Bosnian Muslims generally.[88] However, the Judgment accepted that an intention to destroy all of the group in a small specific area, such as Srebrenica, would amount to a *mens rea* to destroy the group in part and so would constitute genocide.[89] Therefore:

> By killing all the military aged men, the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on that territory.[90]

With regard to the relevance of motives to the crime of genocide, the ILC interpreted 'as such' as emphasising that the intention must be to destroy the group as 'a separate and distinct entity, and not merely some individuals because of their membership in a particular group'.[91] The question of motives has been considered by both the Yugoslavia and Rwanda Commission of Experts.

[84] *Jelisić*, Trial Judgment, Case No IT–95–10, para 83 and see *Sikirica, Dosen and Kolundzija*, Trial Judgment on Defence Motions to Acquit, Case No IT–95–8, para 68.
[85] P Drost, above n 30 at 85, emphasis added.
[86] The Proxmire Act, para 1093(8), emphasis added.
[87] *Krstić*, Trial Judgment, Case No IT–98–33, para 558.
[88] *Ibid* paras 559–60.
[89] *Ibid* paras 594–98.
[90] *Ibid* para 597.
[91] ILC Commentary, at 88, but see W Schabas, 'Art 6, Genocide', in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden, 1999) 107–16 at 111 (hereinafter, O Triffterer (ed), *Commentary on the Rome Statute*).

The former stated clearly that '[m]otive and intent may be closely linked, but motive is not mentioned in the Convention',[92] whilst the later confirmed that:

> the presence of political motive does not negate the intent to commit genocide if such intent is established in the first instance.[93]

It is important in this respect to separate motives from a specific intention. The accused must perform the *actus reus*, for example killing some members of the group, with the *dolus specialis*. He must not only intend to kill those individuals, but also intend to destroy the group they belong to, in whole or in part. The fact that the accused is motivated to destroy the group concerned in whole or part for political or even financial reasons is irrelevant when determining whether or not he has committed genocide.[94] Unfortunately, in this respect the *Jelisić* Judgment adds to the confusion between motive and intent, by stating that the prosecutor had failed to prove beyond reasonable doubt that 'the accused was motivated by the *dolus specialis* of the crime of genocide'[95]

3.3 The Rome Statute

The *travaux préparatoires* of the Rome Statute, and the Elements of Crimes do not provide any guidance as to how the International Criminal Court will understand the concepts of 'group' and 'as such'. However, Schabas suggests an interpretation of 'as such' which is consistent with the *travaux préparatoires* and yet does not unduly restrict the offence by requiring that the prosecutor prove motive for each individual defendant.[96] As genocide is invariably a collective crime, Schabas proposes that the organisers and planners must have a 'a racist or discriminatory motive, that is, a genocidal motive',[97] in order for genocide to take place, but that the motives of the individual participants of the genocide would not be relevant to their individual criminal liability.[98]

The interpretation that the ICC will give to the meaning of the 'group' is more problematic. The Court could follow the approach of the US Proxmire Act, that the 'group' means the group in the nation, or the line of authority from the *Jelisić* Judgment, that the 'group' may mean the group in the town or region. However, it is submitted that the ICC should follow the *Krstić* Judgment, which does not

[92] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, para 97.
[93] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), S/1994/1405, para 159.
[94] See H Hannum, above n 75 in footnote 19 at 89, and 110.
[95] *Jelisić*, Trial Judgment, Case No IT–95–10, para 108. The original French text 'que l'accusé était animé du *dolus specialis* du crime de génocide', is equally problematic on this point.
[96] W Schabas, above n 20 at 254–56.
[97] *Ibid* at 255.
[98] *Ibid* at 255–56.

artificially restrict the meaning of the group, but recognises that genocide may take place in a relatively small region.[99]

4. 'NATIONAL, ETHNICAL, RACIAL OR RELIGIOUS'

4.1 Origins

Although included in General Assembly Resolution 96(I) and the Draft Convention prepared by the Ad Hoc Committee[100], political groups, are excluded from the list of groups protected from destruction under Article 2 of the Genocide Convention. The issue was discussed at length in the Sixth Committee, who later reversed an initial vote to include political groups.[101] However, there was strong opposition to their inclusion, along with the suggested inclusion of economic groups. Many delegates considered that only groups with stable and permanent characteristics should be protected by the Convention.[102] The Soviet delegate argued that the criterion used to define groups which could fall prey to genocide 'must be of an objective character; thus the subjective qualities of individuals were ruled out'.[103]

The meaning of the word 'national' caused some confusion in the Sixth Committee. The Swedish delegate appeared to assume that 'national' groups meant the citizens of a constituted State, and proposed inclusion of 'ethnical' groups partly to ensure that such groups were protected if the State ceased to exist, on that basis,[104] the Soviet delegate also subscribed to this interpretation.[105] Indeed, the Iranian delegate also assumed that 'national group' meant a group with a particular nationality.[106] However, both the delegates from Egypt and Belgium considered that the word 'national' referred to national minorities.[107] The former view would seem to be correct in terms of the ordinary language of the statute, and given that national minorities would in any case be protected as ethnical, racial or religious groups.

Both the Swedish delegate and the Soviet delegate discussed the meaning of 'ethnical' groups. According to the delegate of Sweden, 'ethnical' would take into consideration issues of cultural and historical heritage, language and traditions.[108] The Soviet delegate, however, merely saw ethnical groups as

[99] *Krstić*, Trial Judgment, Case No IT–98–33, paras 558–60 and 590.
[100] ECOSOC Report, 13–14.
[101] Sixth Committee, 75th Meeting, 115 and 128th Meeting, 664.
[102] Sixth Committee, 69th Meeting, at 57–59 and 61; 74th Meeting, 99 and 105 and 75th Meeting, at 111. Some delegates, however, spoke in favour of retaining political groups, see 69th Meeting, at 60; 74th Meeting, at 99 and 101.
[103] Sixth Committee, 74th Meeting, 105.
[104] Sixth Committee, 73rd Meeting, 97–98.
[105] Sixth Committee, 74th Meeting, 106.
[106] *Ibid* at 99.
[107] *Ibid* at 99 and 75th Meeting, 116.
[108] Sixth Committee, 73rd Meeting, 97 and 75th Meeting, 115.

being 'a sub-group of a national group', being a smaller collectivity than a nation.[109]

4.2 Development

In the decades since the Geneva Convention came into force, the definition of the four groups have been explored in much greater depth. However, as remarked upon by the ICTR in *Rutaganda*, 'there are no generally and internationally accepted precise definitions thereof'.[110]

National Groups — With regard to 'national' groups, a widely held opinion is that the ordinary meaning of 'national' applies,[111] and the ICTR held, in the case of *Akayesu*, that 'national' means 'a collection of people who are perceived to share a legal bond based on common citizenship … '.[112] The definition given to this group in the US Genocide Convention Implementation Act (Proxmire Act) appears to be wider, including 'a set of individuals whose identity as such is distinctive in terms of nationality or national origins'.[113]

It is submitted that the purpose of 'national groups' is to protect groups with a particular citizenship. It is not necessary to protect groups of a particular national origin under this heading, such as those of Italian origin in America, as they would in any case be protected as ethnical or racial groups. The importance of 'national groups' can be shown by an example of US citizens working and living in another State, where they are then targeted for destruction on the basis of their nationality. The group members may have a variety of religions, national origins, and racial and ethnic backgrounds. However, if they were targeted on the basis of their citizenship of the US, then they would be protected under the Genocide Convention as a 'national group'.

Ethnical Groups — Undoubtedly the definition of 'ethnical' groups has given rise to the greatest controversy and international case-law. The term is defined in the US Proxmire Act as meaning 'a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage'.[114] The ICTR described such groups as being generally those 'whose members share a common language or culture',[115] and the ILC noted that tribal groups would be protected within this grouping.[116]

[109] Sixth Committee, 74th Meeting, 106.
[110] *Rutaganda*, Trial Judgment, Case No ICTR–96–3, para 56.
[111] M Lippman, above n 21 at 456, but see W Schabas, above n 20 at 114–20.
[112] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 512, but the ICTY in *Krstić* appears to interpret 'national' groups in the sense of 'national minorities', *Krstić*, Trial Judgment, Case No IT–98–33, para 555.
[113] The Proxmire Act, para 1093(5).
[114] *Ibid.*
[115] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 513 and in almost exact wording, *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 98.
[116] ILC Commentary, 89.

The *travaux préparatoires* to the Genocide Convention indicate an assumption that the issue of defining which individuals were part of a specific group would be 'clear-cut'.[117] The law has now developed, especially in regard to 'ethnical' groups, to acknowledge that determination of the membership such a group:

> today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation.[118]

Although it is clear that 'membership of the targeted group must be an objective feature of the society in question',[119] the ICTR and ICTY case-law indicates the need for a subjective approach in the case of groups without precisely defined boundaries. Therefore, the ICTR in *Musema* suggests that the concepts of national, ethnical, racial and religious groups 'must be assessed in the light of a particular political, social and cultural context'.[120] The Trial Chambers in the cases of *Kayishema and Ruzindana*, *Rutaganda* and *Musema* have taken the approach that membership in an 'ethnical' group for the purposes of the Genocide Convention may be by identification by the perpetrator, or by self identification of the victim with that particular group.[121] However, the Judgments in the cases of *Jelisić* and *Bagilishema* suggest that the specific group is only that which is subjectively stigmatised by the perpetrator.[122]

Racial Groups — The overriding opinion regarding the definition of 'racial' groups was expressed by the ICTR in both *Akayesu*, and *Kayishema and Ruzindana*, that the group 'is based on the hereditary physical traits often identified with a geographical region'.[123] This is similar to the US definition in the Proxmire Act, where 'racial' group is described as 'a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent'.[124] Shaw suggests, however, that it may be preferable to take the two concepts of racial and ethnic groups together to cover relevant cases 'rather than attempting so to distinguish between these that unfortunate gaps appear'.[125]

[117] Sixth Committee, 69th Meeting, 61.
[118] *Jelisić*, Trial Judgment, Case No IT–95–10, para 70.
[119] *Bagilishema*, Trial Judgment, Case No ICTR–95–1, para 65, but this is disputed by the Rwanda Commission of Experts, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), S/1994/1405, para 159.
[120] *Musema*, Trial Judgment, Case No ICTR–96–13, para 161.
[121] *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 98, *Rutaganda*, Trial Judgment, ICTR–96–3, para 56 and *Musema*, Trial Judgment, Case No ICTR–96–13, para 161. See also F Harhoff, 'The Rwanda Tribunal, A Presentation of Some Legal Aspects' (1997) 321 *IRRC* 665 at 668.
[122] *Jelisić*, Trial Judgment, Case No IT–95–10, para 70 and n 95 and *Bagilishema*, Trial Judgment, Case No ICTR–95–1, para 65.
[123] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 514 and *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 98.
[124] The Proxmire Act, para 1093(6).
[125] M Shaw, above n 3 at 807. See also B Saul, above n 80 at 497; W Schabas, above n 20 at 112 and *Krstić*, Trial Judgment, Case No IT–98–33, para 556.

Religious Groups — The case-law from the Rwanda Tribunal suggests that a 'religious' group is one 'whose members share the same religion, denomination or mode of worship'.[126] This, once more, is similar to the US Genocide Convention implementing legislation, where the group must be 'distinctive in terms of common religious creed, beliefs, doctrines, practices, or rituals'.[127] Certain academic commentators have suggested that atheistic beliefs should be included within this division.[128] However, this interpretation is contrary to the ordinary meaning of the words 'religious groups', which is those adhering to a particular system of faith and worship.[129]

Other Groups — The Judgment in *Akayesu* was unclear as to whether the Tutsi were an ethnic group as opposed to as 'a group with a distinct identity',[130] and 'a stable and permanent group'.[131] Presumably as a result of this uncertainty, the Trial Chamber considered whether the protection of the Genocide Convention was limited to the four groups mentioned, or should extend to 'any group which is stable and permanent like the said four groups'.[132] They found that it was important to respect the intention of the drafters of the Genocide Convention, 'which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group'.[133] This approach to treating the groups protected by the Genocide as an *ejusdem generis* list[134] was supported by *Rutaganda*, which on the facts did not need to decide this issue,[135] but was not directly referred to by either *Kayishema and Ruzindana*,[136] or *Jelisić*.[137] The *Krstić* Judgment took the opposing view, clearly stating that:

> the Genocide Convention does not protect all types of human groups. Its application is confined to national, ethnical, racial or religious groups.[138]

Whilst the *travaux préparatoires* of the Genocide Convention do suggest that only permanent and stable groups were to be protected, and rejected political and

[126] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 515 and *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 98.
[127] The Proxmire Act, para 1093(7).
[128] M Lippman, above n 21 at 456 and M Shaw, above n 3 at 807.
[129] Definition taken from the *Concise Oxford Dictionary* (9th edn), (Clarendon Press, Oxford, 1995).
[130] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 170.
[131] *Ibid* para 702, but see Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), S/1994/1405, Letter dated 9 Dec 1994 from the Secretary-General Addressed to the President of the Security Council, at 1; *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 291 and *Rutaganda*, Trial Judgment, Case No ICTR–96–3, para 374.
[132] *Akayesu* Trial Judgment, Case No ICTR–96–4, para 516.
[133] *Akayesu*, Trial Judgment, *ibid* paras 516 and 701. See also D Amann, 'International Decisions, Prosecutor v Akayesu, Case ICTR–96–4–T' (1999) 93 *AJIL* 195 at 196 and T Simon, above n 6 at 245–47.
[134] See W Schabas, 'Article 6, Genocide', in O Triffterer (ed), *Commentary on the Rome Statute* 107–16 at 110–11.
[135] *Rutaganda*, Trial Judgment, Case No ICTR–96–3, para 58. The *Musema*, Trial Judgment, Case No ICTR–96–13, paras 161–63 appears to be in agreement with *Akayesu*, above n 132, and *Rutaganda*.
[136] *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 98.
[137] *Jelisić*, Trial Judgment, Case No IT–95–10, paras 69–72.
[138] *Krstić*, Trial Judgment, IT–98–33, para 554.

economic groups on that basis,[139] this does not necessarily mean that all such stable groups would be automatically protected. Indeed the Venezuelan delegate in the Sixth Committee praised the method of listing protected groups and acts, stating that this 'allowed for the *subsequent amendment of the convention* by the addition, to the current enumeration, of further acts or groups'.[140] Therefore it was clearly his belief that an amendment to the convention would be necessary in order to add more protected groups. In any case, on the plain wording of the text there is no suggestion that the groups enumerated are merely examples.

Another issue raised by the ICTY, in the case of *Jelisić*, was whether the perpetrator may take a 'negative' or 'positive' approach to identifying a group for destruction.[141] A 'positive' approach would be to identify the victim as a member of a national, ethnical, racial or religious group which he intends to destroy.[142] A 'negative' approach would:

> consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical racial or religious characteristics.[143]

The individuals 'thus rejected would, by exclusion, make up a distinct group'.[144] This approach is similar to that of the Yugoslavia Commission of Experts, with which the *Jelisić* Judgment concurred, but it has since been disapproved of in the *Stakić* Trial Judgment.[145]

4.3 The Rome Statute

Neither the *travaux préparatoires* of the Rome Statute, nor the Elements of Crimes, assist in elucidating the meaning of the various protected groups. The possibility of extending the protected groups to include social and political ones was mooted by the PrepCom in 1996, but it was noted that this question could be addressed within crimes against humanity[146] and this was the suggestion forwarded to the Diplomatic Conference in Rome by the final report of the sixth PrepCom.[147]

[139] See above n 102.
[140] Sixth Committee, 72nd Meeting, 81, emphasis added.
[141] *Jelisić*, Trial Judgment, see above n 137, para 71.
[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid.*
[145] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, para 96 and *Stakić*, Trial Judgment, Case No IT–97–24–T, para 512.
[146] UN Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol (I), (Proceedings of the Preparatory Committee During March–April and August 1996), GAOR 51st Session, Supp No 22 (A/51/22), para 60.
[147] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, 14 April 1998, A/CONF 183/2/Add 1, 13.

In view of this, there are still unanswered questions, which must be dealt with when prosecuting, defending and judging cases under the International Criminal Court. The case-law of both the ICTY and ICTR support a subjective approach when deciding upon the membership of the specific groups.[148] This is in line with the object and purpose of the Genocide Convention, given that the membership of the enunciated groups, especially ethnic groups, cannot always be scientifically and objectively defined, even when the existence of the group is an objective feature of the society in question.[149] However, this raises the question of whether the criterion for subjective determination of the group includes self-identification by the victim, as well as identification by the perpetrator.[150]

For the purposes of a criminal prosecution for the offence of genocide under the Rome Statute, in addition to proving that the accused had the specific intention to destroy one of the listed groups in whole or in part, it is necessary to show that he carried out the *actus reus*, such as killing one or more persons, intentionally. However, in a case of self-identification on the part of the victim, this raises problems of *mens rea*. An individual may have escaped death because the perpetrator did not perceive him to be part of the stigmatised group, yet suffer serious mental harm, such as post-traumatic stress, through witnessing a massacre upon the group to which he perceives himself as belonging. Nevertheless, a charge of genocide by causing serious bodily or mental harm to that person would not be appropriate, as it could not be shown that the perpetrator, who did not consider that individual as part of the stigmatised group, had the mental element for the *actus reus* of the offence. On the other hand, if the perpetrator killed someone that he classified as belonging to the group, such as a person of mixed parentage, then whether or not that person actually identified themselves with the group, a charge of genocide would be reasonable, given that the perpetrator killed the individual as part of his destruction of the group.[151]

Another important issue is whether the enumerated groups are part of a closed list, or may be added to *ejusdem generis*, as is posited by the *Akayesu* Judgment. As has been argued, this is not supported by the ordinary meaning of Article 2, nor by the *travaux préparatoires* of the Genocide Convention. However, it could represent a development of the Genocide Convention in customary law, if supported by *opinio juris* and state practice. Evidence that such *opinio juris* may be in the process of formation is available in Canada's Crimes Against Humanity and War Crimes Act, which defines genocide as:

> an act or omission committed with intent to destroy, in whole or in part, *an identifiable group of persons*, as such, that, at the time and in the place of its commission,

[148] *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 98, *Rutaganda*, Trial Judgment, Case No ICTR–96–3, para 56 and *Jelisić*, Judgment, Case No IT–95–10, para 70.
[149] *Bagilishema*, Trial Judgment, Case No ICTR–95–1, para 65 and see W Schabas, above n 20 at 110.
[150] See G Verdirame, 'The Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals' (2000) 49 *ICLQ* 578 at 588–94.
[151] Although it is true that the perpetrator may be aided in this by self-identification on the part of the victim when he orders a mixed group to separate into their separate ethnicities.

> constitutes genocide according to customary international law or conventional international law . . . .[152]

Nevertheless, the Canadian Act also states that 'for greater certainty' the crimes described in Article 6 of the Rome Statute are, as of July 1998, 'crimes according to customary international law'.[153] This suggests that the potentially broad definition of genocide in the Canadian Act provides for the potential future development of customary international law, rather than demonstrating that the law relating to genocide has already developed.

The final issue which arises from the ICTY case-law, is the suggestion in *Jelisić* that a perpetrator may take a 'negative' approach to identifying those for destruction, all those stigmatised by this approach constituting a group for the purposes of the Genocide Convention. However, given that the Trial Chamber found that *Jelisić* was a case of 'positive' stigmatisation of the Bosnian Muslim population,[154] this interpretation was effectively obiter dicta and has not been applied nor commented upon by the ICTR.

The 'negative' approach would benefit the prosecution in the case of a homogenous regime attempting to exterminate all other influences within their sphere of power. However, neither the ordinary wording of Article 2 of the Genocide Convention, nor the *travaux préparatoires* support this approach. As long as the accused had performed the *actus reus* with the specific intent for each group, there is no reason why an accused should not be accused of the crime of genocide against two or more groups. If the specific intent is not made out, the victims may in any case be protected under the prohibition of crimes against humanity.[155]

5. THE *ACTUS REUS* OF GENOCIDE

The *actus reus* of genocide is 'any of the following' five acts which will be discussed in turn:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

However, it is necessary to establish whether this list of acts is a restrictive list, or whether it may be added to *ejusdem generis*. The *travaux préparatoires* of the

[152] Arts 4(3) and 6(3), emphasis added, Crimes Against Humanity and War Crimes Act, 2000, (Canada), passed to implement the Rome Statute into Canadian Law, available at: <http://laws.justice.gc.ca/en/C-45.9/38096.html>.
[153] Arts 4(4) and 6(4), *ibid.*
[154] *Jelisić*, Trial Judgment, Case No IT–95–10, para 72.
[155] This is essentially the approach taken in *Stakić*, Trial Judgment, Case No IT–97–24–T, para 512.

Genocide Convention show that the majority of delegates in the Sixth Committee expressed the view that this list was an exhaustive one,[156] and indeed a Chinese amendment which would have taken the opposite approach was defeated.[157] This restrictive interpretation of the list of genocidal acts is supported by a plain reading of the text, by academic commentators,[158] and the International Law Commission.[159] The ICTY and ICTR have not yet suggested a different approach to the list of genocidal acts,[160] nor do the *travaux préparatoires* of the Rome Statute. Therefore, it seems likely that the International Criminal Court will treat the list of acts as exhaustive rather than illustrative.

'*(a) Killing Members of the Group*'

5.1 Origins

Whilst the phrase 'killing members of the group' appears relatively straightforward, the Sixth Committee debates raised two questions on this issue. The first problem was the divergence between the French and the English text. The English text uses the word 'killing', but the term 'meurtre' used in the French text is not an exact translation. The UK delegate preferred the English word because it 'had a much wider meaning than the word "murder" '.[161] However, the US delegate, who had been Chairman of the Ad Hoc Committee, explained that the word 'killing' had been chosen owing to the fact that the necessary intent had been made clear in the first part of the article, and that '[i]t had never been a question of defining unpremeditated killing as an act of genocide'.[162] Given that the Sixth Committee had already confirmed that the crime of genocide need not be premeditated, it would appear that the US delegate was referring to the need for the killing to be done intentionally rather than accidentally.

The second problem raised in the Sixth Committee on the issue of 'killing members of the group', was the question of whether killing one member alone would fulfil the *actus reus*. This issue caused a split between the delegates. One view was that the isolated killing of a member of the group 'would in fact be genocide if committed with the intent to destroy a group'.[163] The opposing view was stated forcibly by the Egyptian delegate that 'the idea of genocide could hardly

[156] Sixth Committee, 72nd Meeting, 83 and 78th Meeting, 143–44.
[157] Sixth Committee, 78th Meeting, 143 and 145.
[158] L LeBlanc, above n 24 at 90 and P Drost, above n 30 at 81.
[159] ILC Commentary, 90.
[160] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, para 98.
[161] Sixth Committee, 81st Meeting, 175.
[162] *Ibid* 177.
[163] Sixth Committee, 69th Meeting, 61 and see 73rd Meeting, 90 and 81st Meeting, 176.

be reconciled with the idea of an attack on the life of a single individual'.[164] This was supported by the UK delegate who proclaimed that:

> when a single individual was affected, it was a case of homicide, whatever the intention of the perpetrator of the crime might be.[165]

Whilst Robinson's commentary on the Genocide Convention remarks that 'killing' is broader than 'murder', it does not assist in an interpretation of whether the *actus reus* can include the killing of a single member of the group.[166] Nevertheless, his remarks in the preface to the commentary make it clear that he considers that the taking of a single life could never be genocide.[167] Despite this, an interpretation in line with the ordinary meaning of the text suggests that killing one member (or perhaps at least two, given that 'members' is in the plural) would suffice for genocide, provided the specific intention can be proven.[168]

Whilst academics have differed on the issue of whether one murder is sufficient for genocide,[169] it is submitted that this has stemmed from a confusion between the *actus reus* and the *mens rea* of the crime. The number of group members which the accused must have killed in order to fulfil the *actus reus* of genocide must not be confused with the number of group members he must intend to kill in order to fulfil the *mens rea* of genocide. The question of whether the prosecution ought to allege genocide in circumstances where very few people have actually been killed, and the difficulties of proving genocidal intent in such a situation, are separate issues.

5.2 Development

The main issue of concern to the ICTR when dealing with alleged crimes under this section has been whether to prefer the French translation 'meurtre' over the English version 'killing'. The first Judgment to consider this issue was *Akayesu*.[170] Here the Trial Chamber acknowledged that the term 'killing' in the English version was probably wide enough to 'include both intentional and unintentional homicides', whereas 'meurtre' in the French version is more precise, meaning

[164] Sixth Committee, 73rd Meeting, 92.
[165] *Ibid.*
[166] N Robinson, above n 29 at 63.
[167] *Ibid* ix.
[168] See N Ruhashyankiko, 'Study on Genocide', n 69 above paras 50–54 and Whitaker Report, 16.
[169] Cp B Bryant, above n 29 at 691 and P Drost, above n 30 at 85 who believe that one murder is sufficient, with L Kuper, *Genocide: Its Political use in the Twentieth Century* (Yale University Press, New Haven, 1982) 32, who assumes that there must be an '"appreciable" number of victims'.
[170] *Akayesu*, Trial Judgment, Case No ICTR–96–4, paras 500–1.

'homicide committed with the intent to cause death'. Therefore, the Trial Chamber found that:

> Given the presumption of innocence of the accused, and pursuant to the general principles of criminal law … the version more favourable to the accused should be upheld.[171]

In contrast the Trial Chamber in *Kayishema and Ruzindana* held that there is virtually no difference between the two words in the context of genocide.[172] They stated that in order to constitute genocide the acts must be committed with the intent to destroy the group in whole or in part, and quoted with approval the ILC statement that such acts would not 'normally occur by accident or even as a result of mere negligence'.[173]

The other issue considered by the ICTY and ICTR, was whether the *actus reus* of this section could be fulfilled by killing only one, or a small number of members of the group. In the *Jelisić* case the ICTY accepted without question that Goran Jelisić had committed the *actus reus* of genocide by killing somewhere between thirteen and over a hundred Muslims.[174] The ICTR case of *Akayesu*, however, confirms that a charge of genocide could be preferred when the killing or indeed any of the genocidal acts is committed against just one person by stating that 'the act must have been committed against *one or several* individuals … '.[175]

5.3 The Rome Statute

The Elements of Crime for killing members of the group require that the accused, with the requisite *mens rea*, killed '*one or more* persons' who belonged to the specific group which the perpetrator intended to destroy in whole or part,[176] making it clear that the Court will accept a single killing as fulfilling the *actus reus* of Article 6(a). However, when the contextual element which requires that:

> The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.[177]

is taken into account, it is clear that the reference to 'one or more persons' will not lead to the prosecution of individuals who have essentially acted alone in

[171] *Ibid* para 501 and see *Rutaganda*, Trial Judgment, Case No ICTR–96–3, para 50; *Musema*, Trial Judgment, Case No ICTR–96–13, para 155 and *Bagilishema*, Trial Judgment, Case No ICTR–95–1, para 57–58.
[172] *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 104.
[173] *Ibid* para 103, quoting from the ILC Commentary, 88.
[174] *Jelisić*, Trial Judgment, Case No IT–95–10, para 65 (the numbers in question being the difference between the number of murders Jelisić admitted, para 37, and the number of murders alleged by the Prosecution, para 64).
[175] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 521, emphasis added.
[176] EOC, 113, emphasis added.
[177] EOC, 113–15.

the commission of race-hate crimes.[178] Nevertheless, this Element may be important in assisting the prosecution when they have evidence that the accused has been part of a mob killing many members of a specific group, but only have sufficient evidence to prove that the accused killed one person beyond reasonable doubt.

On the question of the difference between 'meutre' and 'kill', whether the accused must murder or merely kill, there is an interesting development in the Elements of Crimes. The expression 'the accused killed' is used in the English version, in line with 'killing members of the group', however, in the French version the expression 'l'accusé a tué' is used, in contrast to the use of the word 'meurtre' in 'meurtre de membres du groupe'. The verb 'tuer' translates directly as 'to kill'. This suggests that, unlike the Trial Chamber in *Akayesu*, the Preparatory Commission took a broad view of 'killing' and included incidents which would not constitute intentional murder as amounting to the *actus reus* of genocide under Article 6(a) of the Rome Statute. However, it is unlikely that this will make any practical difference, given that under Article 30 the perpetrator must have acted with intent and knowledge with respect to each of the Elements.

'(b) Causing Serious Bodily or Mental Harm to Members of the Group'

5.4 Origins

Several amendments were proposed to the Ad Hoc Committee's '[i]mpairing the physical integrity of members of the group'.[179] The proposed expression 'serious bodily harm' was accepted without discussion by the Sixth Committee, however, the meaning of 'mental harm' was more contentious. The concept of mental harm was introduced by a Chinese amendment in order to ensure that the use of narcotic drugs would be part of the *actus reus* of genocide.[180] Although the Chinese amendment of 'impairing mental health' was rejected, a very similar Indian amendment 'or mental harm' was adopted, and voted for by the Chinese delegate on the basis that 'it had the same implication' as their rejected amendment.[181]

The question of what would constitute bodily harm or how serious 'serious bodily or mental harm' had to be was left unanswered in the *travaux préparatoires*. Robinson suggests that 'serious harm' is:

> a matter of interpretation to be decided in each instance on the basis of the intent and the possibility of implementing this intent by the harm done.[182]

[178] This contextual element should also be taken into account with respect to the other forms of the *actus reus* of genocide discussed below.
[179] ECOSOC Report, 13.
[180] Sixth Committee, 81st Meeting, 175 and see ECOSOC Report, 15.
[181] *Ibid.*
[182] N Robinson, above n 29 at 63.

The exact scope of 'mental harm' is also left unanswered. Is it restricted solely to harm inflicted by the use of narcotic drugs? This is Robinson's contention;[183] however, the ordinary meaning would seem to be much wider, encompassing serious mental harm no matter how inflicted.

5.5 Development

Many commentators on the Genocide Convention have been somewhat vague about the meaning of 'serious bodily or mental harm'. The ILC in its work on the Draft Code of Crimes merely commented that 'bodily harm' 'involves some type of physical injury' and that 'mental harm' 'involves some type of impairment of mental faculties'.[184] It also emphasised that this harm 'must be of such a serious nature as to threaten [the group's] destruction in whole or in part'. Similarly Drost, whilst acknowledging that this section 'leaves much room for divergent valuation as to the seriousness of the harm inflicted', also commented that the injury inflicted must 'be such as to endanger … the integrity of healthy existence of the group in whole or in part'.[185]

On a plain reading of this section, it is submitted that provided the bodily or mental harm is serious and intended to destroy the group in whole or part, the crime of genocide is theoretically committed. Whether the harm actually does threaten the group would depend upon how far the accused has progressed upon his genocidal plan, and would be an issue only relevant to the prosecution when deciding whether genocide was an appropriate charge, or to the Judges when sentencing an individual found guilty under this section.[186]

The ICTR has analysed the meaning of 'serious bodily or mental harm' in *Akayesu*, which interpreted this as including, inter alia, 'acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution'.[187] The Judgment also stressed that:

> Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.[188]

The Trial Chamber in *Kayishema and Ruzindana* expanded upon the meaning of 'bodily harm' stating that:

> This phrase could be construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.[189]

[183] *Ibid* ix.
[184] ILC Commentary, 91.
[185] P Drost, above n 30 at 86.
[186] See W Schabas, 'Article 6, Genocide', in O Triffterer (ed), *Commentary on the Rome Statute*, 107–16 at 113.
[187] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 504.
[188] *Ibid* para 502 and see *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 108; *Musema*, Trial Judgment, Case No ICTR–96–13, para 156; *Bagilishema*, Trial Judgment, Case No ICTR–95–1, para 59 and *Stakić*, Trial Judgment, Case No IT–97–24–T, para 516. See also J Webb, above n 36 at 393.
[189] *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 109.

Importantly the *Akayesu* Judgment tackled the issue of the place of rape in genocide. The Trial Chamber emphasised that rape and sexual violence 'constitute genocide in the same way as any other act' so long as they are committed with the *dolus specialis* of genocide.[190] They confirmed that such acts 'certainly constitute infliction of serious bodily and mental harm on the victims', and are, in their opinion, 'one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm'.[191] This interpretation is supported by the Judgments of *Rutaganda* and *Musema*, both of which confirmed in identical wording, that serious bodily or mental harm includes acts 'of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution'.[192] This approach is strongly supported by academics such as Fein and Fisher.[193]

Therefore a modern interpretation of the definition of genocide views this section widely, including temporary serious harm to the body and mind, caused in a variety of ways including rape. The US interpretative declaration,[194] that 'mental harm' means the 'permanent impairment of mental faculties through drugs, torture or similar techniques',[195] appears to be out of step with both academic commentators and the ICTR.

5.6 The Rome Statute

The meaning of 'mental harm' was the cause of some discussion during the drafting of the Rome Statute. Initially the Preparatory Committee noted that this term needed further clarification,[196] before suggesting an interpretation identical to the US 'understanding' discussed above.[197] By the third PrepCom in 1997, however, the footnote attached to 'mental harm' had altered to an understanding that this referred to 'more than the minor or temporary impairment of

[190] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 731.
[191] *Ibid.*
[192] *Rutaganda*, Trial Judgment, Case No ICTR–96–3, para 51 and *Musema*, Judgment, Case No ICTR–96–13, para 156.
[193] See H Fein, 'Genocide and Gender: The Uses of Women and Group Destiny' (1999) 1 *Journal of Genocide Research* 43, especially 59; S Fisher, 'Occupation of the Womb: Forced Impregnation as Genocide' (1996) 46 *Duke LJ* 91, especially 123 and M Karagiannakis, 'The Definition of Rape and its Characterisation as an Act of Genocide — A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia' (1999) 12 *Leiden JIL* 479 at 490.
[194] USA Understanding (1) to the Convention on the Prevention and Punishment of the Crime of Genocide, entered on ratification on 25 Nov 1988, emphasis added, available on the ICRC website at <http://www.icrc.org/>.
[195] See C Joyner, 'The United States and Genocide Convention' (1987) 27 *Indian Journal of International Law* 411 at 444–45.
[196] UN Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol(I), (Proceedings of the Preparatory Committee During March–April and August 1996), GAOR 51st Session, Supp No 22 (A/51/22), para 61.
[197] UN Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol(II), (Compilation of Proposals March–April and August 1996), GAOR 51st Session, Supp No 22A (A/51/22), 59.

mental faculties',[198] although whether 'more than temporary' meant permanent was unclear. This footnote remained on the document forwarded to the diplomatic conference by the final PrepCom.[199]

The Women's Caucus for Gender Justice in their submission to the February 1999 Preparatory Commission contended that customary law recognises 'rape and other forms of sexual violence … as inflicting serious mental or physical harm on the victim'.[200] The acceptance of this approach can be seen in a footnote to 'serious bodily or mental harm' in the Elements of Crime. The Elements, in addition to contextual and mental elements already discussed, require that the perpetrator caused 'serious bodily or mental harm to one or more persons' and the footnote explains that 'acts of torture, rape, sexual violence or inhuman or degrading treatment' are included.[201]

Therefore, when dealing with a case under Article 6(b) of the Rome Statute, it seems likely that the Judges of the International Criminal Court will apply a fairly wide understanding to causing 'serious bodily or mental harm'. Injuries such as broken bones, injuries to internal organs, and physical injuries caused by rape and sexual violence should come within the definition of serious bodily harm and mental harm should also be read in its wider sense taking into account serious psychiatric disorders caused by mistreatment by way of, inter alia, narcotics, rape, torture, and inhumane and degrading treatment. It is submitted that the Preparatory Committee footnote stating that the harm must be more than temporary is either no longer relevant, not being reflected in the text of Article 6(b) or the Elements of Crimes, or should be understood as meaning that the bodily or mental harm must not be so minor that its effects disappear in a short length of time.

'*(c) Deliberately Inflicting on the Group Conditions of Life Calculated to Bring About its Physical Destruction in Whole or in Part*'

5.7 Origins

Drost suggests that the word 'deliberately' was included in this section, not only to denote intention, which finds expression in the word 'calculated', but also to show that the imposition of such conditions of life must be pre-meditated.[202]

[198] Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 Feb 1997, A/AC 249/1997/L 5, 3.
[199] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, 14 April 1998, A/CONF 183/2/Add 1, 13.
[200] Women's Caucus for Gender Justice, 'Suggestions for the Elements Annex (Part I) Genocide: Sexual Violence as Acts of Genocide', Submitted to the 16–26 Feb 1999 Preparatory Committee, available at <http://www.iccwomen.org/icc/>.
[201] EOC, see footnote 3, at 113.
[202] P Drost, above n 30 at 82.

The ordinary meaning of the word 'deliberate', which is 'fully considered, not impulsive' supports this interpretation.[203] Robinson's Commentary on the Genocide Convention suggests that the actions covered by this section would include:

> placing a group of people on a subsistence diet, reducing required medical services below a minimum [and] withholding sufficient living accommodations … .[204]

5.8 Development

The ICTR in *Akayesu* stated that this section 'should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction', and concurred with Robinson's suggestions of ways in which an accused could satisfy this section.[205] The Trial Chamber in *Kayishema* added to these examples of 'conditions of life', rape, and the suggestions of the UN Secretariat Draft Convention, which included 'lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion'.[206] Lippman contended that the conditions prohibited are those 'which are likely to result in death',[207] and LeBlanc stated that such conditions 'must be extreme'.[208]

Although a Syrian amendment to include expulsion from homes as an additional section of the *actus reus* of genocide was defeated in the Sixth Committee,[209] the ILC and the ICTR have accepted that such expulsions can constitute 'conditions of life' calculated to bring about physical destruction, within this section.[210] This interpretation appears to be correct in the light of the 'ethnic cleansing' carried out in the former Yugoslavia. Whilst there is as yet no judgment on this issue, it seems clear that expelling both old and young from their homes *en masse*, especially during severe winter conditions could constitute 'conditions of life' capable of bringing about their physical destruction. However, it must be noted that deportation alone is insufficient to satisfy this part of the *actus reus* of genocide, as was emphasised by the Trial Chamber in *Stakić* which drew the distinction between the physical destruction of a group and its mere dissolution.[211]

[203] See *Concise Oxford Dictionary* (9th edn), (Clarendon Press, Oxford, 1995).
[204] N Robinson, above n 29 at 63–64.
[205] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 505–6. Followed by *Rutaganda*, Trial Judgment, Case No ICTR–96–3, para 52 and *Musema*, Trial Judgment, Case No ICTR–96–13, para 157.
[206] *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, paras 115–16. The Draft Convention of the UN Secretariat is reprinted in N Robinson, above n 29 at 122–30.
[207] M Lippman, above n 21 at 456.
[208] L LeBlanc, above n 24 at 108.
[209] Sixth Committee, 82nd Meeting, 184–86.
[210] ILC Commentary, 92 and ICTR cases above.
[211] *Stakić*, Trial Judgment, Case No IT–97–24–T, para 519.

5.9 The Rome Statute

This section did not raise controversy in the *travaux préparatoires* of the Rome Statute, and indeed no alterations were proposed to it during the Preparatory Committee sessions. The Women's Caucus for Gender Justice submitted to the Preparatory Commission for the ICC that 'conditions of life' should be recognised as including rape and sexual violence, given that such abuse may be inflicted 'to destroy the spirit as a means of bringing about the physical destruction of the group'.[212] Whilst the Elements of section 6(c) do not explicitly mention rape and sexual violence, this view has the support of the ICTR,[213] and it is likely that such actions would be accepted under this section by the International Criminal Court.

The Elements of Crimes for Article 6(c) state that the accused must have the *dolus specialis* of genocide, and inflict 'certain conditions of life' upon one or more persons.[214] These conditions must be 'calculated to bring aboutthe physical destruction of that group, in whole or in part'.[215] Although the expression 'calculated' may give the impression of a mental element, Garraway comments that:

> the element does not refer so much to a calculation by the perpetrator, but rather to the character of the conditions of life imposed.[216]

Nevertheless, the default mental element of Article 30 would require knowledge on the part of the perpetrator that such was the case. The Elements also include a statement explaining that the conditions of life may include 'deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes'.[217]

A final issue is whether 'conscious acts of advertent omission' such as destroying a group through famine or disease by calculated neglect, would come within this section.[218] Whitaker suggested that such omissions would not be covered by the Genocide Convention,[219] and it is possible that an omission to help a minority in a particular part of the country suffering from disease or famine, combined with the specific intention of genocide, may not come within Article 6(c). However, any action such as ordering appropriate departments or doctors not to help the group, or preventing relief agencies such as the Red Cross from operating

[212] Women's Caucus for Gender Justice, above n 200.
[213] *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 116.
[214] EOC, 114.
[215] *Ibid.*
[216] C Garraway, 'Elements of the Specific Forms of Genocide', in R Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, New York, 2001) 49–55 at 52.
[217] EOC, see footnote 4, at 114.
[218] Whitaker Report, 20.
[219] *Ibid.*

to assist those in distress, would in all likelihood be considered as 'actions' for the purposes of Article 6(c), and if combined with the specific intent a successful prosecution could follow before the International Criminal Court.

'*(d) Imposing Measures Intended to Prevent Births Within the Group*'

5.10 Origins

The wording of this section was taken without change, and with little comment, by the Sixth Committee from the text of the Ad Hoc Committee's Draft Convention.[220] It is quite clearly worded, although Robinson comments that it may give rise to confusion over whether the measures must be intended to prevent births within the whole group or merely in part of it. He declares himself in favour of the latter interpretation, by analogy with the specific intention of genocide, which would seem to be the correct approach when the article is read as a whole.[221]

5.11 Development

Forcible prevention of births has been accepted as amounting to genocide as far back as the World War II tribunals.[222] Although it is clear that extreme measures such as forced sterilisation and abortions would come within this section,[223] more recent interpretations have demonstrated its full scope. Rape as a method of preventing births within a group was discussed by Fisher, who pointed out that in the Bosnian Muslim culture (and indeed in many others) 'a woman may not be marriageable if she has been raped or carried the child of another man'.[224] Women may also be psychologically traumatised as a result of rape and 'unable to have normal sexual or childbearing experiences with members of their own group'.[225]

The ICTR in the case of *Akayesu* discussed the scope of measures intended to prevent births. The Judgment held that the measures should include 'sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriages'.[226] The Trial Chamber noted that measures

[220] ECOSOC Report, 13.
[221] N Robinson, above n 29 at 64 and see P Drost, above n 30 at 87.
[222] W Schabas, 'Article 6, Genocide', in O Triffterer (ed), *Commentary on the Rome Statute*, 107–16 at 113–14, referring to *Trial of Obersturmbannführer Hoess*, 7 LRTWC, 11–26 at 25 and *Trial of Ulrich Greifelt and Others*, 13 LRTWC, 1–69 at 17.
[223] Sixth Committee, 82nd Meeting, 183.
[224] S Fisher, above n 193 at 123.
[225] *Ibid* 93, (although this was a comment in relation to enforced pregnancy).
[226] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 507, and see *Kayishema and Ruzindana*, Trial Judgment, Case No ICTR–95–1, para 117; *Rutaganda*, Trial Judgment, Case No ICTR–96–3, para 53 and *Musema*, Trial Judgment, Case No ICTR–96–13, para 158.

to prevent births could be mental as well as physical, given that 'members of a group can be led, through threats or trauma, not to procreate', and that individuals who are raped may subsequently refuse to procreate.[227] The Judgment also acknowledged the problem of enforced pregnancy, and stated that this could be a measure intended to prevent births in a patriarchal society where membership of a group is determined by the identity of the father, and as a result of the rape the child will not belong to its mother's group.[228]

The International Law Commission notes a limiting factor on measures to prevent births. They state that the use of the phrase 'imposing measures' demonstrates that there must be 'an element of coercion' involved in the prevention of births and that this section would not, therefore, outlaw the provision of voluntary birth control programmes.[229] Amnesty International argues that 'there is no requirement that the measures have been imposed forcibly'.[230] However, given that the ordinary meaning of 'impose' is to 'enforce compliance with',[231] it is clear that the measures to prevent births must involve some sort of compulsion, be it mental or physical.

5.12 The Rome Statute

An alteration to the text of this section of the Genocide Convention was suggested in the 1996 Preparatory Committee meetings by replacing 'measures intended to prevent births', with 'measures preventing births'.[232] However, rather than clarifying the section, this would have been an alteration so that any measures taken to prevent births would, in fact, have to have been effective, before the offence of genocide was committed. The third PrepCom abandoned this position and the original wording was retained.[233] Therefore under Article 6(d), in the words of Amnesty International, there is no requirement 'that the accused have *succeeded* in preventing births'.[234]

The proposed Elements of Crimes set out this type of genocide relatively clearly. They state that the accused must have 'imposed certain measures upon

[227] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 508.
[228] *Ibid* para 507.
[229] ILC Commentary, 92.
[230] Amnesty International, 'The International Criminal Court: Fundamental Principles Concerning the Elements of Genocide', AI Index: IOR 40/01/99, available on the Amnesty International website at <http://icc.amnesty.it/library/aidocs/>.
[231] See *Concise Oxford Dictionary* (9th edn) (Clarendon Press, Oxford, 1995).
[232] UN Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol (I), (Proceedings of the Preparatory Committee During March–April and August 1996), GAOR 51st Session, Supp No 22 (A/51/22), para 62 and UN Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol (II), (Compilation of Proposals March–April and August 1996), GAOR 51st Session, Supp No 22A (A/51/22), 58.
[233] Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 Feb 1997, A/AC 249/1997/L 5, at 3.
[234] Amnesty International, above n 230, emphasis added.

one or more persons' belonging to one of the specified groups and that the measures were 'intended to prevent births within that group'.[235]

Therefore before the International Criminal Court, 'imposing measures to prevent births' should be read widely. It should include compulsory physical measures such as sterilisation, abortion, sexual mutilation, enforced pregnancy, birth control, separation of sexes, and prohibition of marriage. Measures to produce the same effect mentally such as threats, trauma and rape should be included. Provided that measures are taken with the intention of preventing births in all or part of the group, they need not actually be successful for the *actus reus* of genocide to be committed.

'*(e) Forcibly Transferring Children of the Group to Another Group*'

5.13 Origins

Forcibly transferring children was not included as part of the *actus reus* of genocide in the Ad Hoc Committee's Draft Convention, although it had been included in the earlier Draft Convention prepared by the Secretariat's Human Rights Division.[236] It was re-introduced by the Greek delegate in the Sixth Committee,[237] and caused controversy as some delegates considered transferral of children to be cultural rather than physical genocide and therefore argued against its inclusion in this convention.[238] However, after the Greek delegate emphasised that forcible removal of children could be connected with the destruction of the group and physical genocide, the amendment was adopted by a small majority.[239]

The section is somewhat ambiguous in parts. One problem is the definition of 'children'; at what age is a person an adult whose transfer would no longer constitute the *actus reus* of genocide? This problem is not tackled in the *travaux préparatoires* of the Genocide Convention. Robinson suggests that the term 'children' should be interpreted according to the law of the State prosecuting for genocide.[240] However, this interpretation is incompatible with a consistent international interpretation of genocide, and is inappropriate for an international tribunal.

Another question is whether the children must be transferred to another specific group, or whether they may just be dispersed among the general population.[241] The

[235] EOC, 114.
[236] See Draft Convention prepared by the Secretariat's Human Rights Division, reprinted in N Robinson, above n 29 at 122–30.
[237] Sixth Committee, 82nd Meeting, 186–87. Greece had political motives in introducing this amendment, see L LeBlanc, above n 24 at 114.
[238] Sixth Committee, 82nd Meeting, 187–91 and 83rd Meeting, 193–95 and 206.
[239] Sixth Committee, 82nd Meeting, 189–90.
[240] N Robinson, above n 29 at 65.
[241] P Drost, above n 30 at 87.

Greek delegate's comment that his amendment was aimed at the 'forced transfer from one human group to another' does not elucidate this issue.[242] As this section is aimed at preventing the removal of children from their own specific group, it would seem absurd if removing children from their particular group to another homogenous group was a violation, and yet removing them to a variety of other national, ethnical, racial and religious groups was not.

5.14 Development

Academic commentators and the ICTY and ICTR have in the main ignored the issue of the upper age limit for 'children' under this offence. It could be argued that a child is a person under the age of 15, the definition given in the 1949 Geneva Conventions.[243] However, given that there is no binding precedent on this issue, a modern interpretation would be to define 'children' in accordance with the 1989 United Nations Convention on the Rights of the Child, which states in Article 1 that a 'child' is a person under 18 years old.

The meaning of 'forcibly' transferring children is discussed by Drost, who opines that the action itself need not be 'by force', and that '[a]dministrative measures compellingly imposed but obediently performed fall likewise under the provisions'.[244] The interpretation of non-physical means of forcibly transferring children given by the ICTR in *Akayesu*, is that:

> the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.[245]

An important question is whether the children have to be mistreated in any way in order for this section to be fulfilled. Bryant suggests that even if the 'transferred children were treated in all respects like the natural children' of the group they are removed to, and although no further action was taken against the parents, the crime of genocide would be committed.[246] It is true that the *actus reus* of genocide is clearly fulfilled under this section if children are forcibly transferred to another group. There is no need to demonstrate ill-treatment. However, it must be remembered that the accused must have the *dolus specialis* of genocide,

[242] Sixth Committee, 82nd Meeting, 188.
[243] See Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 Aug 1949, reprinted in A Roberts and R Guelff (eds), *Documents on the Laws of War* (2nd edn) (Clarendon Press, Oxford, 1989) Arts 24, 38 and 50 refer to 'children under fifteen', but note that Arts 51 and 68 make special allowance for persons under 18 years of age.
[244] P Drost, above n 30 at 87
[245] *Akayesu*, Trial Judgment, Case No ICTR–96–4, para 509 and see *Kambanda*, Trial Judgment, Case No ICTR–97–23, para 118, *Rutaganda*, Judgment, Case No ICTR–96–3, para 54 and *Musema*, Trial Judgment, Case No ICTR–96–13, para 159.
[246] B Bryant, above n 29 at 695.

that being to destroy the group in whole or in part, and it is clear that this means physical destruction.[247]

A final issue is whether rape and enforced pregnancy can constitute forcibly transferring a child from one group to another. The Women's Caucus for Gender Justice states that:

> forced pregnancy, through manipulation of patriarchal norms which determine group identity by the identity of the father and imposing the identity of the enemy on the children born of that group, is another form of forcibly transferring children of the targeted group to another group.[248]

This was clearly not envisaged by the Sixth Committee, who only discussed this section in terms of the physical transfer of children. However, given that the children in a patriarchal society would be born with, rather than transferred to, the group identity of the father, perhaps Article 6(d) would be a more appropriate charge for this type of action.

5.15 The Rome Statute

The main issue with regard to Article 6(e) in the 1996 Preparatory Committee sessions was whether the forcible transfer of children should be expanded to include forcible transfers of all persons.[249] This suggestion was dropped by the third PrepCom, which retained the original wording of the Genocide Convention.[250] With regard to the age of a child, the Elements of Crimes state that persons transferred must be under eighteen.[251] They also make clear that the meaning of 'forcible' is:

> not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power … or by taking advantage of a coercive environment.[252]

Therefore, under the Rome Statute a person would be liable under Article 6(e) if he had the specific intent of genocide, and in furtherance of that intent forcibly,

[247] See Sixth Committee, 82nd Meeting, at 189, but see Tatz's discussion of whether forcible transferal of children as the sole *actus reus* can constitute physical genocide, C Tatz, 'Genocide in Australia' (1999) 1 *Journal of Genocide Research* 315.
[248] Women's Caucus for Gender Justice, above n 200 and see also S Fisher, above n 193 at 114.
[249] UN Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol (I), (Proceedings of the Preparatory Committee During March–April and August 1996), GAOR 51st Session, Supp No 22 (A/51/22), para 63 and UN Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol (II), (Compilation of Proposals March–April and August 1996), GAOR 51st Session, Supp No 22A (A/51/22), 58.
[250] Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 Feb 1997, A/AC 249/1997/L 5, at 3.
[251] EOC, at 115, but see comments of W Schabas, above n 20 at 176.
[252] EOC, see footnote 5, at 114.

(read in its wider sense), 'transferred one or more' persons who he knew, or 'should have known', to be under 18, to another group. The group to which the children are transferred need not be homogenous and the children need not be physically ill treated in any way in order to fulfil the *actus reus* of genocide under this section.

6. CONCLUSION

Although Article 6 of the Rome Statute uses the same language as Article 2 of the Genocide Convention, the exact meaning of this offence has been analysed and clarified in the last half of the twentieth century. Academic criticism has contributed to a clarification of some issues, and demonstrated the problem areas of the definition of genocide.[253] Work by international bodies, such as the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, the International Law Commission and the Commission of Experts for the former Yugoslavia and Rwanda have further probed areas of confusion.

In particular the work of the International Criminal Tribunals for the former Yugoslavia and Rwanda has been invaluable in demonstrating the practical problems which arise when prosecuting and defending cases of genocide in an international court, and by giving authoritative judicial pronouncements upon the legal definition of the crime of genocide. The *travaux préparatoires* of the Rome Statute and the Elements of Crime further clarify the approach which will be taken by the International Criminal Court in such cases.

Kuper stated in *The Prevention of Genocide* that, 'the Genocide Convention has been almost totally ineffective in securing punishment of the crime'.[254] However, as this analysis has shown, what has been missing is not an appropriately worded convention, but an effective enforcement mechanism.[255] Such a mechanism has been provided in a limited way by the Yugoslavia and Rwanda tribunals, and now the International Criminal Court has the potential to become a truly effective instrument for the international punishment of this crime, subject to the complementarity provisions of the Rome Statute.

[253] For more information see I Charny, *Genocide a Critical Bibliographic Review* (Mansell, London, 1998).
[254] L Kuper, *The Prevention of Genocide* (Yale University Press, New Haven, 1985) 173.
[255] See N Procida, 'Ethnic Cleansing in Bosnia-Herzegovina, A Case Study Employing the United Nations Mechanisms to Enforce the Convention on the Prevention and Punishment of the Crime of Genocide' (1995) 18 *Suffolk TLJ* 655.

7

Crimes Against Humanity

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1. INTRODUCTION

IN THE LEAD up to the Rome Diplomatic Conference for the negotiation of a Statute for a new International Criminal Court, inclusion of a category of crimes against humanity within the jurisdiction *ratione materiae* of the Court was never in question. The lack of controversy surrounding the inclusion of the category of offences, however, obfuscated the likely difficulties in reaching agreement on the definitions of the specific offences constituting crimes against humanity. I suspect that very few national delegations anticipated an often difficult and protracted negotiation of the various aspects of the definition of crimes against humanity. In stark contrast to expectations that the definition of war crimes would be complicated and often controversial, assumptions were made that defining crimes against humanity would be relatively straightforward. Those fallacious assumptions were quickly exposed once the Rome negotiation process was under way.

The task of defining war crimes in Rome was deliberately and strategically left until other so-called 'core crimes' of genocide and crimes against humanity were defined — at least in part in the hope that time limitations before the conclusion of the Diplomatic Conference would provide the necessary catalyst for the multiple compromise proposals required for consensus — or something close to it. Following the decision in the first week of negotiations not to deviate from the 1948 Genocide Convention definition for the crime of genocide[1] and the subsequent agreement to provide for the controversial crime of aggression in the Statute subject to some adequate future definition of that crime, attention in the relevant Working Group of the Conference turned to crimes against humanity at the start of Week Two of negotiations. Many national delegations were buoyed by a sense of significant progress — particularly because of misplaced optimism about the likely pace of negotiations on the non-controversial category of crimes against humanity.

[1] The definition of Genocide in Art 6 of the Rome Statute is a *verbatim* replication of the definition in Art 2 of the 1948 International Convention on the Suppression and Punishment of the Crime of Genocide, opened for signature in New York, 9 Dec 1948, 78 *UNTS* 277. See Byron in this volume.

The lengthier than anticipated negotiations to conclude a text for what ultimately became Article 7 of the Rome Statute are primarily explicable by the lack of an extant convention definition. The Genocide Convention for Article 6 and various multilateral treaties such as the Geneva Conventions of 1949 and their Two Additional Protocols of 1977, the Hague Conventions and Declarations of 1899 and 1907 and the Hague Convention for the Protection of Cultural Property of 1954 for Article 8 each provided critical reference points — previously negotiated and adopted treaty definitions of the offences now to be included in the Rome Statute. Although the term 'crimes against humanity' has been in use since at least the end of World War I,[2] no global multilateral treaty definition had ever been negotiated prior to the Rome Conference.[3]

It is, of course, inaccurate to create the impression that delegates to the Rome Diplomatic Conference were bereft of multilateral instruments purporting to define crimes against humanity. Repeatedly throughout the negotiations references were made to the Nuremberg and Tokyo Tribunal Statutes[4] and to the Statutes of the two ad hoc international criminal tribunals — for the Former Yugoslavia and for Rwanda[5] — as precedents for the general threshold requirements for a crime against humanity as well as for the specific acts that should be included in a list of those constituting crimes against humanity. However, all four instruments are skeletal and, in the case of each of the four Tribunals operating pursuant to the respective statutes, judges had to resort to supplementary sources to flesh out the specific elements of alleged crimes against humanity. Rome represented the first occasion on which the inter-governmental community had been called upon to negotiate a treaty definition of crimes against humanity and, in spite of unanimity on the desirability of concluding agreement on a suitable definition for inclusion in the Statute, the novelty of the exercise protracted proceedings. That was the simple reality. In retrospect it seems obvious that national delegations ought not to have been surprised by the complexity of the negotiations.

The lack of an existing treaty definition was not an entirely negative constraint. Paradoxically, it also proved liberating in that delegates were not beholden to

[2] MC Bassiouni, *Crimes Against Humanity in International Law* (2nd edn) (Kluwer, The Hague, 1999) 62–69.

[3] This observation was also made by T Meron, 'Crimes Under the Jurisdiction of the International Criminal Court' in H von Hebel, J Lammers and J Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (TMC Asser Press, The Hague, 1999) 49.

[4] The Charter for the Nuremberg Tribunal was incorporated in the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, 8 UNTS 279. In contrast, the Charter for the Tokyo Tribunal was not included in the terms of a multilateral treaty but in a proclamation by the Supreme Commander of the Allied Powers in the Pacific Theatre of World War II, General Douglas MacArthur, on 19 Jan 1946, US Dept of State Pub No 2675.

[5] *Report of the Secretary-General Pursuant to Para 2 of Security Council Resolution 808*, 48 UN SCOR , UN Doc S/25704 (3 May 1993), annexed to UN Security Council Resolution 827, 48 UN SCOR, UN Doc S/RES/827 (25 May 1993); and Statute of the International Criminal Tribunal for Rwanda annexed to UN Security Council Resolution 955, 49 UN SCOR, UN Doc S/RES/955 (8 Nov 1994).

some past compromise text paraded as sacrosanct and somehow beyond re-negotiation. The potential of this 'lack of past shackles' phenomenon was neatly encapsulated in a debate during Week One of negotiations in relation to the definition of genocide. A number of 'Like-Minded'[6] delegates argued for a broadening of the 1948 Convention definition of genocide on the basis that the Convention definition was unnecessarily restrictive. These familiar a rguments[7] included the claim that the exhaustive list of target groups — 'national, ethnical, racial or religious group' ought to be extended; that the high mental threshold — the 'intent to destroy in whole or in part' ought to be relaxed; and that the intent to 'destroy' ought to be explicitly extended beyond physical destruction to include the intent to destroy a culture. These arguments were steadfastly resisted — repeatedly on the basis that it is unwise to tinker with a long established and widely supported treaty definition — a definition that has attained customary normative status and that enshrines one of the most grievous categories of international crime. This conservative position prevailed but on the basis of an explicit agreement insisted upon by the delegations desirous of a more progressive approach to the development of international criminal law that the negotiation of the definition of crimes against humanity be broad enough to cover the sorts of genocidal activity otherwise excluded from the Genocide Convention definition.

So it was that negotiations for the definition of crimes against humanity commenced on the basis of an acknowledged opportunity to negotiate a novel formulation. Naturally there was no agreement about how radical the new formulation could be. Several delegations reflected what von Hebel and Robinson characterise as a 'procedural, adjectival' approach to the court's jurisdiction — that is, 'the establishment of a new Court with jurisdiction over existing international crimes' by reiterating again and again the importance of faithfulness to existing customary international law.[8] This ostensibly principled approach was, however, often only a conveniently authoritative mantra for conservativism, in negotiations. The same delegations espousing fidelity to existing customary norms were the most promiscuous in their betrayal of custom when it suited their interests. Even so, the novelty of the exercise in Rome did provide an opportunity to establish some new normative standards and the negotiated text of Article 7 reflects some significant advances. Interestingly, the lack of pre-existing treaty definition facilitated some creative re-negotiation of definitions of some

[6] The so-called 'Group of Like-Minded States' consisted of an informal coalition of more than 60 States committed to an effective new international criminal law regime. The Group included member States from all geographic regions of the world and caucused together throughout the Conference in pursuit of a robust Statute.

[7] See generally, W Schabas, *Genocide in International Law* (CUP, Cambridge, 2000). See also SR Ratner and JS Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd edn) (OUP, Oxford, 2001) 29–39.

[8] H von Hebel and D Robinson, 'Crimes Within the Jurisdiction of the Court' in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer, The Hague, 1999) 91.

specific acts constituting crimes against humanity overriding existing treaty definitions. The contrast between loyalty to the convention definition of genocide as a crime in its own right and the approach to definitions of torture and apartheid as specific acts constituting crimes against humanity, for example, could hardly be more stark. Torture as a crime against humanity in Article 7 of the Rome Statute is all the more intriguing because torture as a war crime in the very next Article of the same Statute is defined differently — the Elements of Crimes document adhering *verbatim* to the existing Torture Convention definition.

The purpose of this chapter is to critique the Article 7 definition of crimes against humanity against international criminal law as it stood prior to the Rome Diplomatic Conference in 1998. It is intended to expose some of the new developments in the law and to identify those aspects of the definition reflecting inevitable political compromise — the sorts of concessions characteristic of any multilateral negotiations that always preclude the attainment of a stronger, more comprehensive instrument.

2. GENERAL ISSUES

2.1 Altering the Order of the Article Within the Statute

All versions of the draft text of the Statute prior to the Rome Diplomatic Conference place crimes against humanity third in order after genocide and war crimes — not because of any hierarchical order of gravity but simply because it seems to be the way it was done.[9] The re-ordering of the Articles defining the three core crimes begs the question: for what reason?

As far as I am aware, the issue of a possible re-ordering of the definition Articles was first raised in the context of informal discussions of strategies for the expansion of the list of sexual offences constituting war crimes and crimes against humanity. The discussions occurred during Week Three of the Conference and involved representatives from various national delegations[10] clearly committed to an expansive list of sexual offences and from the Women's Caucus for Gender Justice (commonly known as the 'Women's Caucus') — the proactive and high profile umbrella non-government organisation for a number of women's

[9] See eg, Report of the International Law Commission on the Work of its Forty-Sixth Session — Draft Statute for an International Criminal Court, reprinted in MC Bassiouni (ed), *The Statute of the International Criminal Court: A Documentary History* (Transnational Publishers, Ardsley NY, 1998) 721 at 728; Report of the Preparatory Committee on the Establishment of an International Criminal Court (proceedings of the Preparatory Committee during its 1996 meetings), reprinted in Bassiouni, *id* 363 at 383–94; Draft Report of the Intersessional Meeting From 19 to 30 Jan 1998 in Zutphen, The Netherlands, reprinted in Bassiouni, *id* 143 at 148–59; Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute and Draft Final Act*, UN Doc A/Conf 183/2/Add 1 (1998), reprinted in Bassiouni, *id* 119.

[10] I was invited to attend the meeting at the invitation of a colleague from the Australian Government Delegation who was one of the co-chairs of the informal meeting.

lobby groups attempting to influence the negotiations throughout the Rome Conference.

Much of the discussions focused upon the then unresolved and clearly problematic question of 'forced pregnancy' — an issue so potentially explosive as to lead some to characterise it as a 'Conference wrecker' if left unresolved. As far as representatives of the Women's Caucus were concerned, the inclusion of 'forced pregnancy' in a list of sexual offences constituting either war crimes or crimes against humanity was a fundamental imperative. Some representatives of the Women's Caucus struggled to accept that the Republic of Ireland's position (strongly supported by The Holy See and other Catholic States) on 'forced pregnancy' would have to be accommodated one way or another for 'forced pregnancy' to be included in the Statute. Ireland's concern was that its State policy of forcibly detaining pregnant wards of the State against their will to ensure that they did not leave Ireland seeking an overseas abortion could be characterised as the crime against humanity of 'forced pregnancy'.

At the time these informal discussions were taking place, significant progress had been achieved on the form and structure of the definition of crimes against humanity. By that time, for example, it had become clear that the final text of the Article defining crimes against humanity would include clarifications[11] of intended meanings for at least some of the specific acts constituting crimes against humanity. It was also clear at this stage of the negotiations that no other Definition Article would be structured in quite the same way. Neither the genocide nor the war crimes draft texts contained clarifications — either in footnotes or in a separate sub-paragraph of their respective drafts. Accordingly, it was suggested in the context of the informal discussions that a re-ordering of the crimes against humanity and war crimes Articles in the final text of the Statute would maximise the prospects for agreement on the inclusion of 'forced pregnancy'. The recommendation was that a clarification of the meaning of 'forced pregnancy' which accommodated the concerns of the Republic of Ireland and The Holy See located within the sub-paragraph already established for the general purpose of clarifying certain specific acts might well provide the mechanism for an essential compromise. The suggestion also was that if the crimes against humanity definition preceded the war crimes Article in the final text, then the meaning of 'forced pregnancy' as incorporated within the clarification should also apply to the subsequent references to forced pregnancy as a war crime in a provision with no established place for clarifications of intended meaning.

At some stage in the work of the Drafting Committee at the Rome Conference this re-ordering of provisions took place. The final text includes the definition of crimes against humanity in Article 7 with the clarifications already discussed as paragraph 2, sub-paragraphs (a)–(i) of that Article. The definition of war crimes follows as Article 8 without its clarifications of intended meanings with the sole

[11] Incorrectly, in my view, referred to throughout the Informals on Crimes Against Humanity as 'Definitions'.

exceptions found in 8(2)(b)(xxii) and 8(2)(e)(vi) where 'forced pregnancy' as a war crime has the meaning 'as defined in Article 7, paragraph 2(f)'.

2.2 Eliminating the Requirement of a Nexus With Armed Conflict

It has been reported extensively elsewhere that one of the major achievements of the negotiation of the definition of crimes against humanity in Rome was the final elimination of a requisite nexus with armed conflict.[12] One major criticism of the Nuremberg and Tokyo Charters[13] has been the retrospective application of new international criminal law despite the attempt by the drafters to evade alleged violations of the *nullem crimen sine lege* principle by tying the perpetration of a crime against humanity to the conduct of the war. Bassiouni explains this strategy as an attempt to characterise crimes against humanity as a mere extension of war crimes.[14] However the strategy is explained or characterised, the criticism has remained prevalent in the decades since Nuremberg (and also Tokyo).[15]

Irrespective of the allegations of illegality in relation to crimes against humanity in the Nuremberg and Tokyo Charters, one incontrovertible legacy of the instrument is the requisite nexus with armed conflict as an element of any crime against humanity. Subsequent instruments, including the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY),[16] have incorporated the nexus reinforcing the view that, at least until the early 1990s, uncertainty about the need for crimes against humanity to be perpetrated in the context of armed conflict prevailed. Professor Bassiouni has traced the development of crimes against humanity since the drafting of Article 6(c) of the Nuremberg Charter and identified several important legal instruments omitting the requisite nexus with armed conflict.[17] The Statute for the International Criminal Tribunal for Rwanda (ICTR),[18] adopted by the UN Security Council in 1994, made no reference to a requisite nexus with armed conflict for the perpetration of a crime against humanity and, consequently, established an important precedent for the negotiations in Rome.

A number of delegations at the Rome Conference cited the Statute of the ICTR in support of the proposition that the nexus with armed conflict should no longer

[12] See, eg, T Meron, above n 3 at 49; D Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *AJIL* 45–46; W Schabas, *An Introduction to the International Criminal Court* (CUP, Cambridge, 2001) 34–36; H von Hebel and D Robinson, above n 8, 92–93.
[13] See above, n 4.
[14] Bassiouni, above n 2, particularly at 146–58.
[15] For a discussion of the criticism and its validity, see Bassiouni, *id* at 158–72. For an example of judicial criticism of Art 6(c) of the Nuremberg Charter see Justice Brennan of the Australian High Court in dissent in *Polyukhovich v Commonwealth* (1991) 172 *CLR* 501, 584–91.
[16] See above, n 5. For text of the Statute see: <http://www.un.org/icty/legaldoc/index.htm>
[17] Bassiouni, above n 2, ch 5, 'Post-Charter Legal Developments', 177–242.
[18] See above, n 5. For text of the Statute see: <http://www.ictr.org/wwwroot/ENGLISH/basicdocs/statute.html>

be required as an element of crimes against humanity. An overwhelming proportion of national delegations indicated their support for the elimination of the nexus — to the extent that the Chair of the Informals on Crimes Against Humanity insisted on the removal over the objection of at least two national delegations — representing States, coincidentally, which both indicated their negative vote against the adoption of the Statute. This fundamental amendment to a lingering legacy of Nuremberg and Tokyo constitutes the affirmation of a new customary international norm — a development recognised by many of the national delegations arguing for the change in Rome. In my view, it may well have been more difficult to achieve this outcome if there had been a global multilateral treaty definition of crimes against humanity negotiated following Nuremberg and Tokyo and incorporating the same nexus contained within the Charters of the two International Military Tribunals.

2.3 Eliminating the Requirement of a Discriminatory Motive

A second important development in the negotiation of Article 7 of the Rome Statute is the clarification that a crime against humanity does not require proof of the existence of a discriminatory motive to the effect that the alleged crime be perpetrated on national, political, ethnic, racial or religious grounds.[19] Daryl Robinson has identified the historical basis for the assumption by some that the presence of a discriminatory motive is a threshold element for the perpetration of a crime against humanity.[20] He has explained the possible construal of Article 6(c) of the Nuremberg Charter as requiring a discriminatory motive but also exposed the general rejection of that misleading and inaccurate interpretation.[21] Robinson concedes that the requirement of a discriminatory motive is explicit in Article 3 of the Statute of the ICTR and, while absent from the ICTY Statute, was applied by the ICTY Trial Chamber in *Tadić* on the bases of statements by members of the Security Council and the report by the UN Secretary-General to the Security Council attached to the draft Statute.[22] So, although the origins of the lingering ambiguity about the requirement of a discriminatory motive are more opaque than is the case for the requisite nexus with armed conflict, Article 7 of the Rome Statute has had a similarly cathartic clarifying role in eliminating both requirements.

The majority of delegations in the Rome negotiations agreed that the specific crime against humanity of persecution does require proof of the existence of a discriminatory motive. It will be shown below that the negotiation of the specific act of 'persecution' resulted in a more extensive list of possible discriminatory motives than has hitherto been the case. However, the existence of

[19] See authors above at n 12.
[20] See Robinson, above n 12, 46–47.
[21] *Id* 46.
[22] *Ibid.*

a discriminatory motive as a threshold element for all crimes against humanity was rejected by the overwhelming majority of delegations participating in negotiations. The prevailing view was that, if the other threshold requirements of crimes against humanity are met and that the perpetrator(s) commit one or more of the specific acts constituting a crime against humanity, the precise motivation for the offence is immaterial.

3. THE 'CHAPEAU' AND THRESHOLD REQUIREMENTS

The negotiation of the *chapeau* to Article 7 with its general threshold requirements for the perpetration of a crime against humanity represented one of the more difficult challenges for the informal Working Group on Crimes Against Humanity. As Robinson explains, it was readily accepted in Rome that not all inhumane acts constitute crimes against humanity[23] but the process of arriving at agreement on the threshold requirements rendering inhumane conduct a crime against humanity proved complex. It was readily agreed that a crime against humanity must be directed against a civilian population irrespective of the context in which the targeting of civilians occurs (that is, in armed conflict or in peacetime). Much of the early discussion on additional threshold requirements centred upon the qualifying terms 'widespread' and 'systematic' and, in particular, whether or not the specific acts constituting the crime should be committed against the civilian population in a 'widespread *or* systematic' manner or a 'widespread *and* systematic' manner.

Delegations from States participating in the Group of Like-Minded States argued repeatedly and forcefully that widespread and systematic were alternatives — that the International Criminal Court should not be limited to dealing only with a small number of egregious acts which satisfied both the widespread and the systematic tests. These delegations relied extensively upon the Statute of the ICTR, which explicitly refers to 'widespread or systematic' in its *chapeau* to Article 3, and to jurisprudence of the ICTY in the *Tadić* Case in which the Trial Chamber characterises the qualifying tests as alternatives despite the lack of inclusion of the qualifying tests in the *chapeau* to Article 5 of the ICTY Statute. The thrust of the argument in favour of 'widespread *or* systematic' was that the International Criminal Court ought to have a subject-matter jurisdiction at least reflective of customary international law and not artificially restrictive of the scope of that existing law.

Arguments against the use of the word 'or' and in favour of 'widespread *and* systematic' were articulate and sustained. Many of those delegations philosophically committed to a narrowly restrictive subject-matter jurisdiction for the new Court argued here that the use of 'or' for the qualifying terms was unwarranted. The Court is only intended to deal with the most egregious crimes

[23] See Robinson, above n 12, 47.

and the suggestion that a crime against humanity could be committed either in a widespread manner or in a systematic manner but not both will not assist the Court in choosing to deal only with the worst atrocities. Robinson also makes the observation that at least one delegation argued that 'widespread' can be interpreted to include a spontaneous wave of crimes occurring concurrently in different physical locations but entirely unrelated whereas that sort of scenario would not constitute a crime against humanity under customary international law prior to Rome.[24]

Although these opposing positions appeared irreconcilable, the quirk of the existence of clarifications in Article 7(2) of the Statute again provided the means by which a compromise agreement was possible. There was no reason in principle why Article 7(2) should deal exclusively with clarifications of intended meaning in respect of specific enumerated acts in Article 7(1). Consequently, Article 7(2)(a) clarifies the intended meaning of 'attack directed against any civilian population' in the *chapeau* as 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 … pursuant to or in furtherance of a State or organisational policy to commit such attack'. The critical issue is the extent to which the wording in Article 7(2)(a) has the practical effect of rendering the qualifying terms 'widespread' and 'systematic' as joint requirements rather than in the alternative as the use of the disjunctive 'or' in the *chapeau* would suggest.

The individual most directly involved in formulating the compromise wording in Article 7(2)(a) was Daryl Robinson, a member of the Canadian delegation. He has written his own account of the negotiation of the *chapeau* and the threshold requirements for Article 7 and strenuously denies that the Article 7(2)(a) formula effectively restores a conjunctive test for the terms 'widespread' and 'systematic'.[25] Instead he characterises the effect of Article 7(2)(a) asestablishing a middle ground between a conjunctive test (widespread and systematic) and an unqualified disjunctive test (widespread or systematic).[26]

There is no suggestion that the various requirements in Article 7(2)(a) are alternatives — all of them are necessary preconditions for the commission of a crime against humanity. Robinson argues that the Article 7(2)(a) requirement of the 'multiple commission of acts referred to in paragraph 1' does not constitute a reintroduction of the 'widespread' qualifier in Article 7(1)(a). The distinction, he argues, is a quantitative one — a matter of scale. Robinson quotes the ICTR in the *Akayesu* Case as follows: 'The concept of 'widespread' may be defined as massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.[27] Robinson's position is that if the

[24] *Ibid.*
[25] *Id* 47–51. For additional support for this interpretation of the text see R Dixon, 'Paragraph 2: Definitions of Crimes or Their Elements — (a) Attack', in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos, Baden-Baden, 1999) 158–59.
[26] Robinson, above n 12, 51.
[27] *Id* 47.

prosecutor of the International Criminal Court wishes to indict an individual for an alleged crime against humanity on the basis of systematicity rather than that the attack was widespread, the prosecutor must also prove beyond reasonable doubt that the attack involved the multiple commission of acts referred to in paragraph 1. In other words, even if the attack was thoroughly planned and instigated consistent with an existing *modus operandi*, that attack must still have involved more than one civilian victim to constitute a crime against humanity. The multiple victims requirement, however, is a much lower threshold than that required to prove 'massive, frequent, large-scale action'.

Similarly, Robinson also argues that the Article 7(2)(a) requirement that the attack be conducted 'pursuant to or in furtherance of a State or organisational policy' does not reintroduce the Article 7(1)(a) qualifier 'systematic'. Again Robinson seeks to distinguish the Article 7(1)(a) alternative qualifier from the Article 7(2)(a) requirement on the basis of the level of pre-planning and instigation. The Trial Chamber judges in the *Akayesu* Case stated that: 'The concept of "systematic" may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'.[28] So, if the prosecutor of the International Criminal Court wants to indict an individual for an alleged crime against humanity on the basis that the attack was widespread rather than that it was systematic, it will not be sufficient for the prosecutor to prove beyond reasonable doubt that the attack involved massive, frequent and large-scale action in the absence of any connection between different aspects of the attack. The prosecutor will also need to show that there was some State or organisational policy to commit the attack. That requirement of some policy element to the attack is not the same as proving that the attack was thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.

Robinson relies on a range of sources to substantiate his arguments — the post-World War II UN War Crimes Commission, the Nuremberg Tribunal, the International Law Commission, jurisprudence from the two ad hoc international criminal tribunals and even French national jurisprudence in the trials of Paul Touvier and Klaus Barbie. Ultimately, the genius of the compromise text lay in its creative ambiguity. The 'recalcitrants' were able to argue that Article 7(2)(a) preserved the effect of the conjunctive test — 'widespread and systematic' and the 'progressives' were able to claim that the disjunctive test had prevailed. The reality, as Robinson himself argues, lies somewhere between those two positions. This new qualified disjunctive test will probably not limit the capacity of the Court to deal with the most egregious crimes against humanity although the international community will need patience to observe how the judges of the new Court interpret and apply this threshold formula to those on trial for alleged violations of Article 7.

[28] *Ibid.*

It should also be noted that Article 7(2)(a) does introduce a specific *mens rea* element to the threshold requirements for a crime against humanity: the individual defendant must have perpetrated their alleged acts in the knowledge that the attack against the civilian population was taking place. There is no requirement that the individual themselves must have personally participated in all the multiple acts constituting the alleged crime against humanity or that the individual defendant is personally responsible for planning the overall attack. However, in the absence of proof of knowledge that the accused's acts formed part of an attack against the civilian population, the prosecution will fail to establish a key element of a crime against humanity.

4. THE ENUMERATED SPECIFIC ACTS

All previous international provisions dealing with crimes against humanity have included a list of specific acts which, when committed consistently with the requisite threshold circumstances, can constitute crimes against humanity. No suggestion was made in Rome that the International Criminal Court Statute should deviate from that general approach. The composition of the list of specific acts in Article 7 of the Rome Statute is unique in a number of key respects as is the inclusion of the various 'clarifications' in Article 7(2) but the overall format of the provision is a familiar one.

The intention in this section is to discuss each of the specific acts including, where appropriate, the clarifications of intended meaning in Article 7(2). Some of those clarifications add another *mens rea* aspect, over and above that incorporated in the general threshold requirements of the *chapeau*, to the requirements for a perpetration of the relevant specific act constituting a crime against humanity. All of those clarifications amplify the intended meaning of the *actus reus* component of the specific crime against humanity. In considering each of the specific acts in turn, including, where relevant, any clarification, the approach here will be to evaluate the specific act as a crime against humanity against existing customary international law.

4.1 Murder

Murder was one specific act constituting a crime against humanity deemed not to require a clarification of intended meaning in Article 7(2) of the Statute. The notion of murder as the unlawful killing of a human being is well understood in every legal system and in every independent sovereign nation State. Although the actus reus may be similar (to cause the death) the *mens rea* may vary considerably (as it does in Art 7(1)(a) and the Elements). Christopher Hall has suggested that the lack of a definition of murder in Article 7 will require judges of the International Criminal Court to resort to the experience of various international

criminal tribunals already called upon to define the crime against humanity of murder. These tribunal decisions have been made on the basis of the purpose of the prohibition in international law as well as, to a lesser extent, on the common elements of the crime of murder in different domestic penal law systems.[29] It should also be acknowledged that the Elements of Crimes document helps to clarify the precise elements of the crime against humanity of murder and will assist judges of the International Criminal Court in their deliberations.

Murder as a specific crime against humanity has been the first act included in every international instrument enumerating specific acts constituting crimes against humanity and not a single delegation at the Rome Conference had any objection to its inclusion in the Rome Statute.[30] The retention of murder listed in the Draft Statute as the first enumerated act constituting a crime against humanity — just as it is the first specific act constituting a crime against humanity in all the lists of specific acts in other international instruments — was approved on the first day of negotiations on the definition of crimes against humanity and was not referred to again in the oral negotiating sessions.

4.2 Extermination

Extermination as an act constituting a crime against humanity was also included in the lists of specific acts in the relevant international instruments prior to the Rome Conference. 'Extermination' first appeared in the London Charter of 1945 establishing jurisdiction *ratione materiae* for the Nuremberg Tribunal. The London Charter pre-dated the Genocide Convention of 1948 and, consequently, 'extermination' was considered an essential inclusion for jurisdiction over Nazi atrocities perpetrated against Jews and other minority groups not covered by the definition of war crimes. The question was raised in the course of the Rome discussions about the continuing need for 'extermination' to be listed as a crime against humanity given the existence of genocide as a crime in its own right in Article 5 of the *Rome Statute*. That question was answered emphatically by a number of delegations reminding the negotiators of the verbal agreement to define crimes against humanity broadly enough to cover limitations to the accepted definition of genocide. In the case of 'extermination' as a crime against humanity there is no requirement that the attack against the civilian population be undertaken on 'national, racial, ethnical or religious' grounds. This lack of a specific discriminatory intent for the perpetration of the crime against humanity of extermination is a particularly significant reflection of the attempt to broaden the International Criminal Court's subject matter jurisdiction in relation to 'genocidal' activity not falling within the Statute's definition of genocide.[31]

[29] CK Hall, 'The Different Sub-Paragraphs — (a) Murder' in O Triffterer, above n 25, 130.
[30] Robinson, above n 12 at 52. See also, Hall, *id* at 129.
[31] See CK Hall, 'The Different Sub-Paragraphs — (b) Extermination' in O Triffterer, above n 25, 131, where the author cites the International Law Commission's comment on Art 18 of its 1996 Draft Code

Article 7(2) includes a clarification of intended meaning of the term 'extermination' extending the act beyond a blatant attack on a civilian population resulting in immediate and extensive loss of life to include 'the intentional infliction of conditions of life … calculated to bring about the destruction of a part of a population'. This broader meaning of 'extermination' was considered important so as not to exclude an insidious targeting of a civilian population with a less obvious, more protracted means of achieving physical destruction of human lives. It is the case that the clarification imports a *mens rea* element which is additional to the knowledge of the attack — that is, the *intentional* infliction of conditions … *calculated* to have the desired effect of destruction — wording imported directly from the Genocide Convention. However, it is the nature of the concept of 'extermination' that there be a higher mental element than simply the accused's knowledge of the attack upon the civilian population.

4.3 Enslavement

Enslavement as an act constituting a crime against humanity also appears in the lists of relevant acts in each of the pre-existing international instruments. The novelty in the Rome Statute is the addition of a clarification of intended meaning in Article 7(2)(c). While some draft clarifications were already included in the so-called 'Rolling Text' of the Statute prior to the commencement of the Diplomatic Conference, these drafts did not include a clarification for the crime against humanity of enslavement. In Rome, negotiators discussed the essence of the crime of enslavement and agreed that the essential characteristic is the exercise of powers of ownership of another person. This notion of the exercise of proprietorial power over another person is encapsulated in the definition of slavery in Article 1(1) of the 1926 Slavery Convention: 'slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.[32] Some delegations were anxious to ensure that the meaning of the crime include trafficking in human beings — particularly women and children. To the extent that any such trafficking involves the exercise of proprietorial powers, the clarification gives the International Criminal Court jurisdiction *ratione materiae*.

4.4 Deportation or Forcible Transfer of Population

The inclusion of 'deportation or forcible transfer of population' in Article 7 was one of the more controversial of the specific acts constituting a crime against humanity negotiated in the course of the Rome Diplomatic Conference.

of Crimes Against the Peace and Security of Mankind distinguishing genocide and the crimes against humanity of murder and extermination from each other.

[32] Slavery Convention, opened for signature in Geneva, 25 Sept 1926, 60 *LNTS* 253.

The Israeli Delegation was the most implacably opposed to the final version of the provision: so much so that the head of the Israeli delegation indicated that this particular reference in Article 7(1)(d) combined with its clarification of intended meaning in Article 7(2)(d) was a primary reason for Israel voting against the adoption of the Statute in the Final Session of the Diplomatic Conference.

Given the inclusion of 'deportation' as a crime against humanity in the Nuremberg and Tokyo Charters and in the statutes of the two ad hoc international criminal tribunals, it was difficult for delegations in Rome to argue that deportation was not already well entrenched as a crime against humanity in customary international law. It is true that all earlier international instruments referred only to 'deportations' and that the Rome Statute seems to extend the category of specific act by adding 'or forcible transfer of population'.[33] 'Deportation' is usually understood to mean the forcible removal of people from one State across an international border to another State whereas 'forcible transfer of population' usually means the forcible movement of people from one place to another within the territorial borders of one State.[34] Article 7(1)(d) proved less problematic than the formulation of the clarification in Article 7(2)(d). In the course of negotiations the Israeli delegation indicated that it was unhappy with the originally proposed wording in the Draft Rolling Text of the Statute which referred to 'the movement of [persons] [populations] from the area in which the [persons] [populations] are [lawfully present] … '. Israel expressed a dislike for the word 'movement' and indicated a preference instead for 'expulsion or displacement'. The final version of Article 7(2)(d) defers to this preference with the clarification that the act 'means forced displacement of the persons by expulsion or other coercive acts … '. Even with this new wording which clearly raises the requisite level of force to prove the elements of the crime, the Israeli delegation still expressed fundamental reservations about the wording of the clarification.

Israel was, and remains, concerned about the potential for the International Criminal Court to be manipulated for politically motivated prosecutions of alleged international crimes. From time to time Israel does forcibly expel Palestinians from the West Bank or the Gaza Strip convicted of support for or involvement in attacks against Israeli civilians. Because those individuals are civilians and the expulsions are committed on the basis of State policy, the theoretical potential exists for proceedings to be instituted against Israeli nationals for the crime against humanity of deportation or forcible transfer of population before the International Criminal Court. Article 7(2)(d) ties the test for the legitimacy or otherwise of the forcible transfer to both domestic and international law. The victims of the crime must have been forcibly expelled from

[33] CK Hall explains that 'forcible transfer of population' is characterised as a crime against humanity in the 1973 Apartheid Convention. See 'The Different Sub-Paragraphs — (d) Deportation or Forcible Transfer of Population' in O Triffterer, above n 25, 135.
[34] *Id* 134.

'the area in which they are lawfully present, without grounds permitted under international law'. This dual domestic/international law test is in contrast with the exclusively domestic law test for torture referred to in Article 7(2)(e) that excludes 'pain or suffering arising only from, inherent in or incidental to, lawful sanctions'.

Israel argues that, because the assessment of the legality of the purported grounds for the expulsion are ultimately judged according to international law and not to domestic law, its policies implemented on the basis of its own domestic law may be judged to be criminal and those individuals responsible for them held accountable. This fear is fuelled by differences of interpretation of the international law applicable to the Israel-Palestinian Conflict between Israel on one hand and the majority of the rest of the international community on the other.

Given the historical development of international criminal law and the motivations for the post-World War II Nuremberg Trials in particular, it is a sad irony that Israel is not now a strong supporter of the new International Criminal Court. It may be that after some years of the Court's experience it will have developed its credibility to such an extent that Jerusalem (and other governments like that of Israel) will come to respect the new Court enough to shift the prevailing position of mistrust and opposition and join existing States Parties to support the work of the Court.

4.5 Imprisonment or Other Severe Deprivation of Liberty

Imprisonment or other severe deprivation of liberty are the first of the enumerated acts that can constitute crimes against humanity in Article 7 not to have been included in the Nuremberg or Tokyo Charters. Imprisonment alone appears in the enumerated lists of specific acts in the Statutes of both ad hoc international criminal tribunals but the reference in Article 7(1)(e) broadens the potential category of offence by extending the act to include forms of severe deprivation of liberty other than imprisonment. Obviously imprisonment is a form of punishment fundamental to the systems of criminal justice in almost every society on earth. The intention of the drafters of the *Rome Statute* was not to preclude the incarceration of criminals indicted, tried and convicted according to validly constituted domestic criminal justice systems. Consequently, Article 7(1)(e) adds the qualifying phrase 'in violation of fundamental rules of international law' to indicate that the imprisonment or other severe deprivation of liberty satisfying the threshold requirements for a crime against humanity must have been either arbitrarily imposed or imposed on some grounds in violation of fundamental international legal norms. With this qualification appearing in Article 7(1)(e) itself, it was considered unnecessary to add any clarification of intended meaning in Article 7(2). So, as with the crime against humanity of murder, imprisonment or other severe deprivation of liberty is absent from the list of clarifications in Article 7(2).

4.6 Torture

Although torture as a crime against humanity was neither included in the London Charter for the Nuremberg Tribunal nor in the Charter for the Tokyo Tribunal, it does appear in the statutes of the two ad hoc international criminal tribunals. There was certainly no dispute about its inclusion in the Rome Statute and, as already suggested above, the clarification of intended meaning in Article 7(2)(e) is one of the significant advances in international criminal law of Article 7 of the Statute.

In the course of negotiations in Rome on the clarification of intended meaning for torture, several delegations acknowledged the limitations of the definition in the 1984 Torture Convention.[35] Article 7(2)(e) does draw extensively upon wording in Article 1 of the 1984 Convention in that torture:

> [M]eans the intentional infliction of severe pain or suffering, whether physical or mental … [but] shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

However, Article 7(2)(e) does not require the torture to be inflicted by a public official for a designated purpose or on the basis of discrimination. For the purposes of the crime against humanity of torture, assuming the threshold requirements have been met, it is sufficient that the accused held the victims in custody or otherwise under his/her control and inflicted the requisite level of severe pain and suffering. This formulation was a welcome intentional departure from restrictive treaty language — particularly in the light of other expressions of faithfulness to the treaty definition of genocide for example.

The negotiation of clarifications within the context of Article 7, and of the clarification to the intended meaning of torture in Article 7(2)(e) in particular, proved beneficial in the negotiation of the Elements of Crimes during the Preparatory Commission phase post-Rome. In Article 8 of the Statute there are two separate war crimes of torture — Article 8(2)(a)(ii) in the context of international armed conflicts and Article 8(2)(c)(i) in the context of non-international armed conflicts. In both cases, the Statute itself merely lists torture by name as Article 8 does not incorporate clarifications. During the negotiation of the Elements of Crimes, delegations seized on the lack of clarifications in Article 8 and included the same element for both war crimes of torture that, 'the perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind'.[36] This language is clearly based upon the treaty definition of torture in Article 1 of the 1984 Convention. The Geneva Conventions

[35] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature in New York, 10 Dec 1984, 1465 UNTS 85.
[36] See Elements of Crimes: Element 2 for Art 8(2)(a)(ii) — I and Element 2 for Art 8(2)(c)(i)–4.

of 1949 and the Additional Protocols to the Conventions of 1977 all prohibit torture and cruel and inhuman treatment of prisoners of war and of civilians but do not define precisely what constitutes torture or cruel and inhuman treatment. The delegations pushing for a purposive element for the war crime of torture were unsuccessful in their attempts to argue for the additional element that the accused be a public official or be acting in an official capacity. However, one suspects that these same delegations would have preferred a similar purposive element for the crime against humanity of torture were it not for the explicit rejection of that in the negotiation of the Statute itself — made possible by the quirk of including clarifications of intended meaning in Article 7(2).

4.7 Sexual Offences

The unprecedented and extensive list of specific sexual offences that may constitute crimes against humanity is arguably the single most significant development of international criminal law in Article 7 of the Rome Statute. Both statutes of the ad hoc international criminal tribunals for the Former Yugoslavia and for Rwanda include 'rape' as the only specific sexual offence that may constitute a crime against humanity. That Article 7(1) extends the list of offences to include 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity' is a remarkable achievement. The breadth of the final list of specific sexual offences is all the more remarkable given the relatively limited approach in the Rolling Text prior to the Rome Diplomatic Conference. The relevant provision in the Rolling Text, square-bracketed in its entirety, included 'rape or other sexual abuse [of comparable gravity] or enforced prostitution'. I personally believe that the broadening of the list of specific sexual offences is largely attributable to the relentless and highly effective lobbying of women's interest groups in Rome. The Women's Caucus was the most successful single issue lobby group operating in Rome and it was impossible, as a member of a national delegation, to ignore the group's presence and its effectiveness.[37] This observation is not to deny the reality that most of the specific sexual offences which can now constitute crimes against humanity can apply to male victims as well as to female victims.

The Women's Caucus persuaded many States that 'rape' did not adequately cover the range of sexual atrocities perpetrated mainly against women in times of armed conflict and outside of it. This argument was assisted by two key developments prior to the Rome Conference. The first development was the global awareness of the perpetration of shocking sexual offences — particularly

[37] For the role and contribution of NGOs generally in the Rome Diplomatic Conference see WR Pace and J Schense, 'The Role of Non-Governmental Organisations' in A Cassese, P Gaeta and JR Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford, 2002), 105; and WR Pace and M Thieroff, 'Participation of Non-Governmental Organisations' in RS Lee (ed), above n 8 at 391.

in The Balkans and in Rwanda — that would not be adequately covered by the sole reference to rape. The delegation of Bosnia-Herzegovina, for example, argued passionately for the inclusion of 'forced pregnancy' as a specific sexual offence. One particular atrocity involved a systematic Serb policy of the repeated rape of Bosnian Muslim women until pregnant and then forcibly detaining those women until they delivered their children or reached such an advanced stage of pregnancy as to render abortion impossible — all in order to change the ethnic composition of the children. As with other specific acts included in Article 7(1) — particularly the crime of apartheid and enforced disappearances — the brutal reality of particular practices in the Balkan conflicts predisposed many delegations to support the inclusion of a specific act to cover any future practices of a similar kind.

The second fundamentally important development was the emergence of ICTY and ICTR jurisprudence on sexual offences as war crimes, crimes against humanity and genocide.[38] Importantly, judges of both tribunals refused to be restricted by the inclusion of 'rape' as the only specific sexual offence constituting a crime against humanity in the Statutes of both tribunals. The judges had demonstrated their own belief that other sexual offences were also crimes in their own right and several of these tribunal decisions were cited by delegations in support of the argument to broaden the list of sexual offences.[39]

All the specific acts included in the list of sexual offences in Article 7(1)(g) were relatively uncontroversial with the sole exception of 'forced pregnancy' — already discussed in some detail above. It is telling, for example, that the only specific act in the list of sexual offences the subject of a clarification of intended meaning in Article 7(2) is 'forced pregnancy'. The successful negotiation of a compromise formula which included forced pregnancy on the basis of Bosnia-Herzegovina's horrible experiences but which also accommodated the concerns of Ireland, the Holy See and other States with anti-abortion policies and concerns about politically motivated prosecutions encapsulates all the vagaries, challenges and possibilities of the multilateral negotiation process. It is a marvellous case-study in that respect.

4.8 Persecution

Persecution as a crime against humanity appears in the lists of specific acts in all the major international instruments prior to the adoption of the Rome Statute. The debate in Rome, therefore, focused not upon whether to include 'persecution' in Article 7(1) but more on the specific grounds for the persecution. Each of the major international instruments included persecution on 'political, racial or

[38] See KD Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Issues' (1999) 93 *AJIL* 97.
[39] See C Steains, 'Gender Issues' in RS Lee, above n 8, 357 at 359.

religious grounds'. Consequently, some delegations argued very strongly in favour of limiting the grounds for the crime against humanity of persecution to these three (with the possible addition of 'ethnic' and 'religious' grounds to bring the number of specific grounds to five on the basis of the Genocide Convention's inclusion of ethnicity and religion as possible grounds for the perpetration of genocide) and these alone. In other words, that the list of grounds should be exhaustive and restricted to those five grounds already entrenched in customary international law.

The argument for a restrictive list of five grounds did not prevail in the face of strong and repeated interventions to support the draft list of grounds in the Rolling Text which added persecution on 'cultural … or gender' grounds to the other five grounds already prohibited in international law. Repeated reliance was made on the Convention on the Elimination of All Forms of Discrimination Against Women[40] as authority for the inclusion of 'gender' as an explicit ground for persecution although there was a protracted debate about the meaning of this term. A number of delegations were keen to avoid using the term 'sex' as the explicitly prohibited ground for persecution because of the broader concepts inherent in the term gender.[41] However, this broader notion of 'gender' was emphatically rejected by members of some of the exclusively male Middle Eastern delegations who insisted instead upon the inclusion of Article 7(3) with its clarification of the intended meaning of the term 'gender' throughout the Statute.

4.9 Enforced Disappearances

The enforced disappearance of persons as an act constituting a crime against humanity, like the crime of apartheid, makes a novel appearance in the list of specific acts in Article 7 of the Rome Statute. Although there was some reluctance on the part of certain delegations to extend the traditional list of specific acts constituting crimes against humanity, a more powerful argument prevailed. A number of Latin American delegations — most notably Argentina and Chile enjoying widespread regional support for their views — argued for the explicit inclusion of the crime on the basis of painful national experience. The articulation of the argument in support of the inclusion of the act by the very States subjected to the practice of the specific crime established an influential moral authority that no other delegation was able to counter. This experience was

[40] Opened for signature in New York, 18 Dec 1979, 1249 UNTS 13.

[41] According to M Boot: 'In United Nations usage, "gender" refers to the socially constructed roles played by men and women that are ascribed to them based on their sex. The word "sex" is used refer to physical and biological characteristics of women and men, while "gender" is based on socially assigned roles'. Boot cites the Report of the UN Secretary-General on *Implementation of the Outcome of the 4th World Conference on Women*, UN Doc A/51/322 (3 Sept 1996) — the S/G's Report itself referring back to the *Report of the Fourth World Conference on Women*, UN Doc A/CONF 177/20 (1995). See M Boot, 'Definition of Gender' in O Triffterer, above n 25 at 172. See also the extensive discussion of the definition of 'gender' in C Steains, above n 39 at 371–75.

very similar to the moral authority of Bosnia-Herzegovina on forced pregnancy or South Africa on the crime of apartheid. The argument of Argentina and Chile was supported by the observation that enforced disappearances meeting the threshold criteria for crimes against humanity would be covered by the 'catch-all' — 'other inhumane acts' in Article 7(1)(k). Consequently, there could be no valid objection to including them as an explicit category of specific acts in their own right. In any case, it could hardly be argued that 'enforced disappearances' had never been characterised as crimes against humanity previously. This reference in Article 7(1)(i) reaffirms the gist of the UN General Assembly's 1992 Declaration on the Protection of all Persons from Enforced Disappearance[42] and confirms the customary international law prohibition on the practice of enforced disappearances.[43]

Article 7(2)(i) provides an elaborate clarification of the intended meaning of enforced disappearances as a crime against humanity. The clarification requires the taking of the persons in pursuance of a specific policy (State or organisational) followed by a refusal to acknowledge the deprivation of liberty and an ongoing refusal to provide information about the fate or whereabouts of the 'disappeared' with the intention to remove those victims from the protection of the law for a protracted period of time. Given the novelty of the explicit inclusion of this practice as a crime against humanity, it is perhaps understandable that the clarification is couched so as to limit the agreed meaning consistent with the actual practice of the crime in Latin America. This approach was entirely consistent with that taken to negotiation of the wording of the clarification in relation to the crime of apartheid.

4.10 Apartheid

The inclusion of the crime of apartheid as one of the specific acts constituting a crime against humanity is a novelty in Article 7 of the Rome Statute. It could be argued that the inclusion of 'persecution on [inter alia] racial grounds' in Article 7(1)(h) reflecting the same act in the Nuremberg and Tokyo Charters as well as in the Statutes of the two ad hoc international criminal tribunals would facilitate the prosecution of any widespread or systematic policy of apartheid. This argument was made in Rome to support the position that the inclusion of apartheid in the enumerated list of specific acts in Article 7 was otiose. However, reason has never been the sole determinant of multilateral treaty negotiation outcomes. The multiracial South African national delegation in Rome intervened with the unassailable moral authority of its own painful national experience and led a coalition of sub-Saharan African States to insist that the crime of apartheid

[42] 47 UN GAOR (Supp 49), UN Doc A/47/49 (1992).
[43] See H von Hebel and D Robinson, 'Crimes Within the Jurisdiction of the Court' in RS Lee, above n 12, 102.

be included in its own right in Article 7's list of specific acts. Other national delegations were understandably reticent to be seen to be prolonging South Africa's apartheid-induced suffering by arguing against the explicit inclusion of apartheid in Article 7. Consequently, Article 7(1)(j) includes 'the crime of apartheid' as a specific act — on the same basis as Bosnia-Herzegovina's successful inclusion of 'forced pregnancy' in the list of specific sexual offences in Article 7(1)(g) and as Germany's insistence that the crime of aggression be included in the Statute subject to some future satisfactory definition of that crime.

Despite the widespread and palpable deferral to South Africa in relation to explicit inclusion of 'the crime of apartheid' in Article 7, the process of negotiation of the clarification of accepted meaning in Article 7(2)(h) was a relatively protracted one. The chairman of the Informal Working Group on Crimes Against Humanity invited interested delegations to work with South Africa to develop a consensus text for the clarification for inclusion in Article 7(2). In the context of this search for consensus language, the experience was consistent to that in relation to the clarification of the meaning of torture in Article 7(2)(e) and in stark contrast to the approach in relation to the definition of the crime of genocide in Article 6. The small group of delegates involved in the negotiation of consensus language on apartheid did not consider itself constrained by the treaty definition of the international crime in the Apartheid Convention.[44] That convention definition is quite lengthy with general threshold elements followed by its own list of specific acts which can constitute the crime of apartheid. In the context of the Rome negotiations it was felt that the clarification of intended meaning in Article 7(2) did not need to be so detailed — particularly because of the over-arching threshold elements for a crime against humanity outlined in the *chapeau* to Article 7. The more important influence was to couch the terms of the clarification in a manner reflective of South Africa's bitter national experience.

The US delegation was one of those with specific concerns about the precise wording of the clarification to the meaning of the 'crime of apartheid' — to ensure that the practices of white supremacy organisations operating within the US were not covered by the definition of the crime against humanity of apartheid in the *Rome Statute*. The wording of Article 7(2)(h) that 'inhumane acts committed [in the context of] … domination by one racial group over any other racial group' is derived directly from the language of the Apartheid Convention. However, the words '[committed] in the context of an institutionalised regime of systematic oppression and [domination] … committed with the intention of maintaining that regime' represent a departure from the convention formulation where the inhumane acts are to be committed 'for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons'. The US delegation was not condoning the racist activities of

[44] See Art II of the Genocide Convention, above n 1.

white supremacy organisations. Rather, the motivation for this new wording departing significantly from relevant multilateral treaty language is explicable in terms of US resistance to potential International Criminal Court jurisdiction in relation to US nationals. The US delegation acted entirely consistently throughout the Rome Diplomatic Conference in its unqualified commitment to absolute exclusivity of US national jurisdiction over US nationals. The new articulation of the crime of apartheid in Article 7(2)(h) effectively requires a government policy of apartheid before the International Criminal Court can try an individual for their participation in the crime against humanity of apartheid.

The national delegation of South Africa, along with its other African supporters with the South African national experience foremost in their minds, had no objection to this explicit requirement of institutionalisation of apartheid policies. It was, therefore, possible on the final day of negotiations on the definition of crimes against humanity to pass consensus language on the clarification of the meaning of the crime of apartheid to the bureau and have that language endorsed in the plenary meeting of the Working Group.

4.11 Other Inhumane Acts

A number of delegations at the Rome Diplomatic Conference argued against the inclusion of a so-called 'catch-all' provision in Article 7 of the Statute — purportedly on the basis of the lack of technical precision and the certainty required for criminal prosecutions inherent in any such provision. Ironically, some of the most ardent opponents of a catch-all clause were among those ostensibly promoting fidelity to existing customary international norms in the context of the negotiations in relation to other specific acts in the list in Article 7. It became increasingly apparent that the purported commitment to customary norms was only a shield to more progressive, broader provisions promoted by delegations from the Like-Minded Group of States. The same arguments were never raised when the customary norm represented a broader, or less restrictive, position to that preferred by these same delegations. In the context of negotiations about the catch-all provision 'other inhumane acts', this selective and, at times promiscuous, approach to a commitment to customary norms was exposed to great effect.

The prevailing argument in Rome was that 'other inhumane acts' appears in all the previous major international instruments and that it was not acceptable to dismiss the inclusion of this catch-all provision simply on the basis of imprecision or uncertainty. Instead, there was no reason in principle why this specific act could not also be subject to a clarification of intended meaning in Article 7(2). Any such clarification could help assuage expressed concerns by incorporating both quantitative and qualitative elements. Ultimately this approach was adopted except that the quantitative threshold is included in the *chapeau* to Article 7 and the qualitative elements are reflecting in the text of Article 7(1)(k) itself. None the

less, the approach did result in language broadly supported in the context of the Working Group on Crimes Against Humanity.

Although the draft text of the Statute prior to the Diplomatic Conference contained no clarification of the intended meaning of 'other inhumane acts'[45] the reference to 'other inhumane acts' did include the qualifications 'of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. This draft wording formed the basis of negotiations in Rome and the only alteration to the proposed wording in the final version of the Statute text is a broadening of the qualifying words to now read 'intentionally causing great suffering, or serious injury to body or to mental or physical health'. In my view, it is critical that the catch-all provision is included in Article 7 so that any particular atrocity not covered by the other specific acts which is directed at a civilian population and meets the other threshold criteria can be prosecuted as the crime against humanity of 'other inhumane acts'. The capacity of human beings to concoct novel forms of atrocity is a constant source of discomfort and shame and it is critical that provisions exist to facilitate prosecution of such actions not currently known or experienced.

5. CONCLUSION

The novelty of Article 7 coupled with the respect accorded the Rome Statute, supported as it currently is by 139 States Signatories and by 92 States having either ratified or acceded to the Statute, will ensure that this definition of crimes against humanity occupies an authoritative position in international law. The various international and internationlised criminal tribunals will undoubtedly refer to Article 7 to clarify the current customary international law position on one or other aspect of the definition of crimes against humanity in their own deliberations. It is also likely that national courts called upon to enforce international criminal law in a national context will cite Article 7 as an authoritative definition of crimes against humanity.[46]

The definition in Article 7 includes some significant advances in international criminal law. The most significant of these include the removal of the nexus with armed conflict so that crimes against humanity can now be committed either in the context of an armed conflict or in times of peace; the broadening of the

[45] Unlike the draft clarifications for most of the other specific acts — see Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute and Draft Final Act*, above n 9 at 23–24.

[46] In my own country, Australia, this has been happening in a succession of decisions applying Art 1(F) of the Refugee Convention to exclude the application of the Convention's protections to those individuals arriving in Australia for whom there are serious grounds for believing have committed a war crime, crime against humanity or act of genocide. Members of the Australian Administrative Appeals Tribunal have been relying extensively on the Rome Statute as the authoritative source of the definitions of war crimes, crimes against humanity and genocide.

definition of torture (beyond the limitations imposed by the definition of the crime contained within the Torture Convention) as a specific act which can constitute a crime against humanity; the novel inclusion of the crime of apartheid and enforced disappearances as specific acts which can constitute crimes against humanity; the substantial extension of the list of sexual offences which can constitute crimes against humanity; and the inclusion of an open-ended list of grounds for the crime against of humanity of persecution. Despite the efforts of a number of delegations to prescribe the limits of crimes against humanity as narrowly as possible and given the vagaries of the multilateral treaty negotiation process, the final text of Article 7 represents a significant achievement in the development of international criminal law.

I am not suggesting here that Article 7 is a perfect provision. It, like all other provisions in the Statute, is a product of political compromise. The final wording of the *chapeau* and the general threshold requirements for the commission of a crime against humanity probably represent the quintessential compromise language necessary for something approaching consensus text. Here I agree with Cherif Bassiouni who concedes that for all the flaws and weaknesses in Article 7 of the Rome Statute, 'it must be said that the ICC's formulation is a significant improvement over all other previous ones'.[47]

[47] See MC Bassiouni, above n 2, 178.

8

War Crimes

PETER ROWE

1. INTRODUCTION

THROUGHOUT HISTORY, AND in common parlance, the term 'war crime' has a number of meanings. The word 'war' itself is no longer of legal significance[1] and has been replaced by the factual existence of an armed conflict. Used in a general sense 'war crime' can refer to any breach of international law during an armed conflict either between (or among) States or within a State. It can therefore include genocide, crimes against humanity, grave breaches of the Geneva Conventions 1949 and of Additional Protocol I, 1977, breach of common Article 3 to the Geneva Conventions 1949 and breaches of the laws or customs of war (whether incorporated into the Rome Statute 1998 of the International Criminal Court or not). The fact that the term exists at all is a measure of the existence of a dividing line between 'acceptable' and 'unacceptable' conduct during an armed conflict. What is *not*[2] acceptable is normally now[3] set out in various multilateral treaties or in customary international law, both of which form the backbone of Articles 6, 7 and 8 of the Statute. Since the concept of a war *crime*[4]

[1] Unless there is a formal declaration of war. See generally, C Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *ICLQ* 283; C Greenwood in D Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (OUP, Oxford, 1995) 39–53.

[2] Conduct, or use of a particular weapon, during an armed conflict which is not specifically prohibited by treaty or customary may be argued, nevertheless, to be unlawful as a result of argument that the effects of the conduct or illegal weapon are illegal or that such conduct is caught by the Marten's Clause (Preamble to the Hague Convention IV, 1907; Additional Protocol I, 1977, Art 1(2); Additional Protocol II, 1977, Preamble). In addition to customary international law these draw upon the principles of 'humanity and … the dictates of public conscience'.

[3] Historically, the means of conducting fighting during a 'war' would have depended, inter alia, on chivalric practices where an individual was of sufficient social status to lay such obligations upon him. This provided a means of distinguishing someone with high social status from a 'common fighter', P Rowe, 'The Use of Special Forces and the Laws of War: Wearing the Uniform of the Enemy or Civilian Clothes and of Spying and Assassination' (1994) XXXIII *Revue de Droit Militaire et de Droit de la Guerre* 209, 210; T McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in T McCormack and G Simpson (eds), *The Law of War Crimes* (Kluwer, The Hague, 1997) ch 2.

[4] Cf the use of the phrase 'breach of the law of nations' which is not so clear in equating breaches of the international laws of war with *criminal* conduct, the appropriate procedures being drawn from criminal legal systems rather than from any executive process existing at the international level.

involves the assessment of an individual's liability before a judicial process it has within it notions of due process, the need to uphold the human rights of an alleged war criminal along with the equally strong requirement to ensure that justice[5] is seen to be done.

The term war crimes may, on occasion, be used for political purposes to denigrate the acts of an adversary during an armed conflict and in such a context it may be perceived to have an important propaganda function in showing that the enemy is 'not civilised' or that its fighters are merely 'criminals'. Used in this sense it may cause the opposite of its intended purpose and lead to an unwillingness amongst combatants to accord the 'protection' of the law to their adversaries, who are seen in this light.[6] In non-international armed conflicts it has become common for the leaders of States to describe those who have taken up arms against them as 'criminals' or 'terrorists' who may, paradoxically, crave the 'status' of *war* criminal. In their minds there may be only a short step from this to an expectation of being treated as a prisoner of war if captured and a hope that others will see them as fighting for a 'legitimate'[7] cause, even though the State concerned does not see their actions in this light.[8]

2. WAR CRIMES AND CRIMES OF WAR

The generic term, 'war crimes', encompasses the most and the least serious breaches of the international laws of war. National legal systems in most, if not all, States distinguish different types of conduct according to their nature and seriousness and label them as particular crimes. It is, perhaps, not surprising then

[5] In this context 'justice' is taken to refer to a judicial rather than an executive (primarily military) disposal of an individual case. It is often seen as an obligation to ensure justice for the victims and a desire to try to ensure that 'this never happens again'. Political leaders may invoke a coercive threat to influence behaviour during an armed conflict that war crimes trials will be established after the conflict. See I Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *EJIL* 561.

[6] An extreme view is that adversaries are 'sub-human' or are (various types of) animals, deserving of no protection by the laws of war. See generally, P Karsten, *Law, Soldiers, and Combat* (Greenwood Press, Westport, 1978) 35 at 55–62. Karsten also discusses other factors creating a propensity to commit war crimes. For the types of person who may be prosecuted for war crimes see K Kittichaisaree, *International Criminal Law* (OUP, Oxford, 2001) 133–34; *ICTY Prosecutor v Kordić, Cerkež*, Trial Chamber (26 Feb 2001), Case No IT–95–14/2 (politician and military commander charged together); *ICTR Prosecutor v Akeyusu*, Appeals Chamber (1 June 2001) Case No ICTR–96–4, para 444.

[7] As compared with a criminal whose actions are driven either by a desire for private gain or for some other private purpose. In *ICTY Prosecutor v Kunarać, Kovać, Vuković*, Appeals Chamber (12 June 2002), Case No IT–96–23 and IT–96–23/1, the Chamber explained that 'what distinguishes a war crime from a purely domestic offence is that a war crime is shaped by and dependent upon the environment-the armed conflict-in which it is committed', para 58.

[8] Those taking up arms against the State may also see themselves not as 'criminals' or 'terrorists' but as 'freedom fighters' in which the ends (freedom from the authority of the existing State) justify the methods employed. For comment on the view that a State, 'by accepting the existence of internal armed conflict … lends legitimacy to irregular armed groups who seek to destroy the democratic system', see F Kalshoven, 'A Columbian View on Protocol II' *1998 Yearbook of International Humanitarian Law* (TMC Asser Press, The Hague, 1998) 263.

that the general term 'war crimes' becomes, in reality, the 'crimes of war'.[9] Thus is born the distinct crimes of genocide, crimes against humanity and grave breaches of the Geneva Conventions 1949 and of their First Additional Protocol (1977). This leaves war crimes (or more accurately, breaches of the laws or customs of war) to cover everything else that is prohibited by the international laws of war. But it is still a wide, encompassing term covering breaches (or crimes) of different degrees of seriousness. It is not, therefore, surprising to see that all judicial bodies, whether acting as an international or a national tribunal, have concentrated on what they perceive to be the most serious crimes under this umbrella. The pattern was set in the Geneva Conventions 1949 which draw clear distinctions between 'grave' breaches of the Conventions and other breaches,[10] imposing specific obligations upon States in respect of the former. The International Criminal Court is no exception in this regard. In Article 8(1) the Court is given jurisdiction:

> in particular when [war crimes as set out in the Article are] committed as part of a plan or policy or as part of a large scale commission of such crimes.[11]

This paragraph refers to the *jurisdiction* of the Court and thus the reach of the prosecutor. It does not impose any limitation to war crimes liability under any other form of jurisdiction[12] since liability for war crimes (as defined in the Statute) is more likely, as a matter of fact, to draw in a greater number of actors at various levels of military or organised armed group responsibility than might be the case in respect of genocide or crimes against humanity. Use of the term, 'in particular' is intended to direct the prosecutor's attention to those war crimes which are, in their actual commission, more similar to genocide and to crimes against humanity. That is, they are committed as part of a plan or policy or as part of a large-scale commission of such crimes. War crimes of a much more limited scale may lead to a State arguing that the case should be declared inadmissible as not being of 'sufficient gravity to justify further action'.[13] Moreover, it is much more usual for such war crimes to be committed by lower ranking individuals in a military organisation or organised armed group and it is, therefore, more likely

[9] See R Gutman and D Rieff (eds), *Crimes of War* (WW Norton, New York, 1999).
[10] See the Geneva Conventions 1949, Arts 49, 50, 129, 146 respectively of each Convention.
[11] For the background to this 'threshold' see UN 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' A/CONF183/2/Add1, 14 April 1998, 25; C Hall, 'The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 92 *AJIL* 331, 332; R Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer, The Hague, 1999) 107–8; M Bothe, 'War Crimes' in A Cassese, P Gaeta, J Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford, 2002) 379 at 380 (who draws particular reference to Art 5 of the Statute).
[12] Eg, under national law or the military law of a State (which may include universal jurisdiction over grave breaches of the Geneva Conventions 1949 or of Additional Protocol I, 1977 or over war crimes generally). In relation to the grave breach provisions States have an obligation to prosecute or extradite, Geneva Conventions 1949, Arts 49, 50, 129, 146 respectively of each Convention.
[13] Art 17(1)(d); Art 19.

that they will be dealt with at the State or armed group organisation level than before the Court.[14]

3. WAR CRIMES BEFORE THE ICC

3.1 International Armed Conflicts

Although many more individuals, of various levels of seniority, might come within the reach of Article 8 during an armed conflict it may well prove to be the case that, paradoxically, relatively few charges of war crimes are brought before the Court where the armed conflict is of an international character. The principle of complementarity[15] will ensure that the Court's jurisdiction will only be invoked in the limited circumstances provided by Article 17.[16] It should not be thought that this principle of complementarity will render the Court otiose and is, therefore, a negative feature of the Statute. It is much more likely to cause individuals to be tried (rather than escape trial altogether) under the national legal system and thus avoid an investigation by the prosecutor for the Court.[17] The prosecutor can investigate a particular war crime about which it could not be said that it was 'part of a plan or policy or as part of a large-scale commission of such crimes' since the inclusion of the words 'in particular' in Article 8(1) do not limit such an investigation where the scale of the actions does not meet the general words in that Article. The potential for the prosecutor to commence an investigation is therefore wider for an alleged war crime than it is for genocide or a crime against humanity. This width of jurisdiction may well cause prosecutors at the national level to act in such a way as to make particular cases inadmissible before the Court, by invoking national jurisdiction. Indeed, an individual State may not have accepted the jurisdiction of the Court over war crimes set out in Article 8 for a period of seven years from the date the Statute came into force.[18] In this case, trial under the national jurisdiction is the only possibility.

[14] See Art 17(1)(a); (b); (c).

[15] See the Preamble to, and Art 17 of, the Rome Statute.

[16] Where Art 8(2) has not been implemented in national law in the same form as it appears in the Rome Statute it is possible that argument might occur as to whether the crime with which the accused is tried is the same or substantially the same as the nearest equivalent in Art 8(2). An example might be whether the *mens rea* of 'wilful killing' in Art 8(2)(a)(i), as supplemented by Arts 30 and 32 and by the Elements of Crimes is the same as murder under a particular national legal system.

[17] Had these principles applied to the events which occurred in 1968 at My Lai, South Vietnam, it is possible that the senior officers charged but not tried for their alleged complicity in the events that led to the trial of Lt Calley would have been placed on trial. See R Hammer, *The Court-Martial of Lt Calley* (Coward, McCann & Geoghegan, New York, 1971) 34–36, 42–43; G Solis, *Son Thang, An American War Crime* (Naval Institute Press, Annapolis, Maryland, USA, 1997) 4, 57–58. See generally, W Fenrick 'War Crimes' in O Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft, Baden-Baden, 1999) 181.

[18] Art 124 of the Rome Statute. See M Politi and G Nesi (eds), The *Rome Statute of the International Criminal Court. A Challenge to Impunity* (Ashgate, Dartmouth, 2001) 96, 312. See the declarations made by France and Colombia on their ratification of the Statute.

3.2 Non-International Armed Conflicts

The position is not quite so clear where the armed conflict is a non-international one. The State, in whose territory the armed conflict is taking place, may well be able to place its own soldiers or police on trial for war crimes as set out in Article 8(2)(c) and (e) but may well be unable to do the same in respect of those belonging to an organised armed group. Article 17(3) enables the Court to exercise its jurisdiction taking into account the inability of the State to investigate a case against an individual or to place him on trial. This exercise of jurisdiction may well not produce the defendant into the custody of the Court but it may serve the purpose of declaring that an indictment has been issued against him.[19]

3.3 Armed Conflicts

A further limitation on the jurisdiction of the Court is to be found in the requirement that the individual war crime (but not a charge of genocide or a crimes against humanity) must be committed during an 'armed conflict' whether of an international or of a non-international nature.[20] This term is not defined in the Rome Statute nor in any other treaty which adopts it as a threshold for the assumption of international obligations.[21] Pictet,[22] writing about an international armed conflict, put forward the following definition, 'any difference arising between two States and leading to the intervention of armed forces'. This definition has not proved to be exhaustive, which led the United Kingdom to make a declaration upon signature of Additional Protocols I and II, 1977. It stated its understanding that:

> [I]n relation to Article 1, that the term 'armed conflict' of itself and in its context implies a certain level of intensity of military operations … [which] cannot be less than that required for the application of Protocol II.[23]

This understanding was altered when the United Kingdom entered its reservations upon ratification of these instruments.[24] It did, however, have the merit of drawing attention to the need for a degree of intensity of military operations.

[19] See eg, the indictments issued by the International Criminal Tribunal for the Former Yugoslavia against Mladić, and Karadžić, on 24 July 1995, Case No IT–95–5–1.
[20] The issue here is whether objectively an armed conflict was taking place, rather than whether the accused must know this, see Elements of Crimes, Art 8, *chapeau*.
[21] See eg, the Geneva Conventions 1949, common Art 2; Additional Protocols I and II of 1977, Arts 1(3) and 1 respectively.
[22] J Pictet (ed), *Commentary on Geneva Convention I, 1949* (ICRC, Geneva, 1952) 32.
[23] Understanding (a), 12 Dec 1977.
[24] In Reservation (d) the United Kingdom referred specifically only to Art 1(4) and 96(3) of Additional Protocol I. For the terms of the ratification by the UK see the Geneva Conventions Act (First Protocol) Order 1998, (1998 SI 1754).

France, alone[25] drew attention to the nature of an 'armed conflict' in its declaration upon ratification of the Rome Statute. It stated that the term referred:

> [T]o a situation of a kind which does not include the commission of ordinary crimes, including acts of terrorism, whether collective or isolated.[26]

It is likely that the Court will follow the view of the International Criminal Tribunal for the Former Yugoslavia that if there is an international armed conflict taking place the reach of Article 8 of the Statute extends to the whole of that territory even though there is no fighting taking place in the area where the war crime is alleged to have been committed.[27] Similarly, where the armed conflict is non-international it will extend 'to the whole of the territory under the control of a party to the conflict'.[28]

3.4 War Crimes under Customary International Law

The individual war crimes selected for inclusion in Article 8 of the Statute reflect a limited range of those accepted as clearly established under treaty or customary international law.[29] To have attempted to include 'new' war crimes would, in reality, have been inconsistent with the aim of establishing an international criminal court as a matter of some urgency.[30] Many other existing war crimes were affected by non-signature, non-ratification or reservations made under the treaties by which they were established. It soon became clear that to pursue some or all of this group for inclusion would lead to the same consequences as proposing new crimes. The perceived need for speed in the negotiations[31] and the absence of a power to enter reservations[32] when becoming a party to the Statute, formed the basis for inclusion or non-inclusion of a particular established war crime.

4. NEW TREATY LAW

One issue did, however, lead to 'new' treaty law. This was whether the Court would have jurisdiction over war crimes (as defined in the Statute) committed during a non-international armed conflict. The previous treaty law had drawn a clear

[25] The United Kingdom's statement of understanding of 12 Dec 1977 cannot stand with its declaration upon ratification of the Rome Statute, which refers to 'its statements made on *ratification* of relevant instruments of international law'.
[26] Declaration by the Republic of France, para 3.
[27] *Prosecutor v Kunarać, Kovać, Vuković,* Appeals Chamber, 12 June 2002, above n 7 at para 57.
[28] *Ibid.*
[29] See P Kirsch and J Holmes, 'The Rome Conference on an International Criminal Court: the Negotiating Process' (1999) 93 *AJIL* 7 at n 19.
[30] See McCormack in this volume.
[31] See L Condorelli in Politi and Nessi, above n 18 at 115 and 111 for the 'closed' list of the war crimes.
[32] Art 120 provides that no reservations are to be made to the Statute. A number of States have, however, made 'declarations' upon ratification. See Turns in this volume.

distinction between an international and a non-international armed conflict and had provided for individual liability in respect of grave breaches only in respect of the former type of armed conflict.[33] The International Criminal Tribunal for the Former Yugoslavia had confirmed that this grave breach liability existed only when the armed conflict was international in nature but it had gone on to decide that breaches of the laws or customs of war could form a suitable charge against a person acting during a non-international armed conflict.[34] Neither logic nor the avowed purposes of the Court, as set out in the Preamble to the Statute, could justify this pre-existing demarcation[35] of individual criminal liability as between these two types of conflict.[36] The political circumstances that underlay the earlier treaties with their neat distinctions between international and non-international armed conflicts were quite different from those existing in 1998. The expectations placed upon political leaders actually to establish an international criminal court to 'end the impunity' of (alleged) war criminals was much greater in 1998 than it had been previously. The public knew that, in modern conditions, the incidence of a non-international armed conflict was much higher than of a traditional international armed conflict. It would have seemed almost perverse to attempt to end this impunity only in respect of the latter type of conflict when large numbers of people, who were not involved in the fighting, were shown on television news programmes and in the press as victims of one (or more) of the warring parties.

From 1977, when the two Additional Protocols to the Geneva Conventions 1949 were opened for signature, States were given the option of becoming a party to Protocol II (non-international armed conflict) and by choosing not to do so they could assume those additional international treaty obligations only where the conflict was of an international character. After 1998, when the Rome Statute was opened for signature, States had to accept the whole package or nothing. For ratifying States there would be an acceptance, for the first time by treaty, that individual criminal liability could exist before an international judicial body[37] for acts committed during a non-international armed conflict.

[33] See however, the Geneva Conventions, 1949, common Art 3, which had been established as a basis of individual criminal liability in the Statute of the International Criminal Tribunal for Rwanda (1994) 33 *ILM* 1598.

[34] *Prosecutor v Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (2 Oct 1995), Case No IT–94–1–AR72.

[35] This demarcation assumed that a clear distinction could be made between these two types of conflict. For the difficulties see *Prosecutor v Tadić* (1995) n 34; C Byron, 'Armed Conflicts: International or Non-International' (2001) 6 *Journal of Conflict and Security Law* 63.

[36] More recent treaties included both, see Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997, (1997) 36 *ILM* 1507, Art 1; Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices (1996) 35 *ILM 1206,* Art 1 to the UN Convention on Prohibitions or Restrictions on the Use of Certain Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980.

[37] States were always free to implement into their national law as applicable to non-international armed conflicts any of their treaty obligations applying to international armed conflicts. Some treaties

The translation of war crimes liability from an international armed conflict setting, from which it originated, to a non-international one is not without its difficulties. In this connection an 'armed conflict' within the purview of the Statute is one that:

> takes place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.[38]

To impose a threshold for this type of individual criminal liability the Statute directs that 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'[39] are not to be considered as armed conflicts and do not therefore come within the compass of the Statute.

There is no mechanism under the Statute to require an independent body, apart from the Court, to determine whether there does in fact exist on the territory of a particular State a non-international armed conflict to which Article 8 refers.[40] Nor is there a power for one or more organised armed groups to make a declaration to the depositary that it (or they) undertake(s) to apply the provisions of the Statute.[41] There may, therefore, be some uncertainty during (at least) the early stages[42] of a conflict as to whether the Court has jurisdiction at all.

apply equally to international as well as to non-international armed conflicts and their implementation obligations apply to both. See eg, the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997, Art 1 and the Landmines Act 1998 (United Kingdom).

[38] Art 8(2)(f). This was first formulated by the ICTY in *Prosecutor v Tadić,* (1995) n 34 at para 70. Cp Additional Protocol II, 1977, Art 1. It does not define the term 'armed conflict' but addresses the issue of the type of participants. A non-international armed conflict is one that is not international. The ingredients of the latter are set out in common Art 2 to the Geneva Conventions 1949.

[39] Art 8(2)(f). See also Additional Protocol II, 1977, Art 1(2).

[40] There are two separate questions here. First, whether there is an armed conflict occurring and, secondly, whether that armed conflict is of a non-international character. As to the first see A*bella v Argentina* Report No 55/97, Case 11 137, 18 Nov 1997, paras 154–56; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)* (1986) ICJ Reports 14, para 219; K Rakate, 'The Shelling of Knin by the Croatian Army in August 1995: A Police Operation or a Non-International Armed Conflict?' (2000) 82 *International Review of the Red Cross* 1037. The UK did not accept that the 'troubles' in Northern Ireland 1968–1998 amounted to an 'armed conflict' for the purposes of common Art 3 to the Geneva Conventions 1949. As to the second see *Prosecutor v Tadić,* Appeals Chamber (15 July 1999), above n 34 at para 84; *ICTY Prosecutor v Delalić,* Appeals Chamber (20 Feb 2001), Case No IT–96–21, paras 26, 50; *ICTY Prosecutor v Kordić, Cerkež*, Trial Chamber, (26 Feb 2001), above n 6 at paras 79, 109, 146. Even if the armed conflict is considered to be a non-international one an issue might arise as to who are the parties to such a conflict, see *Prosecutor v Kordić, Cerkež*, above n 6 at para 25.

[41] Cp Art 96(4) Additional Protocol I 1977.

[42] 'The most difficult problem regarding the application of common Art 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end', *Abella v Argentina* (1997) see n 40 at para 153. Art 8(2)(f) requires this armed conflict to be 'protracted'. Should Art 13(b) be the basis of the exercise of jurisdiction note the possibility of the 12 month deferral of investigation or prosecution, Art 16.

The prosecutor[43] may, however, seek to test the point by issuing a warrant of arrest[44] of a named individual but this may take time and, in turn, may be challenged by the State concerned. Difficulties will occur if the arrest warrant is issued against a member of an organised armed group, as compared with a member of one of the 'governmental authorities'.[45] The State party to the Statute, in whose territory the alleged armed conflict is taking place, may be able to place in custody or prosecute a named individual soldier or police officer but not a member of an organised armed group against which it is fighting.[46] In these circumstances, the first ruling that the Court has over its own jurisdiction (and that a non-international armed conflict is taking place) will be that of the pre-trial chamber.[47] Notwithstanding that the investigation is directed against a member of an organised armed group the State may still consider that the Court has no jurisdiction and seek to challenge this issue before the Court itself.[48] It is possible that for the whole life of an 'armed dispute' taking place in the territory of a State that there will be uncertainty as to the jurisdiction of the Court and thus the extent of the obligations placed upon individuals in Article 8(2)(c) and (e). In turn this may lead to uncertainty as to the applicability of any implementing legislation within that State.[49]

It is therefore foreseeable that an organised armed group will argue, for its own 'political'[50] reasons, that it is taking part in an armed conflict (as defined in the Rome Statute) and the State concerned may argue that it is not engaged in an armed conflict. The State might, for its own political purposes, take the view that its armed forces and police are engaged merely against organised criminals or terrorists. The advantage to it in adopting this course is to apply only its own national law[51] as a means of checking the physical power of its armed forces or police, rather than the limitations on their actions imposed by the Rome Statute. This uncertainty as to the jurisdiction of the Court is unlikely to exist if the armed conflict is of an international character. It becomes of particular importance in respect of war crimes, as defined in the Statute, since jurisdiction over the other

[43] Under his or her powers granted by Art 13.
[44] Art 58.
[45] Art 8(2)(f).
[46] It may be unable to arrest a member of an organised armed group fighting against another such group.
[47] Art 15(3).
[48] Art 15(4).
[49] In the United Kingdom the implementing legislation, the International Criminal Court Act 2001, follows very closely to the Rome Statute on the matter of Art 8.
[50] The group may, however, not wish to engage in the political process, nor may it wish to become the government of the State or a seceded part of it. It may only wish to retain control over part of the territory, eg, to extract its resources for profit. The term 'political' is used here as a neutral term to mean 'for its own purposes'.
[51] In practice, a State's own national law in times of a declared emergency may well give the armed forces or the police extensive powers, or provide wide defences to what would otherwise amount to serious crimes.

crimes, genocide and crimes against humanity, may occur in the absence of an armed conflict. The difficulties inherent in applying the individual war crimes to non-international armed conflicts will be discussed below.

5. THE IMPACT OF HUMAN RIGHTS

5.1 War Crimes as Human Rights Violations

Traditionally, the human rights of those involved either as actor or victim during an international armed conflict have been considered to have been subsumed by international humanitarian law,[52] which has concentrated upon the individual criminal liability of the actor, in the form of a war crimes liability, and upon the protection of the victims of armed conflict. Thus, a person who attacks or ill-treats one or more 'protected persons' under the Geneva Conventions 1949 will commit a grave (or other) breach of the Conventions.[53] Another way of stating this is that an individual protected person has a 'right' not to be dealt with in one of the prohibited ways. Many of these 'rights' map onto those granted by human rights treaties. So, the prohibition against 'wilful killing, torture or inhuman treatment' in the grave breach Articles of the 1949 Conventions, and now part of Article 8(2)(a) of the Rome Statute, are similar respectively to Articles 2 and 3 of the European Convention on Human Rights 1950.[54] The latter Convention, however, does permit derogation from the right to life in time of 'war or other public emergency threatening the life of the nation' in respect of deaths 'resulting from lawful acts of war'.[55] This right of derogation cannot affect protected persons under the 1949 Geneva Conventions since the wilful killing of such a person could not amount to a lawful act of war.[56] No derogation is permitted from the prohibition against torture, inhuman or degrading treatment or punishment contained in Article 3 of the 1950 Convention.

[52] Which contains many provisions of a 'human rights' nature. For an argument that there ought to be a 'merged reformulation of the established rules of human rights law and the law of conflict', see T Hadden and C Harvey, 'The Law of Internal Crisis and Conflict' (1999) 81 *International Review of the Red Cross* 119.

[53] The grave breaches of the Geneva Conventions, 1949 are set out in Arts 50, 51, 130, 147 respectively of each Convention.

[54] The death penalty is permitted as a punishment based on national law in time of war or of imminent threat of war within the terms of Protocol No 6 for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, as amended by Protocol No 11 (1983), Art 2; Cp Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, (2002).

[55] Art 15. There is no known example of a derogation under this Art in time of an international armed conflict.

[56] It would amount to a grave breach of the relevant Geneva Convention of 1949. This assumes that a civilian protected person does not take a direct part in hostilities, Additional Protocol I, 1977, Art 51(3). There are no justifications nor defences set out in the 1949 Conventions for such acts. No reprisals are permitted against protected persons.

The other grave breach provisions can be argued to amount to various human rights of protected persons. The term 'inhuman treatment' in Article 3 of the 1950 Convention is sufficiently wide to cover 'wilfully causing great suffering, or serious injury to body or health';[57] the protection of property[58] is a right matching Article 8(2)(a)(iv) of the Rome Statute, although the latter recognises that during warfare property belonging to an individual may well be destroyed as part of military operations. The prohibition of 'compelling a prisoner of war or other protected person to serve in the forces of a hostile Power'[59] would infringe Article 4 of the 1950 Convention since that Article (which permits service of a military character) must be taken to refer to the State of which the individual is a national. Wilfully depriving such a person of a fair and regular trial[60] would flout Article 6(1) of the 1950 Convention,[61] assuming no derogation has been made, whilst 'deportation or transfer or unlawful confinement'[62] of a protected person would also infringe the 1950 Convention.[63] Many of the other war crimes set out in Article 8(2)(b) applying to an international armed conflict contain within them elements of these European Convention or other human rights established by treaty.[64]

A victim of a breach of human rights may well be able to take steps against the State concerned, certainly within the European Convention on Human Rights procedures, seeking 'just satisfaction'.[65] Should this be successful the State may be directed to make an award of compensation to the victim. The objective of the European Convention is the same as the war crimes liability set out in the Rome Statute, namely, to try to prevent breaches of human rights and war crimes respectively. The means by which they do it and the consequences to the victims are, however, different. In the former case the victim (or his or her family) may be awarded financial compensation and in the latter there may be some satisfaction of seeing an end to the impunity of the actor through a war crimes trial (in addition to receiving a reparations order).

[57] Art 8(2)(a)(iii). This is the case *a fortiori* where the conduct is deliberate or wilful, *Ireland v United Kingdom* (1978) 2 EHRR 25, para 167; R Clayton and H Tomlinson, *The Law of Human Rights* (OUP, Oxford, 2000) 392.
[58] First Protocol (1952) to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No 11, 1952, Art 1.
[59] Art 8(2)(a)(v).
[60] Art 8(2)(a)(vi).
[61] Which does not require such a *mens rea*.
[62] Art 8(2)(a)(vii).
[63] Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, as amended by Protocol No 11, 1963, Art 3, and Art 5 of the 1950 Convention, respectively. The taking of hostages, Art 8(2)(a)(viii) of the Rome Statute, could also be considered as a breach of the human rights of the victim, Art 5 of the 1950 Convention.
[64] Examples would be Art 8(2)(b)(i), (ii), (viii), (x), (xiv), (xxi), (xxii).
[65] European Convention on Human Rights 1950, Art 41. The applicant must exhaust domestic remedies and bring an application within six months of the final decision, Art 35(1).

5.2 The Jurisdictional Limitations of Human Rights Treaties

In a claim made under the European Convention on Human Rights by a person who has not taken any part in the hostilities the defendant State may be that of which the victim is a national or, indeed, an 'enemy' State. It is, no doubt, more likely that should an individual's human rights be violated during an international armed conflict this will be caused by the organs of an enemy State rather than by the State of which he or she is a national. In these circumstances, the key issue will be whether the victim was 'within [the] jurisdiction' of a State party to the 1950 Convention. If the answer is in the affirmative it will be the responsibility of that State to 'secure to everyone' the 'rights and freedoms defined in … [the] Convention'.[66] The European Court of Human Rights has confirmed that:

> the responsibility of a Contracting Party could also arise when as a consequence of military action–whether lawful or unlawful—it exercises effective control of an area outside its national territory … Those affected by … [these military] actions therefore come within the 'jurisdiction' [of the State concerned].[67]

This requirement of 'effective control of an area' was tested before the European Court of Human Rights in *Banković and others v Belgium [and other Individual NATO States]* (2001).[68] It had been argued, inter alia, by the applicants that since the NATO States had effective control over the airspace of the Federal Republic of Yugoslavia that individuals within that territory were also 'within [the] jurisdiction' of the NATO States for the purpose of Article 1 of the 1950 Convention. The Court decided that the applicants were not within the jurisdiction of the respondent State. It confirmed that the:

> recognition of the exercise of extraterritorial jurisdiction by a Contracting State is exceptional [and can only be shown where the respondent State] exercises all or some of the public powers normally to be exercised by that Government.[69]

The *Banković* case does not detract from the principle formulated in *Loizidou v Turkey* (1997) that an individual whose human rights have been breached by a State party to the 1950 Convention may succeed in a claim where the acts of the

[66] Art 1.
[67] *Loizidou v Turkey* (1997) 23 EHRR 513, 530–531, paras 52 and 56; *Loizidou v Turkey (PreliminaryObjections)* (1995) 20 EHRR 99. See also *Issa et al v Turkey*, Application No 31821/96, 30 May 2000 (admissibility); *Ilascu et al v Moldova and the Russian Federation*, Application No 48787/99, 4 July 2001 (admissibility); *Ocalan v Turkey*, Application No 46221/99, Judgment of Court (10 Feb 2003); *Coard et al v United States of America*, Report No 109/99, Case 10, 951, 29 September 1999, para 37 (Inter-American Commission on Human Rights).
[68] Decision of 12 Dec 2001, (2002) 41 *ILM* 517, which related to the bombing by NATO aircraft of the Serbian TV and Radio Station in Belgrade on 23 April 1999. For the conclusion in relation to this incident contained in the 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia', (International Criminal Tribunal for the Former Yugoslavia, 8 June 2000), (2000) 39 *ILM* 1257, see para 79.
[69] *Ibid* at para 71.

armed forces or police of that State take place in an area of which they have, as a matter of fact, taken 'effective control,' as explained by the Court. The most obvious example of a State taking 'effective control' over a part of the territory of another State would be where the armed forces of an enemy State occupy part (or all) of the territory of a State party to the Convention during the course of an international armed conflict. The inhabitants of that territory may thus be placed under the effective control of the occupying force. Under these conditions it is not difficult to see the significance of some of the individual war crimes set out in Article 8(2)(a) and (b). Whilst many of the individual war crimes may be committed by an enemy State which does not occupy any territory of its adversary, an occupying force may find it much easier, as a matter of fact, to commit such crimes on a large scale.[70] Apart from the clear case of occupation of territory discussed above a more problematic issue would be whether a United Nations force would have 'effective control' over an area of territory during a humanitarian assistance or peacekeeping mission'.[71]

A combatant who wished to make a claim under the 1950 Convention would also need to show that the actions which affected him occurred whilst he was 'within [the] jurisdiction' of an enemy State.[72] He may, for instance, have been part of the national army attempting to re-take its territory from the control of an occupying force when the latter deployed a method or means of war prohibited by Article 8(2)(a) or (b).[73] It may appear strange that during an international armed conflict the States concerned must, in the absence of any permissible derogation, have regard to the human rights of (what to each of them) are enemy combatants. Here, again, war crimes responsibility and the human rights of 'everyone' within the jurisdiction of a State party to the 1950 Convention have clear linkages. It is, of course, of the essence of warfare that the lives of combatants are taken but such consequences of military action are only legitimate if the method of killing is not prohibited by international humanitarian law. In its specific formulation under Article 8 of the Rome Statute killing is permitted if the *method* of doing so is not prohibited by that Article. The right to life in Article 6 of the International Covenant on Civil and Political Rights 1966 is interpreted in this way. Thus, the taking of the life of a combatant[74]will not infringe Article 6 if it is

[70] Specific war crimes which could only, in reality, be committed by an occupying force (as compared with an enemy State which does not occupy territory) would be Art 8(2)(a)(vii), (viii); Art 8(2)(b)(viii), (x), (xiv), (xv), (xxiii).

[71] See Art 8 (2)(b)(iii). This assumes there to be an armed conflict. *Quaere* whether the United Nations force is required to be a 'party' to the armed conflict. For the purposes of Art 8(2)(b)(iii) the force must be attacked. See generally, M Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (Kluwer, London, 1999); J Simpson, *Law Applicable to Canadian Forces in Somalia 1992/93* (Public Works and Government Services, Canada, 1997) 20.

[72] The European Court of Human Rights has taken a very practical view of the requirement to exhaust domestic remedies, see *Ilascu v Moldova and the Russian Federation* (2001) n 67, para IV.

[73] Alternatively, he might be a prisoner of war against whom one of the crimes set out in Art 8(2)(a) has been committed.

[74] It will, of course, be much easier to show a breach of the right to life under Art 2 of the 1950 Convention if the victim is not a combatant. An unlawful combatant, ie one who does not come within Art 43(2) of Additional Protocol I, 1977, may be attacked.

carried out in accordance with international humanitarian law, which becomes the *lex specialis*[75] to show that the taking of life was not 'arbitrary'. This principle may also apply to other Covenant rights[76] which may be mapped on to the various forms of conduct prohibited by Article 8(2)(a) or (b) of the Rome Statute.

Although the *Banković* case was concerned with the reach of the European Convention on Human Rights 1950 other human rights treaties have similar language and it may, therefore, prove to have some precedent value in the interpretation of the term 'jurisdiction' in these treaties.[77] The European Court of Human Rights concluded, in the light of its decision in respect of Article 1, that it was not required to address the issue of the effect of the non-derogation of the right to life under Article 15 for 'lawful acts of war' by any of the respondent States.[78] The differences between the 1966 Covenant and the 1950 Convention on this point suggest that States party to the latter are required to issue a formal derogation under Article 15 of the Convention to ensure that no breach of Article 2 takes place as a consequence of the 'lawful conduct of war'.[79]

5.3 Human Rights in Non-International Armed Conflicts

It is much more difficult to apply these human rights norms in the case of a non-international armed conflict since breaches of them may not have been committed by organs of the State but by members of an organised armed group. The responsibility for such actions will only be engaged by the State in whose territory the acts take place:

> if it knew or ought to have known … of a real and immediate risk to the life of an identified individual or individual from the criminal acts of a third party and [the State] failed to take measures within the scope of [its] powers, which judged reasonably, might have been expected to avoid the risk.[80]

[75] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of the International Court of Justice*, 8 July 1996, (1996) ICJ Reports 265 at para 25.
[76] By way of analogy see *Coard v United States*, 29 Sept 1999, Report No 109/99, para 42 (dealing with the right to liberty under the American Declaration of the Rights and Duties of Man).
[77] International Covenant on Civil and Political Rights 1966, Art 2 (although this has an additional requirement that individuals must be 'within its territory'; cp Optional Protocol 1966); American Convention on Human Rights, 1969, Art 1; cf African Charter on Human and Peoples' Rights, 1981. See, however, the Court's view in *Banković et al v Belgium et* al (2001) of these other treaties, at para 78. See D McGoldrick, 'The Extraterritorial Application of the International Covenant on Civil and Political Rights', in M Kamminga and F Coomans (eds), *The Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2004).
[78] 'Indeed Art 15 itself is to be read subject to the "jurisdiction" limitation enumerated in Art 1 of the Convention', at para 62.
[79] In the absence of such a derogation, arguments that such 'lawful acts of war' are 'absolutely necessary' and 'in defence of any person from unlawful violence' (Art 2(2)) are unconvincing.
[80] *Osman v United Kingdom*, 28 Oct 1998, (1999) 29 EHRR 245, para 116; *Cyprus v Turkey* (2002) 35 EHRR 30, para 81; *Kaya v Turkey*, 7 March 2000, Application No 31733/96, at para 114; *Edwards v United Kingdom* (2002) 35 EHRR 19, para 55.

The very nature of a non-international armed conflict, as envisaged by Article 8(2)(f), suggests that the State concerned may, in reality, be unable to prevent breaches of human rights where they are committed by its adversaries or (especially) where the armed conflict is between organised armed groups.[81] The activities of such groups may hardly be distinguishable from an enemy occupying force discussed above but the rights on the part of the victims of their actions will, in terms of an available remedy for a breach of human rights, be distinctly inferior, since claims may be made only against a State.[82]

There will be many fewer difficulties where a claim is brought under a human rights treaty against a State for the acts of its soldiers or police during a non-international armed conflict.[83] It is, perhaps, in this type of armed conflict that a derogation is more likely to be made by the State concerned. Under the 1950 Convention a particular issue (as yet undecided) will be whether the derogation in respect of the right to life in Article 2 of 'lawful acts of war' applies, given the application of the Rome Statute to this type of conflict.

6. THE ROLE OF PREVIOUS TREATIES

Article 8 of the Rome Statute raises a further issue, which is unlikely to apply to Articles 6 (genocide)[84] and 7 (crimes against humanity).[85] This is that Article 8 draws upon existing treaty provisions for its definitions of individual war crimes. Some States, party to the Rome Statute, may not be a party to the original treaty from which the definition of a particular war crime derives or they may have entered reservations to that particular treaty. It will be recalled that reservations are not permitted to the Rome Statute.[86] By becoming a party to the Rome Statute a State's obligations in respect of a war crime specified in Article 8(2) will supersede, subject to any understandings made upon ratification, its treaty obligations contained in the original treaty, to which it may have made a reservation, in so far as the International Criminal Court is a relevant issue. A good example might be drawn from Article 8(2)(b)(xviii) of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices. This war crime is derived from the Geneva Gas Protocol 1925. A number

[81] For an example, see *Ilascu v Moldova and the Russian Federation* (2001) n 67 above (submissions of Moldova concerning the Transdniestrian region).
[82] An organised armed group may declare that it will accord to those whom it holds the rights guaranteed under the European Convention. For breach of such a declaration the group could not be held liable under the Convention since it is not a Contracting State.
[83] It will not be necessary for the judicial body concerned to determine whether an armed conflict had been taking place since this is not a formal requirement of any rights governed by any of the human rights treaties.
[84] Reservations made to this treaty are concerned, not with the definition of the offence, but with jurisdictional issues.
[85] Most of the terms of which do not derive from definitions set out in treaties.
[86] Art 120.

of States entered a reservation to this Protocol to the effect that it would cease to be binding in regard to an enemy state or its allies which failed to respect its provisions.[87] Had Iraq, in 1990–91, used chemical weapons against British or American troops as part of the coalition forces the governments of the United Kingdom and the United States would have been justified, as a strict matter of obligations accepted under the 1925 Geneva Gas Protocol,[88] to respond with such weapons against Iraq. Following the coming into force of the Rome Statute, the United Kingdom, which is a party to it, cannot in any circumstances use such weapons, whereas the United States, which is not a party to it, could, on the basis of its reservation to the Geneva Gas Protocol 1925, against an enemy State which had made first use of them and which itself was not a party to the Rome Statute.[89]

Of more significance, since many of the individual war crimes set out in Article 8(2)(b) were drawn from Additional Protocol I of 1977, is the status of reservations to that Protocol and the fact that none are permitted to the Rome Statute. A good case in point is that of the United Kingdom. In its reservations to the 1977 Protocol it stated that it regarded itself as:

> entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers it necessary for the sole purpose of compelling the adverse party to cease committing violations of [Articles 51 to 55 of that Protocol].[90]

Some of the obligations contained in these Articles are set out in Article 8(2)(b), to which, as it has been stated, no reservations are permitted. The United Kingdom has been able to bind the two separate systems of obligations together by making a declaration upon ratification that it:

> understands the term 'the established framework of international law' used in Article 8(2)(b) and (e) to include customary international law … In that context the United Kingdom confirms and draws to the attention of the Court its views, as expressed, inter alia, in its statements made on ratification of relevant instruments of international law, including [Additional Protocol I].

France made declarations upon ratification of the Rome Statute similar to, but not identical with, its earlier reservations to Additional Protocol I.[91] Other States have made no such declaration. These States may argue, should the issue of

[87] The reservations are conveniently set out in A Roberts and R Guelff, *Documents on the Laws of War* (3rd edn) (OUP, Oxford, 2000) 164–67.
[88] It is possible, however, that other treaty provisions would have been breached had they done so.
[89] The Court will have jurisdiction only where the breach of the Statute occurred on the territory of a State party or by a national of such a State, Art 12 Rome Statute.
[90] Reservation (m), Roberts and Guelff, above n 87 at 511.
[91] Both were made within a short time of each other.

jurisdiction of the Court arise in any particular case, that the term 'established framework of international law' automatically sweeps in their reservations to the original treaty without the requirement of saying so upon ratification. It is by no means clear that the Court would accept this since it might take the view that to do so would defeat the object and purpose of the Statute as set out in its Preamble.[92]

In non-international armed conflicts this issue does not arise in the same form since the war crimes set out in Article 8(2)(e) and which are derived from earlier treaties were not originally designed for individual criminal liability.[93] In its declaration upon ratification of the Rome Statute the United Kingdom referred specifically to Article 8(2)(b) and (e) and thus treated both international and non-international armed conflicts as subject to the same principles as set out in that declaration.

The Rome Statute does not define the terms used in Article 8.[94] The Elements of Crimes does so in relation to the issues addressed by those Elements. There is, however, no definition of 'attack', 'military objective', 'combatant' or 'international armed conflict'. Given that these terms appear in Article 8(2)(b) and (e)[95] both of which are prefaced by the phrase 'within the established framework of international law' it is reasonable to draw their meanings from this established framework, which will include Additional Protocol I, 1977.[96]

The International Criminal Tribunals for the Former Yugoslavia and for Rwanda have produced a number of decisions of great authority on issues relating to war crimes (in addition to those relating to genocide and to crimes against humanity). These Tribunals have acted under their own respective Statutes, the wording of which differs from that of Article 8 of the Rome Statute. Although reference to the judgments of the both Tribunals is made below when discussing war crimes these differences should be borne in mind. It may be that the Court would take a different view.[97]

[92] *Quaere* whether it would accept the United Kingdom's 'understanding' upon reservation on this point.

[93] Many are derived from Additional Protocol II, 1977, which did not, unlike Additional Protocol I, 1977, provide for grave breaches of the Protocol. See M Bothe, 'War Crimes in Non-International Armed Conflicts' in Y Dinstein and M Tabory (eds), *War Crimes in International Law* (Nijhoff, The Hague, 1996) 293.

[94] Although Art 8(2)(b)(xxii) and (e)(vi) refer to the definition of 'forced pregnancy' contained in Art 7(2)(f).

[95] Apart from the term 'military objective'.

[96] See Arts 49, 52(2), 43(2) and 1(3) respectively. It is considered that all reflect customary international law and thus will be applicable to non-Parties to this Protocol. The prohibition on taking reprisals against protected persons, civilians and civilian objects in the Geneva Conventions 1949 and Additional Protocol I must also apply under the Rome Statute. For the authorisation to the Court to consider earlier treaties see Art 21(1)(b) of the Rome Statute. There may be some doubt as to whether Art 1(4) of this Protocol is within 'the established framework of international law' and thus has been brought within the Rome Statute as an *international* armed conflict.

[97] Art 21 of the Rome Statute the Court can take into account 'the established principles of the international law of armed conflict'. It is not bound to take into account, nor follow, a decision of the two Tribunals.

7. WAR CRIMES DURING AN INTERNATIONAL ARMED CONFLICT

It is not surprising to see that the Court has jurisdiction over the grave breaches of the Geneva Conventions 1949.[98] Virtually every State in the world is a party to these Conventions and they have accepted universal jurisdiction over the grave breaches within their national systems, as has the International Criminal Tribunal for the Former Yugoslavia.[99] Since the grave breaches provisions apply only in respect of acts committed during an international armed conflict[100] they did not form part of the jurisdiction of the International Tribunal for Rwanda. For the same reason they do not apply to non-international armed conflicts within the Rome Statute, where this traditional distinction between these two types of conflict is played out.

One of the features of the grave breach regime of the 1949 Conventions was that it was always intended the individual breaches would be tried within the courts of States under their national law. When this is attempted the issue of the rights of a defendant to a fair trial requires the definition of the crimes involved to be set out in clear and certain terms. This involves an understanding of the limits of each individual grave breach, in terms of an *actus reus* and a *mens rea*. The Rome Statute achieves this through its Elements of Crimes which refer specifically to each of the grave breaches.[101] The Elements provide clarification not only as to the *mens rea* of the consequences of a person's actions but also of the surrounding circumstances. Thus, the grave breach must 'take place in the context of and [be] associated with an international armed conflict' and the 'perpetrator must be aware of factual circumstances that established the existence of an armed conflict'.[102]

[98] Arts 50, 51, 130, 147 respectively of each of the four Geneva Conventions 1949. Although Additional Protocol I also contains a list of grave breaches of that instrument such grave breaches have not been included, as such, in the Rome Statute or in the Statute of the ICTY. The 'relevant' Convention must be considered, R Lee (ed), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer, The Hague, 1999) 108. For an example of the trial of grave breaches see *ICTY Prosecutor v Kordić, Cerkež*, Trial Chamber (26 Feb 2001), above n 6, counts 3–6.

[99] Art 2 of the Statute of that Tribunal, (1993) 32 *ILM* 1192.

[100] This was clearly the intention of the framers of the 1949 Conventions, given the clear distinctions between common Arts 2 and 3 to each of the 1949 Conventions; *Prosecutor v Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber (2 Oct 1995), above n 34, para 84, cp the 'strong case [that] can be made for the application of [the grave breach provisions] even when the incriminated act takes place in an internal conflict', Judge Abi-Saab; *Prosecutor v Tadić,* Judgment, Appeals Chamber, 15 July 1999, para 83, where the traditional view is not disputed.

[101] See Art 9 of the Statute; K Dormann, 'Preparatory Commission for the International Criminal Court: The Elements of War Crimes' (2000) 82 *IRRC* 771, who also sets out the background to their existence. The Elements do not reflect completely the views of the International Tribunal for the Former Yugoslavia, see *Prosecutor v Blaskić*, Judgment (3 March 2000), Case No IT–95–14, at paras 150–58.

[102] The existence of knowledge of these circumstances follow from *Prosecutor v Tadić* (1995) n 34 at para 70; for a view that there exists ambiguity between the *chapeau* of the war crimes section and the individual crimes see Dormann, above n 101 at 781. *Quaere* whether this is so, given that it will be for the Court to determine whether an armed conflict (and whether it was international or

The victim of a grave breach of the Geneva Conventions 1949 must be a person 'protected' by those Conventions. In each of the four Conventions protected persons are specifically defined.[103] The effect of this is to limit the scope of the grave breach provisions as a means of holding actors to account for their criminal conduct to situations where the victim comes with the relevant Convention definition. In the fourth Geneva Convention 1949 (the protection of civilians) Article 4 defines protected persons as:

> [T]hose who, at a given moment and in manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are *not nationals*.[104] [emphasis added].

This emphasis on the treatment of non-nationals was understandable in the context of the 1949 Conventions given their applicability only to conflicts between or among States.[105] It would prove to be a distinction which the humanitarian ideals underlying the Convention could not support when the conflict was taking place between two different ethnic groups of (legally) the same nationality. The International Criminal Tribunal for the Former Yugoslavia has taken the view that, despite the perpetrator and the victim being of the same nationality, the latter should be considered to be a protected person within the meaning of the fourth Geneva Convention 1949. The Tribunal stated that 'in granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such'.[106] This wider view as to who is a protected person has not, however, been translated into Article 8(2)(a) or into the Elements. In drawing the limits of the latter, attention is directed to the employment of methods of interpretation 'within the established framework of the international law of armed conflict'.[107] Unlike the International Criminal Tribunal for the Former Yugoslavia, which does not possess jurisdiction over acts directly[108] within the terms of common Article 3 to the Geneva Conventions 1949, the Rome

non-inter-national) was taking place. The *mens rea* to be shown on the part of the perpetrator will be whether he knew of the factual circumstances underlying the Court's assessment that an armed conflict was taking place.

[103] Arts 13, 13, 4 and 4, respectively, of each of the four Geneva Conventions 1949.

[104] Further detail is provided in the other paras of this Art, dealing, inter alia, with the position of nationals of an allied State. For the effect of this on nationals of South Vietnam during the Vietnam war see Solis, above n 17 at 57.

[105] Common Art 2 to each of the four Conventions.

[106] *Prosecutor v Tadić,* Judgment, Appeals Chamber (15 July 1999), above n 34 para 168 and see the view that Art 4 was satisfied through the characterisation of the Bosnian Serb forces as 'de facto organs of another State, namely the FRY', para 167; *Prosecutor v Aleksovski*, Appeals Chamber (24 March 2000), Case No IT–95–14/1, at para 79; *Prosecutor v Delalić et al*, Appeals Chamber (20 Feb 2001), above n 40 at para 83; *Prosecutor v Kordić, Cerkež*, Trial Chamber (26 Feb 2001), above n 6 para 154.

[107] Elements of Crimes, *chapeau* to Art 8.

[108] The view of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Kunarać et al* (12 June 2002), above n 7 at para 187, was that Art 3 of the Statute of the Tribunal (breaches of the laws or customs of war) 'incorporated customary international law, particularly common Art 3 of the Geneva Conventions'.

Statute does.[109] The effect of this is that the perceived need to apply the grave breach provisions to a non-international armed conflict is rendered otiose.

Other serious violations of the laws and customs applicable during an international armed conflict also come within the jurisdiction of the Court. Whilst there could be little doubt that the grave breaches of the Geneva Conventions 1949 would be included within the jurisdiction of the Court the scope for argument over which of the other serious crimes should be included in the Statute was much greater.[110] Some of the crimes are repeated in identical (or similar) wording in Article 8(2)(e) dealing with non-international armed conflict but others apply only to international armed conflict[111] and, thus, the classification of the type of armed conflict will assume some significance.[112]

7.1 Targeting Crimes

The crimes can be considered, conveniently, in different groups. First, the targeting crimes. These comprise Article 8(2)(b) (i), (ii), (iii), (iv), (v), (ix), (xiii) and (xxiv).[113] Their origins lie, variously, in the Regulations Annexed to the Hague Convention (IV) 1907, the Geneva Conventions 1949, Additional Protocol I 1977, the Convention on the Safety of United Nations and Associated Personnel 1994 and the Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, 1999. The crimes set out in Article 8(2)(b)(i), (ii) and (iv)[114] are based on the general principles to be found in Articles 51, 52 and 55 of Additional Protocol I. These Articles draw distinctions between, on the

[109] It also sets out other war crimes over which the Court has jurisdiction if committed during a non-international armed conflict. The ICTY had concluded that it possessed jurisdiction over serious violations of the laws or customs of war 'within the context of an international or an internal armed conflict', *Prosecutor v Tadić* (1995) n 34 at para 94, cp Judge Li at para 11.

[110] For the history of this part of Art 8 see R Lee, *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results* (Kluwer, The Hague, 1999) 109–18; 'The United States and the International Criminal Court' (1999) 93 *AJIL* 12, 29.

[111] See Art 8(2)(b) (ii), (iv), (v), (vi), (vii), (viii), (xiv), (xv), (xvii), (xviii), (xix), (xx), (xxiii), (xxv).

[112] For the difficulties such an assessment might cause see *Prosecutor v Tadić* (1995) n 34, para 77 and the different approach taken in *Prosecutor v Tadić,* Judgment, Appeals Chamber, 15 July 1999 at para 152. See also n 38.

[113] The crimes set out in Art 8(2)(b)(i), (iii), (ix) and (xiii) apply also during a non-international armed conflict.

[114] This involves a combination of parts of Art 51(5)(b) and 55 of Additional Protocol I, 1977. The interesting feature is the inclusion of the 'natural environment' which is not defined in the Statute, nor in Additional Protocol I. It has been suggested that this term should 'be understood in the widest sense to cover the biological environment in which a population is living, [including] foodstuffs, agricultural areas, drinking water, livestock, forests, and other vegetation … fauna, flora and other biological or climatic elements', *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Geneva, 1987) para 2126. See also D Tolbert 'Defining the Environment' in G Plant, *Environmental Protection and the Law of War* (Belhaven Press, London, 1992) 257. For discussion of 'widespread, long-term and severe' see M Drumbl, 'Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes', in J Austin and C Bruch (eds), *The Environmental Consequences of War, Legal, Economic and Scientific Perspectives* (CUP, Cambridge, 2000) 620, 623.

one hand, the civilian population (or an individual civilian) and civilian objects (including the natural environment) and, on the other, combatants and military objectives. Only the latter group may be attacked. Intentionally to attack the former group directly or incidentally (with the necessary *mens rea)* is therefore stated to be a war crime. The lack of any definition provision in the Rome Statute will either drive enquirers back to the definitions of a 'civilian', a 'military objective' and 'attacks' to be found in Additional Protocol I[115] (and from there to argue that such definitions reflect customary international law) or it will lead to the Court having to formulate its own definitions.[116] Paragraphs (iii),[117] (v),[118] (ix),[119] (xiii)[120] and (xxiv)[121] are drawn from the whole range of the treaties referred to above.

7.2 Use of Prohibited Weapons

The second group includes the use of prohibited weapons. These encompass paragraphs (xvii),[122] (xviii),[123] (xix),[124] and (xx),[125] none of which apply to a non-international armed conflict. Each reflects principles well established[126] and

[115] See above n 93.
[116] Such definitions are not to be found in the Elements of Crimes. There is no definition of 'the natural environment' to be found in any relevant treaty. The International Criminal Tribunal for the Former Yugoslavia has formulated definitions of various terms when required to do so, see *Prosecutor v Delalić* Trial Chamber, Judgment (16 Nov 1998), above n 40 at paras 473, 544.
[117] See Convention on the Safety of United Nations and Associated Personnel, 1994, Arts 7, 9 and cp Art 2. The wording of para (iii) is a paraphrase of the Arts of the 1994 Convention to which reference is made.
[118] This is derived from the Regulations Annexed to the Hague Convention IV, 1907, Art 25 (with the addition of the term 'military objectives', as to which see Additional Protocol I Art 52(2)).
[119] See Regulations Annexed to the Hague Convention IV, 1907, Art 27 for the basis of this paragraph, which also includes buildings dedicated to 'education'.
[120] This is identical to the Regs Annexed to the Hague Convention IV, 1907, Art 23(g).
[121] This is a new formulation based upon Geneva Convention I, 1949, Art 19. The distinctive emblems are those set out in that Convention in Arts 38–44. This would cover any additional distinctive emblems, as to which see the proposed Additional Protocol III to the Geneva Conventions of 1949. It also covers the distinctive signs or signals, see the relevant Elements of Crimes, para 1.
[122] See Regs Annexed to the Hague Convention IV, 1907, Art 23(a).
[123] See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of War (the Geneva Gas Protocol 1925). For an interpretation see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice (1996) ICJ Reports 14, at para 55. The prohibition of bacteriological methods of war has not found its way into the Rome Statute. Neither is there any reference to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction, 1972, nor to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993.
[124] See Hague Declaration 3 Concerning Expanding Bullets, 1899.
[125] The origin of the principle contained in this paragraph is the Regs Annexed to the Hague Convention IV, 1907, Art 23. It was re-formulated in Additional Protocol I, Art 35(2).
[126] By, respectively, the Regs annexed to the Hague Convention (IV) 1907, Art 23(1); the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925, first para; The Hague Declaration 3, Concerning Expanding Bullets, 1899; Additional Protocol I, 1977, Art 35(2).

which are non-contentious. The only paragraph that might have been considered contentious, (xx), was saved by adding that any weapons prohibited by it should appear in a yet to be formulated annex. What is, perhaps, more significant is the limited nature of these use of prohibited weapon war crimes. It is not surprising that this should be so given the need for the Rome Statute to attract as many States as possible Party to it and the fact that reservations are not permitted. Notable omissions (at the present time)[127] are nuclear weapons, anti-personnel land mines,[128] bacteriological (biological) weapons[129] and lasers intended to cause permanent blindness.[130] In relation to nuclear weapons a number of States indicated by way of a declaration upon ratification either that the crimes set out in Article 8(2)(b)(i)–(iv) could be committed by the use of nuclear weapons or not,[131] or that Article 8 relates solely to conventional weapons.[132]

The Court may be faced with difficulty over jurisdiction if, for example, a French soldier is accused of a war crime through the use of a nuclear weapon in the knowledge that attack by this means will cause incidental loss of life to civilians which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[133] It would seem to some strange to argue that the Court has no jurisdiction over the French soldier concerned, although it would have if, instead of employing a nuclear weapon, he had used high explosives with the same result. It might be argued, in favour of the jurisdiction of the Court, that a declaration on ratification does not give the same legal status as a reservation (which in this treaty is not permitted) and thus France has accepted on ratification that it is a war crime to commit the offence set out in Article 8(2)(b)(iv) howsoever this result is brought about. A declaration, so the argument runs, cannot alter a fundamental obligation which France has accepted. On the other hand, logic has not always been at the forefront when treaties have attempted to ban the use of certain weapons. Whilst killing an enemy combatant by the use of a gas weapon has been prohibited for some time, killing that enemy combatant by high explosives

[127] Various weapons may subsequently be included in the annex to the Statute envisaged by Art 8 (2)(b)(xx). For discussion of the 'poor man's weapons of mass destruction' see P Kirsch and J Holmes, 'Developments in International Criminal Law' (1999) 93 *AJIL* 11 n 32; W Schabas, *An Introduction to the International Criminal Court* (CUP, Cambridge, 2001) 49.

[128] Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997.

[129] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, 1972.

[130] UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980, Protocol IV (1995).

[131] Egypt, New Zealand, Sweden, the latter two States drawing support from the *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* case (1996) ICJ Reports 265, paras 85–87.

[132] France and the United Kingdom (which drew attention to its statements made upon ratification of, inter alia, Additional Protocol I (1977) in 1998 in which the following statement was made: 'the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons', statement (a)).

[133] A breach of Art 8(2)(b)(iv).

or by fire has not.[134] The suffering caused to the victim may be as much or greater in the latter method of combat.

7.3 Prohibitions on Particular Means of Combat

The third group of war crimes would be those designed to prohibit particular means of combat. It would encompass paragraphs (vi),[135] (vii),[136] (x),[137] (xi),[138] (xii),[139] (xvi),[140] (xxi),[141] (xxii),[142] (xxiii),[143] (xxv),[144] (xxvi).[145]

7.4 Status of Civilians

The fourth group, relating to paragraphs (viii),[146] (xiv),[147] and (xv),[148] deals with the status of certain civilians.[149]

8. WAR CRIMES IN NON-INTERNATIONAL ARMED CONFLICTS

The broad issues involved in charging actors before an international criminal court with acts committed during a non-international armed conflict have been

[134] Although the effects of the use of the weapon may be banned (if it caused 'unnecessary suffering', Regs Annexed to the Hague Convention IV, 1907, Art 23(e)).
[135] See Regs Annexed to the Hague Convention (IV) 1907, Art 23(c), cp Additional Protocol I, Art 41(2)(b).
[136] See Regs Annexed to the Hague Convention (IV) 1907; Art 23(f) and Additional Protocol I, Art 39. Art 8(2)(b)(vii) is more limited than both in requiring this improper use to result in 'death or serious personal injury'.
[137] See Art 11 Additional Protocol I for the background to this para. Note also the consequences required to be proved by Art 11(4) of that Protocol. See also Geneva Convention IV, 1949, Art 32.
[138] See the Regs Annexed to the Hague Convention (IV) 1907, Art 23(b). Cp Additional Protocol I, Art 37.
[139] See the Regs Annexed to the Hague Convention (IV) 1907, Art 23(d). Cp Additional Protocol I, Art 40.
[140] See the Regs Annexed to the Hague Convention (IV) 1907, Arts 28, 47.
[141] See the Geneva Conventions 1949, common Art 3(1)(c).
[142] Although Geneva Convention IV, 1949, Art 27 required women to be 'especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault', there was no specific reference to this type of crime in the grave breach provisions of that Convention; Additional Protocol I, Art 76. See generally, K Askin, *War Crimes Against Women* (Nijhoff, The Hague, 1997); T Meron, 'Rape as a Crime Under International Humanitarian Law' (1993) 87 *AJIL* 424.
[143] See Geneva Convention IV, 1949, Art 28 as the background.
[144] See Additional Protocol I Art 54; Geneva Convention IV, 1949, Art 55.
[145] See Additional Protocol I Art 77(2); United Nations Convention on the Rights of the Child (1989) Art 38(2), (3); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000, Arts 1 and 4 (under the age of 18). The Court has no jurisdiction over anyone under the age of 18, Art 26.
[146] See Geneva Convention IV, 1949, Art 49.
[147] See the Regs Annexed to the Hague Convention IV, 1907, Art 23(h).
[148] *Ibid.*
[149] There is an overlap here with Art 8(2)(a) since, in practical terms, the persons involved will be protected persons within the meaning of Geneva Convention IV, 1949, Art 4.

sketched out above. It has been shown that the traditional view, certainly before 1995,[150] was that no such jurisdiction existed in international law. The State in which the armed conflict was taking place could always exercise its national jurisdiction[151] over those whom it captured or others with whom it came into contact. In addition to this virtually every State had accepted the strictures imposed by common Article 3 to the Geneva Conventions 1949.[152] There was no treaty obligation to implement common Article 3 in the national law of the State concerned, unlike the grave breach provisions which applied only during an international armed conflict.[153] Common Article 3 has shown itself to be of considerable significance at the international judicial level. It was relied upon by the International Court of Justice in *Nicaragua v United States of America (Merits)*[154] as constituting a 'minimum yardstick' reflecting 'elementary considerations of humanity'.[155] In 1977 moves were made to develop and supplement it.[156] Subsequently, in 1994 it was included within the Statute of the International Tribunal for Rwanda as one of the possible charges.[157] From that moment there could be little doubt that an international court or tribunal could exercise jurisdiction over individuals for acts prohibited by that Article committed during a non-international armed conflict.

The specific acts prohibited by Common Article 3 are set out in Article 8(2)(c) of the Rome Statute.[158] They look noticeably different[159] from the grave breaches of the Geneva Conventions set out in Article 8(2)(a), although there are similarities in significant areas.[160] Paragraph (iv), which prohibits the 'passing of sentences

[150] *Prosecutor v Tadić* (1995), above n 34.
[151] Including any 'emergency' legislation.
[152] See J Pictet (ed), *Commentary, Geneva Convention I* (International Committee of the Red Cross, Geneva, 1952) 37–61.
[153] The four Geneva Conventions 1949, Arts 49, 50, 129, 146 respectively of each Convention.
[154] 1986 ICJ Reports 14, see para 218. This was an action brought by one State against another and not a criminal proceeding against an individual.
[155] *Ibid.* The Court confirmed the view taken by *Corfu Channel (Merits)*, (1949) ICJ Reports 22, although no mention is made of common Art 3. It was also considered as customary international law, *Prosecutor v Blaskić*, Judgment (3 March 2000), above n 101 at para 166.
[156] Additional Protocol II (1977) was intended to translate as many of the obligations existing in Additional Protocol I as States could accept applying to non-international armed conflicts.
[157] (1994) 33 *ILM* 1598, at Art 4. For the significance of its non-inclusion in the Statute of the ICTY, see Judge Li, *Prosecutor v Tadić*, above n 34 paras 11 and 12. The other possible charges were genocide and crimes against humanity.
[158] There is no scope therefore to include any additional crimes accepted by way of the special agreements envisaged by common Art 3(2), if they do not form one of the war crimes set out in Art 8(2)(d).
[159] For Art 8(2)(a) the victim must be a 'protected person' (a legal definition) whereas common Art 3 merely requires the victim to be defined by fact as a person 'taking no active part in the hostilities, including members of the armed forces [*sic*] who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause'.
[160] See, for instance, the Elements of Crimes applying to wilful killing (Art 8(2)(a)(i)) and murder (Art 8(2)(c)(i)). The mental element for both is intent and knowledge, Art 30. Similarities exist also in respect of torture and taking hostages (see the relevant Elements of Crimes). Cp the Elements of Crimes in respect of Art 8(2)(a)(vi) and (c)(iv). For an earlier view of the similarities see *Prosecutor v Blaškić*, Judgment (3 March 2000), above n 101 at paras 178–87.

and the carrying out of executions without previous judgment pronounced by a regularly constituted court,'[161] may be difficult to apply in a criminal trial. This is because a condition precedent to an individual's war crimes liability, namely that the court was not regularly constituted, will have to be established by a prosecutor. This is, in reality, a question of law, rather than of fact, and a defendant may well be mistaken about the essential guarantees of independence and impartiality. In this case he must be acquitted.[162] Achieving these guarantees of independence and impartiality has proved difficult for military courts given that these courts are generally established to enforce their own disciplinary regulations.[163] There may be less of a problem where the court is one established by the law of the State concerned, such as court martial.[164] Where a 'rebel' court is brought into existence, however, by an organised armed group to try its own members, those against whom it is fighting and who have been captured (representing governmental authorities or another organised armed group)[165] or those against whom some form of charge is brought, much greater problems arise in achieving these guarantees of independence and impartiality. It is difficult to imagine a rebel court being able to offer such guarantees, considered objectively, given the frequent lack of the necessary legal infrastructure. A defendant may well wish that, in these circumstances, he could be surrendered to the Court.

Although the complementary jurisdiction of the Court is stated to exist only in respect of *national* courts[166] it seems that the Court will take into account trials by other courts in applying the principle of *ne bis in idem.*[167] Thus, a government soldier tried by a 'rebel' court for an offence encompassed by Article 8(2)(c)(ii) might subsequently claim that the Court has no jurisdiction to try him again for an offence based upon the same facts. In this sense rebel courts are given the same legal standing as the national courts of a State.[168]

The war crimes set out in Article 8(2)(d) may also, for convenience, be classified in much the same way as for war crimes during an international armed conflict as formulated above. The first group are the targeting crimes. These include

[161] For an example see *Nicaragua v United States of America (Merits)*, (1986) ICJ Reports 14, para 255 (although this was not a criminal prosecution). In Additional Protocol II the equivalent phrase is 'a court offering the essential guarantees of independence and impartiality', Art 6.

[162] See Art 32(2). In this case the mistake of law may negate the mental element of (the relevant) Elements of Crimes, para 5.

[163] See, eg, *Findlay v United Kingdom* (1997) 24 EHRR 221.

[164] It should not be thought that all military courts would comply in respect of a State's own soldiers with these essential guarantees during a non-international armed conflict. Members of organised armed groups may or may not, depending on the national law involved, be brought before military courts of the State.

[165] The war crime of declaring that no quarter will be given (Art 8(2)(e)(x)) implies that those taking a direct part in hostilities will be captured.

[166] Preamble; Art 17 of the Rome Statute.

[167] See Art 20(3).

[168] The State concerned may take a different view, not recognising the rebel court, and seek to place its soldier on trial if he returns to its jurisdiction. There is unlikely to be any national law restriction to prevent this action.

paragraphs (i),[169] (ii),[170] (iii),[171] (iv),[172] (v),[173] and (xii).[174] The second group are prohibitions on the use of certain weapons. Unlike Article 8(2)(b) there are no war crimes applicable to non-international armed conflicts which come within this group. It is, perhaps, surprising that this should be so given that the employment of poison, asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices and the employment of bullets which expand or flatten easily in the human body are well established forms of prohibited methods and means of combat. In reasoning that breaches of the laws or customs of war could be committed during a non-international armed conflict the International Criminal Tribunal for the Former Yugoslavia seized upon the fact that the member States of the European Community had made a declaration calling upon Iraq to respect the Geneva Gas Protocol 1925 in its dealings with its own people. It concluded that:

> There indisputably emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.[175]

The third group of war crimes involves prohibited methods of fighting. This includes paragraphs (vi),[176] (vii),[177] (ix),[178] (x),[179] and (xi).[180] The fourth group is concerned with the status of certain civilians and is reflected in paragraph (viii).[181]

It will be seen therefore that many of the war crimes apply during both types of armed conflict, with suitable small amendments to reflect their differences.[182]

[169] This is identical to Art 8(2)b)(i). It is similar to, but not identical with, Additional Protocol II, Art 13.
[170] This is identical to Art 8(2)(b)(xxiv). See also Additional Protocol II, Art 12.
[171] This is identical to Art 8(2)(b)(iii).
[172] This is identical to Art 8(2)(b)(ix). It is much wider than Additional Protocol II, Art 15.
[173] This is identical to Art 8(2)(b)(xvi). There is no similar provision in Additional Protocol II.
[174] This is identical to Art 8(2)(b)(xiii). There is no similar provision in Additional Protocol II.
[175] *Prosecutor v Tadić,* (1995), see above, n 34, Cassese, at para 124. For the prohibition on using chemical weapons during a non-international armed conflict see Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993, Art 1.
[176] This is identical to Art 8(2)(b)(xxii) with suitable amendments to reflect the status of the victims in both types of conflict.
[177] This is identical to Art 8(2)(b)(xxvi) with suitable amendments to reflect the different types of armed conflict. See n 131.
[178] This is identical to Art 8(2)(b)(xi) with suitable amendment to reflect the different types of armed conflict. The use of the term 'combatant' has a particular meaning in Additional Protocol I, Art 43(2) which cannot apply to its use in para (ix) since in a non-international armed conflict there is no concept of 'lawful combatant'.
[179] This is identical to Art 8(2)(b)(xii).
[180] This is identical to Art 8(2)(b)(x) with suitable amendments to reflect the different types of conflict.
[181] This is similar to the principle behind Art 8(2)(a)(vii) and (b)(viii).
[182] The war crimes applicable only during an international armed conflict set out in Art 8(2)(b) are the following paragraphs (ii), (iv), (v), (vi), (vii), (viii), (xiv), (xv), (xvii), (xviii), (xix), (xx), (xxiii) and (xxv).

The fact that so many of the war crimes apply also to a non-international armed conflict must be considered to be one of the greatest achievements of the Rome Statute. It will, however, only be translated into a reduction in such prohibited conduct if there exists a disciplined 'organised armed group'[183] able to enforce these prohibitions against its members. To do this effectively the armed group[184] will need to educate its 'fighters' about these prohibited methods and means of combat and provide disciplinary sanctions for infractions which do not, in turn, involve the commission of a war crime. There is no reason to limit the victims of war crimes to individuals on the 'other side' of the conflict. A member of an organised armed group detained by his own side will be a person, inter alia, to whom Article 8(2)(c)(iv) is addressed. Those who deal with him otherwise than through a 'regularly constituted court' may well be in breach of Article 8(2)(c)(iv) or, indeed paragraphs (i), or (ii) themselves.[185]

A person detained by any party to the conflict, whether by government forces of the State or by any of the organised armed groups will not be entitled to be treated as a prisoner of war.[186] Were this to be otherwise such a person would be deemed to be a lawful combatant and have the right to participate directly in hostilities.[187] International law accepts this *right*[188] during an international armed conflict but not during a non-international armed conflict since there is no legally enforceable right to attack one's own government or other organised armed groups within the same State. Indeed, the State concerned has 'the *responsibility* to maintain or re-establish law and order in the State'.[emphasis added][189] The use of the term 'combatant' adversary in Article 8(2)(d)(ix) is not, it is suggested, intended to draw the non-international armed conflict fighter into the category of lawful combatant/prisoner of war as envisaged by Additional Protocol I.[190] Its use is intended to distinguish conduct against another fighter as compared with conduct against a person who is taking no direct part in hostilities.

It will be a war crime for a person to treat any person detained by his or her organisation (whether a State organ or an organised armed group) in one of the ways prohibited by Article 8(2)(c). Unlike the prisoner of war the detained person

[183] The assumption being made here is that the armed forces of the State are such a disciplined group. This assumption may, or may not, be justified in the circumstances of any particular case.
[184] There is an obligation on the State, party to the Geneva Conventions, 1949, to disseminate in time of peace and in time of war the text of the 'Conventions … so that the principles thereof may be known to the entire population', Arts 47, 48, 127 and 144 respectively of each of the Conventions.
[185] There is no reason why this principle should not also apply to a State soldier treated in a similar way by the organs of the State.
[186] This status is dependent upon the application of Geneva Convention III, 1949, Art 2 (generally, an international armed conflict). Note Art 8(2)(a)(v) of the Rome Statute, which has no counterpart in paragraphs (c) or (d) applying to non-international armed conflicts.
[187] In relation to an international armed conflict see Additional Protocol I, Art 43(2).
[188] But only if the person concerned would be entitled to be treated as a prisoner of war on capture, see Geneva Convention III, 1949, Art 4; Additional Protocol I, Arts 43–46, otherwise he would be an unlawful combatant.
[189] Art 8(3).
[190] Art 43(2).

has no other rights in respect of his treatment under international humanitarian law.[191]

9. CONCLUSION

This chapter has attempted to illustrate some of the structural issues surrounding war crimes charges. Their application to non-international armed conflict, whilst a great achievement of the Statute, will not be free from practical difficulty. Success will not necessarily lie in the extension of liability by treaty but in finding means to ensure that, in particular, individual 'rebels' and their commanders comply with their obligations under the Statute. Time alone will tell whether there are sufficient incentives for them to do so or whether the issue of prisoner of war status will have to be extended as a *quid pro quo* for their compliance with Article 8(2)(e).

[191] He is unlikely to be a protected person within the meaning of the Geneva Conventions 1949. A person detained by the State is likely to be owed obligations under human rights treaties, such as the European Convention on Human Rights 1950, subject to any permissible derogations under Art 15 of that Convention.

PART IV

Liability and Defences

9

General Principles of Liability in International Criminal Law

ROBERT CRYER*

1. INTRODUCTION

THE GENERAL PRINCIPLES of criminal liability matter.[1] Being a primary aspect of the 'general part' of criminal law,[2] and applying across the board to criminal offences in international criminal law, the general principles of liability tell us a great deal about the justifications for criminalising conduct.[3] None the less, the general principles of liability have received far less attention from international lawyers than the definition of specific offences in international law. And much of what has been written on the general principles of liability has been based upon an international law, rather than criminal law, perspective.[4] As international criminal law has grown exponentially in the last decade, study of the content of that law is important for reasons relating, in particular, to the principle of *nullum crimen sine lege*. However, since the Rome Statute has brought about a set of principles of liability in a treaty drafted by a large and representative group of States,[5] perhaps the time has come to pay more attention to the criminal law aspects of the Rome Statute.

* Thanks to Peter Cartwright, Matthew Happold, Gerry Simpson, Nigel White and Christian Witting for their comments on earlier drafts of this chapter.

[1] By this I do not mean the general principles of criminal law as referred to in Pt 3 of the Rome Statute, (which include matters such as the irrelevance of official capacity, Art 27), but specific inculpatory doctrines relating to conduct, rather than position, or general matters underlying a rule of law criminal system such as the principle of legality (Art 24).

[2] Which can mean many things. However, a reasonable definition of the 'general part' must include the general principles of liability. For discussion of the general part see S Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (OUP, Oxford, 2002).

[3] See AP Simester and S Shute, 'On the General Part in Criminal Law' in Shute and Simester (eds), *ibid* 1, 2–5.

[4] A recent book length contribution begins by expressly stating that its focus is that of international, as opposed to criminal law, I Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester University Press, Manchester, 2002) xi. From a similar perspective, see R Cryer, 'The Boundaries of Liability in International Criminal Law, or "Selectivity by Stealth"' (2001) 6 *Journal of Conflict and Security Law* 3. A notable exception is A Eser, 'Individual Criminal Liability' in A Cassese *et al* (eds), *The Rome Statute for the International Criminal Court: A Commentary* (OUP, Oxford, 2002) 767.

[5] For doubts about the Rome Statute's relation to custom, see Cryer, *ibid* at 19–29.

An investigation of the kind proposed has a practical advantage. In incorporating the Rome Statute into their domestic legal orders, states have taken two different paths when dealing with the general principles of liability. Some states, including the United Kingdom and Canada have decided to use, for the most part, their pre-existing domestic principles instead of the provisions of the Rome Statute.[6] Other States, of which New Zealand is an example,[7] have adopted the Rome Statute's provisions into their domestic criminal law for the purpose of prosecuting international crimes. As might be expected there are positive and negative aspects to both approaches. On the positive side, using pre-existing criminal principles has the advantage of allowing domestic judges and prosecutors to deal with familiar concepts and rules. Adopting those in the Rome Statute ensures compatibility with that Statute, and will permit more use to be made of the case-law of the International Criminal Court (ICC). This may lead in turn to a more uniform international criminal law at the national and international level.

The problem that both the approaches demonstrate is the difficulty of co-ordinating national and international prosecutions within the law. A State that uses its own principles of liability could run into problems, particularly if it uses universal jurisdiction. Some domestic principles of liability may be wider than those accepted in international law. An example might be the concept of conspiracy adopted in common law jurisdictions. It is unlikely that international law contains such a broad notion of conspiracy (although see section 2.6 below). If a prosecution is brought on the basis of principles of liability more broadly drawn than those in international law, an argument can be made[8] that the prosecution is unwarranted under international law and is thus an illegal assertion of jurisdiction under international law.

On the other hand, if principles of liability are more narrowly drafted at the national level than they are at the international level, some defendants may obtain undeserved acquittals—acquittals they would not be entitled to elsewhere, including before the ICC itself. In serious cases, a prosecuting State could even be accused of holding trial for the purposes of shielding the defendant from liability, in the sense of Article 17(2)(a) of the Rome Statute. Either that, or that such proceedings were being pursued in a way inconsistent with an intent to bring a person to justice, pursuant to Article 17(2)(c).[9] Particularly for States party to the Rome Statute, the

[6] In the UK, by International Criminal Court Act 2001, in Canada by the Crimes Against Humanity and War Crimes Act 2000, SC 2000 c 24. Both have, none the less, introduced superior responsibility into their domestic law as a result of the Rome Statute, s 65, and ss 5, 7 respectively. On the UK legislation see R Cryer, 'Implementation of the International Criminal Court Statute in England and Wales' (2002) 51 *ICLQ* 733; on Canada see W Schabas, 'Canadian Implementing Legislation for the Rome Statute' (2000) 3 *Yearbook of International Humanitarian Law* 337. See generally Turns in this volume.

[7] International Crimes and International Criminal Court Act 2000, s 12. See RS Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2002) 12 *Criminal Law Forum* 291, 293, n 6 for comment.

[8] And is quite likely to be made by the defendant's State of nationality.

[9] An example, which although would not fall under the jurisdiction of the ICC owing to the limitations in that Statute of jurisdiction *ratione temporis* (see Art 12) but which none the less may serve to

argument would be that they were aware of the provision of that Statute, and by initiating prosecutions based on narrower notions of liability, were not showing an intention to bring the person to Rome Statute-based justice. In essence, defending the international administration of justice by removing the double jeopardy bar to prosecution.

These problems will, of course, not arise if a State decides to adopt the principles from the Rome Statute. However, this too, may not be satisfactory. A number of the principles of liability in the Rome Statute were taken from the ILC Draft Code of Offences Against the Peace and Security of Mankind.[10] This code was not drafted as a complete set of principles for international crimes, but only for those crimes that threatened international peace and security. For other international crimes, the code specifically envisaged a role for national courts in prosecuting on the basis of (at times) broader principles.[11] For this and other reasons[12] the Rome Statute contains principles that are narrower than the pre-existing law, and may lead to unwarranted acquittals, if adopted unamended into national law frameworks. Despite the fact that codification of the general principles of liability for the first time can be seen as an advance in itself,[13] there may also be other problems with the principles as set out in the Rome Statute, making them unwise or unjust. Thus the question of the wisdom of incorporating the provisions of the Rome Statute on general principles of liability *in toto* is intimately bound up with the quality, from a criminal law, as well as customary law, standpoint, of those principles. Given that the latter type of analysis has already been done, this chapter will attempt to appraise the Rome Statute from the former standpoint.

2. THE GENERAL PRINCIPLES OF LIABILITY IN THE ROME STATUTE

2.1 Conduct

For the most part, conduct amounting to a crime under the Rome Statute is proscribed pursuant to Articles 25 and 28 of the Rome Statute, in conjunction with

illustrate the point is that of Captain Ernest Medina, who was William Calley's superior at the time of the My Lai massacre. At Medina's trial, and disregarding the provision in the US Military manual, the presiding judge required actual knowledge for command responsibility. The decision was heavily criticised, and if a similar set of events were to occur today, it is not impossible that a complementarity based challenge to the ICC's jurisdiction would succeed.

[10] *Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996* . UN Doc A/51/10 (1996).
[11] *Ibid* commentary to Art 2, paras 6 and 9.
[12] See Cryer, above n 4.
[13] A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *EJIL* 144 at 153. Some of the arguments in favour of, and against, codification can be found in Law Commission Report 177, A *Criminal Code for England and Wales* vol 1, 7–11. See also J Horder, 'Criminal Law and Legal Positivism' (2002) 8 *Legal Theory* 221.

the definitions of the individual crimes in Articles 5–8. Article 28 deals with command responsibility and will be returned to later. Article 25(3) provides for the vast majority of the forms of individual criminal liability included in the Statute, and deserves citation in full:

> A person shall be criminally responsible and liable for a crime within the jurisdiction of the Court if that person,
> (a) Commits such a crime whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
> (b) Orders, solicits, or induces the commission of such a crime which in fact occurs or is attempted;
> (c) For the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> (ii) Be made in the knowledge of the intention of the group to commit the crime;
> (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
> (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime if that person completely and voluntarily gave up the criminal purpose.

2.2 Acts and Omissions

It is notable that the Rome Statute expressly criminalises omissions as a matter of general principle only in the case of superior responsibility (Article 28). On the basis of this failure to expressly criminalise omissions in the light of the drafting history of Article 25, Eser takes the view that omissions are not, as a rule, prosecutable under the Rome Statute 'unless specifically provided for'.[14] If this is the

[14] Eser, above n 4 at 819; Ambos takes a similar view, K Ambos, 'Article 25' in O Triffterer (ed), *Commentary on the Rome Statute for The International Criminal Court* (Baden-Baden, Nomos, 1999) 475 at 492. See also WA Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Pt III)' (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 400 at 412. Sadat, however, considers the Rome Statute to leave the question of the inclusion of omissions liability 'unanswered', LN Sadat, *The International Criminal Court and the Transformation of International Law* (Transnational, New York, 2002) 193, but see also 194, 196–7, which appear more equivocal. Piragoff, on the other hand states that the deletion of omissions was 'with the understanding that the question of when, and if, omissions might constitute … [a crime] … would have to be resolved in future by the Court', DK Piragoff, 'Article 30' in Triffterer, *ibid* 527 at 532. This may be supported by

case the Rome Statute is seriously defective. Article 28 may mitigate the problem, by providing for omissions liability for superior responsibility,[15] but this is not enough. There is nothing inherent in the nature of a failure to live up to a legally imposed duty that necessarily renders it less culpable than an act.[16] Indeed, it is often difficult to distinguish acts and omissions, and different classifications of the same conduct may be possible.[17] Where this is possible, the problem is of course lessened, but does not disappear.

In the criminal law of England and Wales, and of many other jurisdictions, omissions are rightly criminalised.[18] These are often framed as failures to live up to duties to do some positive act. These may arise by virtue of the status of the person (such as a parent's duty to a minor child[19] or a doctor to her patient[20]) or as a result of conduct, such as accepting a duty to care for someone[21] or creating a risk of the relevant harm.[22] There are a number of expressly created duties in international humanitarian law,[23] and there seems to be no reason why they should not be prosecutable before the ICC. If there is no general liability for omissions, a considerable range of wrongful conduct will fall outside the ambit of the Rome Statute. Some examples may assist in making this point.

Imagine that in an international armed conflict, there has been an engagement on land, in which there have been a large number of casualties on both sides. Owing to the severity of the injuries to soldiers on both sides, paramedics at the scene from Utopia, in the course of rendering assistance on the battlefield are required to remove the uniforms of a number of the soldiers. These include Arthur, a Utopian, and Bartholomew, a Dystopian.[24] They are then taken to a Dystopian military hospital. Upon arrival they are treated by Dr Gregory, a Dystopian national.[25] After some time, both Arthur and Bartholomew regain consciousness.

the chair of the drafting commission, although he expresses some doubts, see P Saland, 'International Criminal Law Principles' in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer, The Hague, 1999) 189 at 212–13.

[15] Ambos, *ibid* 492.
[16] AP Simester, 'Why Omissions are Special' (1995) 1 *Legal Theory* 311 at 320–27. On omissions generally, see JC Smith, *Smith and Hogan: Criminal Law* (10th edn) (Butterworths, London, 2002) 60–68; see also GP Fletcher, *Rethinking Criminal Law* (Little, Brown & Co, Boston, 1978) 421–26, 585–634.
[17] Smith, *ibid* 64.
[18] A Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 *Law Quarterly Review* 424 at 424.
[19] *R v Instan* [1893] 1 QB 450.
[20] Eg, *Airedale National Health Service Trust v Bland* [1993] 1 All ER 821.
[21] *R v Stone and Dobinson* [1987] QB 354.
[22] *R v Miller* [1983] 2 AC 161.
[23] A useful list of positive obligations in the conventions can be found in Y Sandoz, C Swiniarski and B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 8 August 1949* (ICRC, Geneva, 1987) 1009.
[24] Who would count as the wounded and sick members of armed forces pursuant to Art 13 of the First Geneva Convention. For a more modern definition see Art 8(a) of Additional Protocol I.
[25] In UK law, this would lead to a duty to maintain care, either on the basis of the relationship (doctor-patient), or his assumption of care for them.

Upon his realisation that Arthur is not Dystopian, Gregory decides not to treat him, and concentrates his attention solely on the comfort of Bartholomew, who is no longer in a critical state. Arthur's condition is critical. Arthur dies of an infection in his wounds that Gregory had noticed, realised would be fatal, but decided not to treat, as he had no sympathy for Utopians. Article 12 of Geneva Convention I requires that:

> [T]he wounded and sick shall be respected and protected in all circumstances. They shall be treated humanely by the party to the conflict in whose power they may be, without any adverse distinction founded on … nationality … or any other similar criteria.[26]

Beyond doubt, as a medical doctor, Gregory should have treated Arthur, but intentionally omitted to do so.[27]

Also contemplate, in the same international armed conflict a situation in which a number of Dystopian soldiers are captured in uniform[28] and placed in a prisoner of war camp. Conditions in the camp are poor, and the commander of the camp, Sam, decides they should not be fed. They are not, and a number die of starvation. Article 25 of Geneva Convention III requires that adequate food and water be provided.[29] It should be noted that provision of inadequate food and medical facilities were a feature of the findings in the *Celebici* case before the ICTY. The failure to provide adequate food was determined to contribute materially to the offence of wilfully causing great suffering or serious bodily injury, a grave breach.[30] The Trial Chamber in that case stated:

> By omitting to provide the detainees with adequate food, water, heath care and toilet facilities, Zdavko Mucić participated in the maintenance of the inhumane conditions that prevailed in Celebici prison-camp.[31]

The above examples have been chosen on the grounds that they involve protected persons, within the meaning of the Geneva conventions.[32] Killing such persons constitutes grave breaches of those conventions and customary law. Such violations are prosecutable before the ICC, by virtue of Article 8(2)(a) of the Rome Statute. There is no compelling moral or legal reason why the above should be

[26] The example is specifically made to ensure that medically, Arthur requires medical attention more urgently than Bartholomew, to avoid issues relating to prioritisation of medical treatment pursuant to Art 12.
[27] For further discussion of the law in this area, see M Gunn and H McCoubrey, 'Medical Ethics and the Law of Armed Conflict' (1998) 3 *Journal of Armed Conflict Law* 133.
[28] Let us presume that they fulfil the conditions in Art 4 of Geneva Convention III.
[29] See generally, H McCoubrey, *International Humanitarian Law* (2nd edn) (Ashgate, Aldershot, 1998), 155–57.
[30] *Prosecutor v Delalić, Mucić, Delić and Landžo*, Judgment, 16 Nov 1998, IT–96–21–T, paras 1092–96, 1101–5.
[31] *Ibid* para 1123.
[32] See Geneva Convention I, Art 49, Geneva Convention II, Art 50, Geneva Convention III, Art 129.

considered exempt from punishment simply on the basis of the fact that the conduct of the protagonists in these examples amounted to omissions.

The pre-Rome law, as reflected in *Celebici,* clearly accepts that offences may be committed in international criminal law by omission. Perhaps another example of omissions liability prior to the Rome Statute may be the idea, expressed in a number of ICTY and ICTR cases, that presence alone, if it has a legitimising effect on the primary perpetrator, may amount to aiding and abetting.[33] However, in most of these cases, previous conduct of the accused was also taken into account.[34] None the less, by the time of the *Tadić* Appeal judgment, there was no question in the mind of the Appeals Chamber that omissions liability was part of international criminal law.[35]

In fact, omissions liability is nothing new to international criminal law. In the judgment of the Nuremberg International Military Tribunal, it was clear that the Tribunal viewed the failure to provide adequate medical care to be criminal, when it held:

> Those inmates who became ill and were unable to work were either destroyed in gas chambers or sent to special infirmaries, where they were given entirely inadequate medical treatment, worse food if possible than the working inmates, *and left to die* [emphasis added].[36]

In the *Hostages* case, conducted between 1946 and 1949 under the auspices of Control Council Law 10, a US court clearly affirmed omissions liability in international criminal law.[37] The Geneva Conventions also seem to accept omissions as a means of commission of an offence.[38]

It may be that the pre-existing support for the criminality of omissions in international law may allow the Rome Statute to be interpreted by the court to include liability for such actions. In England and Wales the question of whether or not an offence is capable of commission by omission is dealt with, not at the level of general principle, but as a matter of statutory interpretation or (in the case of murder and manslaughter) common law assumption.[39] The ICC could well do the same, for example interpreting, in the case of Grave Breaches of the

[33] *Prosecutor v Tadić*, Judgment, 7 May 1999, IT–94–1–T, para 678; *Prosecutor v Furundzija*, Judgment, IT–95–17/1–T, para 274; *Prosecutor v Akayesu*, Judgment, ICTR–96–4–T, para 693; *Prosecutor v Aleksovski*, Judgment, IT–94–14/1–T, para 64.
[34] See *Aleksovski*, *ibid* para 65. Equally the Trial Chamber in that case also commented, *ibid*, 'it can hardly be doubted that the presence of an individual with authority will frequently be perceived by the perpetrators of the criminal act as a sign of encouragement'. In England and Wales presence alone has not been held to amount to abetment, although it can be evidence of it see eg, *R v Coney* (1882) 8 QBD 534, and Smith, above n 16, 149–51.
[35] *Prosecutor v Tadić*, Judgment, 15 July 1999, IT–94–1–A, para 188.
[36] 'International Military Tribunal (Nuremberg) Judgment and Sentences' (1947) 41 *AJIL* 172 at 232.
[37] *The Hostages* Case, XI *TWC* 1230 at 1261.
[38] Above n 23.
[39] See Smith, above n 16 at 61–62.

four Geneva Conventions (prosecutable under Article 8(2)(a)), words such as 'killing', or 'causing great suffering or serious injury to body or health' as capable of being committed by omission.[40] Given that, in addition to its own Statute, its Rules and the Elements of Crimes, the ICC is entitled to apply 'where appropriate … the principles and rules of international law, including the established principles of the law of armed conflict'.[41] This may provide a sufficient basis to assert that the ICC may close the loophole by reference to general international law.

Ambos is wary of any such development of the law by the ICC on the ground that it could cause problems from the standpoint of the *nullum crimen sine lege* rule.[42] However, this fear is unfounded. The point of the principle that it prevents people being punished for conduct that was not criminal at the time it took place. In these instances, the conduct clearly was criminal, by virtue of customary international law.[43] Thus, so long as the ICC acts sensibly in its interpretations, the principle is not infringed.[44] This would ensure that the *nullum crimen* principle is upheld, as liability would depend on an interpretation of the relevant offence ('killed' *etc*) rather than the creation of a new offence.[45] As Pellet has noted, there is nothing inherent in the nature of custom that makes it incapable of providing the relevant law to satisfy the *nullum crimen* principle.[46] By tying the question of omission to the particular crime,[47] it will be possible to decide in the context of each individual crime whether omission can suffice for criminal liability. Given that customary law allows for this, and there is no reason in moral or legal principle for refusing to do so, this may be one area in which the ICC should spread its interpretative wings a little. It may be necessary to do so if the ICC is to achieve its aim of ensuring serious violations of international humanitarian law do not go unpunished.

2.3 Perpetration

Given that the Rome Statute has come in for such heavy criticism above, it is heartening to be able to speak positively of one element in Article 25. It would be churlish in the extreme to deny praise where it is due. Article 25(3)(a) deals with

[40] In England and Wales, one may 'kill' or 'cause grievous bodily harm by omission', see Smith, *ibid* 61–63.
[41] Rome Statute, Art 21. On which see A Pellet, 'Applicable Law' in Cassese *et al*, above n 4 at 1051.
[42] Ambos, above n 14 at 492.
[43] See also I Brownlie, *Principles of Public International Law* (5th edn) (OUP, Oxford, 1998) 565, '[s]ince the latter half of the nineteenth century it has generally been recognised that there are acts or omissions for which international law imposes criminal responsibility on individuals'. See also the ILC Commentary to the Draft Code of Crimes Against the Peace and Security of Mankind Art 2(3)(a) para 7.
[44] See eg, the International Covenant on Civil and Political Rights, 999 UNTS 171, Art 15.
[45] This may also get around the prohibition of analogy in Art 22(2).
[46] Pellet, above n 41 at 1057–58.
[47] Which also will take it to the acceptable side of Lamb's distinction between using custom *praeter legem* and using it *contra legem*, see S Lamb, '*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law' in Cassese *et al* (eds), above n 4, 733 at 750, and n 67.

the concept of perpetration briefly, but fairly well. Article 25(3)(a) declares that that a person is responsible for committing an offence:

> [W]hether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.

Eser criticises the first part of this formulation as being tautological, on the basis that Article 25(2) states that a person:

> [W]ho commits a crime within the jurisdiction of this court shall be individually responsible and liable for punishment in accordance with this Statute.

Eser suggests that the Rome Statute should, for reasons of clarity, have followed §25 of the German *Srafgesetzbuch*, which refers to the commission of a crime 'by himself or herself'.[48] It is not so clear that the Rome Statute is deficient here. Article 25(2) refers to the principle of individual responsibility, as distinct from state, or some form of organisational responsibility.[49] Article 25(3)(a), however attempts to get across the idea of a primary perpetrator committing the offence without a co-perpetrator. It is to be read as being included in contradistinction to the second form of liability, concerned with conduct pursued 'jointly with another', rather than as a tautology. In fact, Eser's suggestion appears to be little more than another way of saying the same thing.

As mentioned above, Article 25(3)(a) also criminalises the commission of a prohibited act 'jointly with another, or through another person, regardless of whether that other person is criminally responsible'. If it is accepted that co-perpetration is sensible and consistent with custom,[50] then imagine two camp guards, James and Martin, both of whom attack a prisoner of war, Bill. James and Martin kick and punch Bill until he finally dies. It makes no sense to attempt to separate off their perpetration. Who killed Bill? In short, they both did.[51] It is worthwhile pointing out that this form of culpability is different from the liability provided for in Article 25(3)(c) which criminalises aiding and abetting, although often the situations in which this type of liability will arise are often similar to those of co-perpetration. The same applies to the 'joint criminal enterprise' liability contained in Article 25(3)(d).

Some interesting issues surround the final part of Article 25(3)(a), which states perpetration through another person[52] can occur 'regardless of whether that other

[48] Eser, above n 4 at 789. See similarly Ambos, above n 14 at 479.
[49] This use is consistent with the similarly related Art 2(1) and 2(3) of the ILC Draft Code, above n 10, explained in the commentary to Art 2, para 4.
[50] See *Trial of Erich Heyer and Six Others (The Essen Lynching case)* 1 LRTWC 88, 89, with the discussion in the *Tadić*, Appeal, above n 35, paras 208–9, although they appear to see it as a common design case, more in line with liability under Art 25(3)(d).
[51] See similarly, G Williams, *Criminal Law: The General Part* (2nd edn) (Stevens & Sons, London, 1961) 349.
[52] It would appear that the final clause does not apply to joint perpetration, see Ambos, above n 14 at 480.

person is criminally responsible'. In providing for the possibility of perpetration through an innocent agent, this is entirely correct. Consider the example of a tank driver, David, who, in full knowledge of the nature of his target, a civilian hospital, tells his weapons operator, Sally, to aim at the hospital, which is over the horizon, after informing her it is an ammunition dump. If Sally knew the target was a hospital, her actions would clearly violate both the fourth Geneva Convention[53] and the Rome Statute. But she does not, and she would have a defence of mistake of fact, which is included in the Rome Statute in Article 32.[54] What has happened is that David has perpetrated the attack on the hospital through Sally. And it is correct that the law reflect this.[55] However, if Sally knew that what was being attacked was a hospital, things become more complex. Now we cannot so easily say that David has attacked the hospital by virtue of Sally's actions.[56] It is normally the case that we cannot trace the essential causal link through the actions of a guilty agent.[57] David is better described as an accessory, as an abettor, solicitor or inducer of Sally's act,[58] or possibly as her co-perpetrator. But to see Sally as a mere tool of David is to fail to respect the importance of her voluntary and intentional act.[59] Yet Article 25(3)(a) would appear to allow us to do precisely this.[60]

2.4 Ordering and Soliciting

Things become even more complex when we consider Article 25(3)(b). This criminalises a person who '[o]rders, solicits, or induces the commission of such a crime which in fact occurs or is attempted'. Solicitation and inducement of crimes that occur are relatively uncontroversial. However, the provision on ordering is under-inclusive. Ambos asserts that commission of a crime by ordering another

[53] Art 18.
[54] This may also apply where, pursuant to Art 33 the 'innocent' agent has a defence of superior orders.
[55] See generally Williams, above n 51 at 349–53.
[56] According to Williams, in UK law a person may commit a crime and be a principal offender in any manner, 'otherwise than through a guilty agent', *ibid* 350.
[57] See AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine* (Hart Publishing, Oxford, 2000) 84–88. Ambos, above n 14 at 479–80 notes that sense can possibly be made of it in circumstances where one person dominates another in a hierarchical structure, but that there are dangers in this in going too low in determining the extent of domination required to attribute one person's conduct to another. Where domination reaches the level that we can treat the subordinate's actions as someone else's, however, defences such as superior orders and duress are evidence that we have to be very careful in treating the acts of the person as also their own, thus imputing guilt to them.
[58] Abetment is criminalised in Art 25(3)(c) of the Rome Statute, solicitation or inducment by Art 25(3)(b).
[59] Simester and Sullivan, above n 57 at 84. Where we have a guilty agent, we simply cannot impute actions to another, *ibid* at 88. That is what the law of complicity exists for.
[60] It is true that a Trial Chamber in *Furundzija*, above n 33, appeared to accept that this could be done, in para 256 'the criminal law maxim *quis per alium facit per se ipsum facere videtur* (he who acts through another is regarded as acting himself) fully applies'. However, this may not deal with the crucial question of when a person is acting through another, and on appeal, *Prosecutor v Furundzija*, Judgment, 21 July 2000, IT–95–17/1–A, para 118, the case was dealt with as a form of co-perpetration rather than acting through another.

to do something, in a situation where a person can commit an act through a guilty as well as an innocent agent, is an example of perpetration 'through another person'.[61] So Article 25(3)(b), in so far as it relates to ordering, is superfluous. After all, a military commander does not, in general, act himself, but acts by issuing orders to those subordinated to him, which he expects to be carried out.[62] There is some force to this. However, the critique above of the concept of perpetration through a guilty agent is highly relevant here. As superior orders are almost never a defence,[63] in almost every situation we will have a guilty agent, although perhaps one entitled to mitigation of sentence. In addition, it is accepted that the passing on of illegal orders by those in the chain of command can also be an offence.[64] It is more difficult to see these intermediaries as perpetrating by means. So there is still a place for Article 25(3)(b). Finally, it should be appreciated that Article 25(3)(b) demonstrates that the drafters did not see orderers as perpetrating by means. It may be difficult therefore to persuade the ICC to convict under Article 25(3)(a) in this case.

The problem with Article 25(3)(b), in adopting the notion of ordering is that it requires that the crime that is ordered 'in fact occurs or is attempted'. Making liability for ordering reliant on the commission of another offence (be it the complete offence, or an attempt) makes that liability derivative, making an orderer secondarily liable for the crime of another.[65] This was not always the case, and a strong argument can be made against it now. In the post-World War II period there was at least one case that unambiguously declared the criminality of ordering offences by others per se, rather than as a secondary offence relating to the implementation of the order. This was the trial of Nickolaus von Falkenhorst.[66] Von Falkenhorst was convicted and sentenced to death by a British Court sitting under the authority of the Royal Warrant of 14 June 1945.[67] One of the charges of

[61] Ambos, above n 14 at 491.
[62] Ambos, *ibid* 480 considers an orderer a perpetrator by means.
[63] See Art 33 Rome Statute. Prior to Art 33, it is questionable whether superior orders was ever a defence. On this see P Gaeta, 'Superior Orders: The Rome Statute Versus Customary International Law' (1999) 10 *EJIL* 172, *contra* C Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied?' (1999) 835 *International Review of the Red Cross* 785. See also Bantekas in this volume.
[64] Nuremberg IMT Judgment, above n 36 at 282 (Keitel), 308 (Raeder), 315 (Jodl); *US v Von Leeb (The High Command Case)* 11 TWC 1, 510.
[65] Eser, above n 4 at 797. Bantekas, above n 4 at 51 considers ordering to be a form of complicity, citing, in support *Prosecutor v Akayesu*, above n 33, para 483, although noting this used Rwandan domestic law as an example. V Morris and MP Scharf, *The International Criminal Tribunal for Rwanda* (Transnational, New York, 1998) 236, also see ordering as a form of complicity.
[66] *Trial of Generaloberst Nickolaus von Falkenhorst*, 11 LRTWC 18, also in EH Stevens (ed), *The Falkenhorst Trial* VI *War Crimes Trials* (William Hodge, London, 1949). Bantekas, above n 4 at 52 mentions the *High Command* Trial, insofar as it relates to the passing on of orders which are not then enforced. However the court in that case relied on the idea that the passing on of orders was implementation of that order (above 511). This idea is rather odd. It makes liability for an orderer (including the original author) contingent on its later transmission by someone else, rather than actual carrying out of the order, and it is difficult to see why transmission equates to implementation of the order.
[67] Army Order 81/1945. See generally, APV Rogers, 'War Crimes Trials Under the Royal Warrant: British Practice 1945–1949' (1990) 39 *ICLQ* 780.

which he was convicted related to an order that had not been implemented. The order required the sending of Jewish prisoners in Norway to the German secret police (the SD[68]). It would thus have ensured their deaths. The order was sent, however, to a camp in which there were no Jewish people. The Judge–Advocate specifically referred to the question of the criminality of orders which were not complied with (in this case, in fact, orders which were impossible to carry out) in his summing up[69] and the court convicted on this count (count 9 of the indictment) fully aware of the nature of their decision.[70]

The Geneva Conventions Grave Breaches provisions and the ICTY and ICTR statutes appeared to take up the view that ordering was, in itself, a crime.[71] More recently, the ILC Draft Code introduced the requirement that offences ordered must be committed, or at least attempted.[72] The commentary to the relevant provision is rather guarded. First, it provides that domestic crimes should be employed where orders do not result in actual crimes.[73] This, in itself, highlights the difficulties that attend a simple transposition of Rome Statute principles into domestic law. The relationship between the ILC's views here and that they also thought that 'national courts are expected to play an important role in the implementation' of the code[74] is fraught with ambiguity, as it appears to envisage the application of different sets of general principles of liability to international crimes, depending on whether or not they fitted its idea of a crime against the peace and security of mankind.

There is an important caveat included in the commentary that should sound alarm bells in the ears of those seeking to treat the ILC Draft Code as determinative of questions of general principle. That caveat is the express assertion that:

> [T]he limitations in this paragraph do not affect the application of the general principles of individual criminal responsibility independently of the present Code or of a similar provision contained in another instrument.[75]

[68] *Der Sicherheitdienst des Erichsfuerer SS.*

[69] The Judge-Advocate's summing up is reprinted in Stevens, above n 66, 224 the relevant passages can be found at 236–37.

[70] The Judge-Advocate's summing up, *ibid* at 237, specifically refers to the issue of impossibility of performance, stating that the defence (he thought) did not disagree that the issuing of an order which would deprive people of rights was wrong. They only differed on the question of whether the fact that the order could not apply to anyone was salient. The commentary of the UN War Crimes Commission on the case, reprinted in L Friedman (ed), *The Law of War: A Documentary History* (Random House, New York, 1972) 1561, is somewhat confused, (1566–67) but it supports the view that the court decided that the issuance of the order itself was criminal, so long as it was thought, by the orderer that it could apply.

[71] See Cryer, above n 4 at 23.

[72] Draft Code Art 2(3)(b).

[73] *Ibid* commentary to Art 2(3)(b), para 9.

[74] *Ibid* commentary to Art 1(2), para 13.

[75] *Ibid* commentary to Art 2(3)(b), para 9. Three such instruments spring to mind, the Geneva Conventions, and the statutes of the two UN Ad Hoc Tribunals.

The ILC expressly noted that the limitation contained in their Draft Code was a consequence of their concentration on crimes against international law that also amounted to threats to peace.[76] However, this focus does not necessarily lead to the conclusion supposed by the ILC, given that the ICTY and ICTR were created pursuant to findings of threats to the peace, but included, on their face, liability for ordering crimes per se, without a reference to commission of the offences ordered.[77]

It should be mentioned that in the *Blaskić* case, a Trial Chamber of the ICTY found that liability for ordering was a form of complicity and the offence of ordering was subject to the requirement that the crime ordered was committed.[78] The Tribunal's findings rested on two bases. First, the acceptance by the prosecution that the limitation was present.[79] Secondly the finding in the *Akayesu* case that this was a requirement.[80] Reliance on the *Akayesu* case is problematic. That case included the requirement of the subordinate committing an offence and conceptualised ordering as 'akin to complicity' because they based themselves on the ILC Draft Code.[81] As we have seen, the ILC Code is an unfaithful guide in this respect.

Given the above, the prosecution's acceptance of the requirement of an underlying offence was unnecessary. But more than this, the modern trend towards viewing ordering as derivative liability for crimes committed pursuant to that order does not fully capture the wrongdoing. Ordering can be seen as similar to solicitation and inducement. And, when the offence occurs, it may be acceptable to see it as such.[82] The closest analogue to the offence of ordering in the law of England and Wales would be incitement, which can include the use of threats to coerce someone into commission of an offence.[83] Threats can also amount to incitement in international criminal law.[84] However, with the exception of direct and public incitement to Genocide (Article 25(3)(e)), international criminal law does not expressly criminalise incitement, although similar crimes such as solicitation and inducement are covered.[85] Solicitation and inducement are analogous, but there is a crucial difference; unlike ordering, it is not necessary to prove a superior-subordinate relationship.

[76] *Ibid*.
[77] See Security Council Resolutions 808, 827, (ICTY) 935, 955 (ICTR).
[78] *Prosecutor v Blaškić*, Judgment, 3 March 2000, IT–95–14–T, paras 281–82. Another Trial Chamber, in *Prosecutor v Kordić & Cerkež*, Judgment, 26 Feb 2001, IT–95–14/2–T, para 388 adopted the *Blaskić* decision on this point.
[79] *Ibid* paras 267–68.
[80] *Akayesu*, above n 33, para 483.
[81] *Ibid* para 475.
[82] WA Schabas, above n 14 at 411 goes as far as to say Art 25(3)(b) is redundant as subpara (c), (on aiding and abetting) covers all the behaviour.
[83] *Race Relations Board v Applin* [1973] QB 815, *Invicta Plastics v Claire* [1996] RTR 251.
[84] *Akayesu*, above n 33, para 482, 555.
[85] See Art 25(3)(b), and Ambos, above n 14 at 486–87.

It is this hierarchical relationship that provides us with an insight into the special harm of ordering, and thus why there is a strong case for a separate inchoate crime of ordering. The Rome Statute, in addition to being inconsistent with earlier provision on the matter, contains a lacuna in this regard. Against this claim, it may be suggested that where orders are issued, but not implemented, there has been no harm, and without harm, there is no appropriate criminalisation.[86] The answer to this may be found in the idea, developed by Von Hirsch, of 'remote harms'.[87] This first point is that by ordering an offence, the superior creates a very significant risk of the harm (the offence ordered) occurring. This is more pronounced in the case of ordering offences than simple incitement because of the superior-subordinate relationship that must be proved. It is true that for the final harm to materialise, the order has to be carried out by another. This involves an intervening choice by subordinates, whether to carry out the order or not.[88] This is why the harm is correctly formulated as a remote, rather than direct harm. The relationship, though, is important, because it makes the likelihood of the occurrence of the ordered offence high. A relationship of superior-subordinate in military or quasi-military settings is one in which obedience to orders is expected after being ingrained in training. Indeed, there is often criminal liability for failure to obey orders. As a result, ordering, per se creates a significant risk of commission of an offence, probably more so than simple instigation or encouragement. Only incitement by threats is likely to have anything approaching the likelihood of causing an offence.[89]

There is also a further cumulative form of harm that argues in favour of an inchoate crime of ordering. This is that, unlike incitement by threats, knowingly, recklessly, or perhaps even negligently ordering offences against international law also involves an abuse of authority. An inevitable concomitant of authority is duty, and, as the ILC expressed itself in its commentary to Article 2(3)(b) of the Draft Code:

> The superior who orders the subordinate to commit a crime fails to perform two essential duties which are incumbent on every individual who is in a position of authority. First the superior fails to perform the duty to ensure the lawful conduct of his subordinates. Secondly, the superior violates the duty to comply with the law in exercising his authority and thereby abuses the authority that is inherent in the position.[90]

[86] For a modern formulation, see J Feinberg, *Harm to Others* (OUP, Oxford, 1984) ch 5.
[87] See A von Hirsch, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation' in A Simester and ATH Smith (eds), *Harm and Culpability* (OUP, Oxford, 1996) 259.
[88] In most instances, international criminal law requires them not to, see Art 33 of the Rome Statute.
[89] Despite the coercive aspect of orders, they are not normally considered to be sufficient to make the act non-voluntary. It is only possible to argue this where (in the Rome Statute) superior orders may be a defence. However, the formulation of that defence in terms of the defendant not knowing, and not reasonably being expected to know, that the order is illegal, places the emphasis on a different aspect to the coercion. On the emphasis of Art 33, see Y Dinstein, 'Defences' in GK McDonald and O Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law* (Kluwer, The Hague, 2000) 367 at 381–82.
[90] See ILC Report, above n 10, commentary to Art 2, para 8.

In addition, this abuse of authority puts subordinates in the dilemma that lies at the heart of the debate over superior orders. That is the:

> [G]rave practical dilemma which confronts a subordinate commanded to commit an international offence: whether he obeys the order (in contravention of international law) or disobeys the order (in compliance with international law), he risks severe punishment either for violation of international law or for disobedience of orders.[91]

Part of the harm is placing the subordinate in this dilemma. Thus there are a number of different harms that accumulate to support an argument that ordering should be treated differently from solicitation or inducement. As the previous law did this, and was correct to do so, the Rome Statute must be considered flawed in this respect, not only from a customary international law standpoint but also from a criminal law one.

2.5 Aiding and Abetting

As Schabas has noted, much of the work of international criminal tribunals is related not to the direct perpetrators of international crimes, but to their accomplices.[92] Nevertheless, in the early, post-World War II cases, there was little differentiation between direct perpetration and accomplice liability.[93] The difference was made clear, however, in the ICTY and ICTR Statutes, which provide that:

> A person who … aided and abetted in the planning, preparation or execution of a crime … [subject to the jurisdiction of the tribunals] … shall be individually responsible.[94]

This is taken further by Article 25(3)(c) of the Rome Statute, which provides for liability for a defendant who:

> For the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

Perhaps one of the most interesting aspects of this element of Article 25 is the mixture of objective and subjective requirements. The objective element does not seem high, notably omitting the requirement, imposed by the ICTY, that the assistance be 'direct and substantial'.[95]

[91] Dinstein, above n 89 at 379.
[92] WA Schabas, 'Enforcing International Humanitarian Law: Prosecuting the Accomplices' (2001) 843 *International Review of the Red Cross* 439 at 440.
[93] See K Ambos, 'Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis, From Nuremberg to the Hague' in McDonald and Swaak-Goldman (eds), above n 89, 1 at 8–9.
[94] ICTY Statute, Art 7(1), ICTR Statute Art 6(1).
[95] *Tadić*, above n 33, paras 681–92.

The seeming balance for this is the clear purposive motivation required by 25(3)(c). This is a high subjective requirement, and one that will not be easy to prove. It is worth remembering that the ICTY has expressly adopted a knowledge based *mens rea* requirement.[96] It is questionable whether the Statute has struck the right balance between objective and subjective requirements. The 'substantial' contribution aspect of aiding and abetting has often been linked to whether or not the correct standard is knowledge or purpose.[97] The general trend has been to require either that the assistance be substantial, or that it be purposive. Domestically (in the US) this relies on the presumption that for less serious offences, more than knowledge should be required.[98] There are no offences in the Rome Statute that are not serious.

Therefore, we should question whether it is necessary to raise the *mens rea* standard so high, particularly as the 'substantial' requirement imposed by the ICTY has not been seen as a difficult hurdle to overcome. It is more a *de minimis* standard than a true limitation.[99] The formulation could also cause considerable problems from the point of view of determining purpose when the assistance does not appear to be substantial. What, for example, is the purpose of someone who knows a weapon they sell to another will be used for an international crime? It could easily be profit, or assistance, and liability may turn on difficult and arguably unnecessary questions.

A final issue is precisely what level of knowledge of the offence assisted is required. It is uncertain what details of that offence must be known for liability to attach to a defendant. Article 25(3)(c) refers to the purpose of facilitating the commission of 'such a crime' (referring to crimes subject to the jurisdiction of the Court in the *chapeau* of Article 25(3)) and a person who aids, abets or otherwise assists 'its' commission. These matters were dealt with in the *Furundzija* and *Aleksovski* judgments. In the former, dealing with the case where it was possible that more than one type of crime may be committed,[100] the Trial Chamber noted, in relation to knowledge, rather than purpose that:

> It is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.[101]

[96] *Ibid* para 692, and *see Tadić* (Appeal), above n 35, para 229. See also Ambos, above n 14 at 483.
[97] See eg, PH Robinson, *Criminal Law* (Aspen, New York, 1997) 327–29.
[98] *Ibid* at 328.
[99] Ambos, above n 14 at 481 notes that in the *Tadić* Trial judgment, 'the Chamber did not take the "direct and substantial" criterion very seriously.' See also Eser, above n 4, at 800–1.
[100] A position familiar to criminal lawyers in England and Wales owing to *DPP of Northern Ireland v Maxwell* [1978] 3 All ER 1140.
[101] Above n 33, para 246.

In *Tadić*, the Appeals Chamber explained that knowledge of all aspects of the relevant offence was not necessary and that 'awareness … of the essential elements of the crime committed by the principal would suffice'.[102] This must surely be correct, and it is to be hoped that the ICC, notwithstanding the differences between knowledge and purpose, will take this approach on board when the time comes.

2.6 Complicity

Questions of complicity are complicated by Article 25(3)(d), although this complication is not necessarily a bad thing. Article 25(3)(d) criminalises those who:

> In any other way contribute … to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either
> (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> (ii) be made in the knowledge of the intention of the group to commit the crime.

As is well known, Article 25(3)(d) is a compromise provision, linked to the omission of a broad, common law conception of conspiracy. Obviously, there are overlaps between this provision and Article 25(3)(c).[103] Owing to these overlaps Eser questions whether Article 25(3)(d) is a necessary addition to Article 25(3).[104] The two are distinct.[105] There are the inclusions of the requirement of a group (possibly meaning more than the accused and one other),[106] and of different mental elements.[107] Owing to these factors, a case can be made for the separate nature of the offence. Whether or not it is entirely based around its 'symbolic',[108] rather than substantive importance remains to be seen.

As should be clear, there are two separate means by which this principle of liability comes into play. Both require any form of contribution not covered by Article 25(3)(c).[109] This sets a very low *actus reus* for the accused.[110] However, this is balanced by additional aspects of the *actus reus*. These are that there is a group that is assisted and that such group has a common purpose to commit a crime.

[102] Above n 35, para 164.
[103] On which see Ambos, above n 14 at 483–86, and Eser, above n 4 at 802–3.
[104] *Ibid* at 803.
[105] Ambos, above n 14 at 484. The *Tadić* appeal, above n 35, paras 172–235 engaged in a detailed discussion of this area of law, distinguishing this type of liability from aiding and abetting in para 223.
[106] Eser, above n 4 at 802.
[107] Ambos, above n 14 at 484.
[108] Eser, above n 4 at 803.
[109] Again, here we can see the complementary nature of that Art, see Ambos, above n 14 at 484.
[110] For a discussion of this matter from the ICTY see *Prosecutor v Kvocka*, Judgment, 2 Nov 2001, IT–98–30/1–T, paras 290–312.

It is not entirely clear from the wording of Article 25(3)(d) whether or not the accused must have joined the group.[111] If that is required, then we have another balancing criterion. Either way, the existence of a common plan is important in lowering the level of assistance required, for it relates to the fact that there is an 'immoderate power to do mischief which is gained by a combination of the means' of many persons.[112]

As to *mens rea*, the first, from Article 25(3)(d)(i), is very similar to the purposive one contained in Article 25(3)(c). Equally, according to Eser, it does not require that a specific crime is decided upon.[113] How much this differs from Article 25(3)(c) will depend on the level of knowledge of the aspects of the crimes required under each provision. It is arguable, although it seems extremely unlikely, that for 25(3)(d)(i) the level of knowledge could amount to knowledge that any crime in the jurisdiction of the court may be committed. This argument would follow from the fact that whereas 'the' crime was used in 25(3)(d)(ii), Sub-paragraph (i) uses 'a crime within the jurisdiction of the Court'. Alternatively it means knowledge of the particular offence decided upon by the group. Article 25(3)(d)(i) is thus unclear as to the level of specificity required. It is also unclear whether foreseeable crimes outside the criminal purpose are covered.[114] Eser states that, 'the crime(s) to be carried out do not need to be determined in a concrete manner'.[115] On the other hand, in *Kvocka*, a Trial Chamber of the ICTY stated:

> The culpable participant would not need to know of each crime committed. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability.[116]

The latter decision, however, was referring to the rather specific case of concentration camps, where the types of offences were clear. It seems very unlikely that the States drafting the Rome Statute intended to require knowledge that any crime be committed would suffice. It is to be hoped that, as Eser implies, the ICC will take the view that what is required is that the type of crime that is part of the purpose is committed, or at the very least, foreseen as likely to be committed.

[111] The Appeals Chamber in *Tadić* appeared to require that there be a common criminal enterprise between the accused and others, above n 35, para 220, 228. But at least for 25(3)(d)(ii) it is possible to argue the defendant does not have to be part of that group, merely know of its design. It seems difficult to argue that a group can have a common purpose without D sharing it if he is a member, so knowledge could be taken as referring to one outside the common purpose, although the Appeals Chamber considered the concept contained in the Rome Statute 'substantially similar', para 222.
[112] *Archbold v State* (1979) 397 NE 2d 1071, 1073. See also Fletcher, above n 16 at 132–33.
[113] Eser, above n 4, at 803.
[114] *Tadić*, above n 35, para 228 had the latter.
[115] See above n 4 at 803.
[116] *Kvocka*, above n 110, para 312.

The alternative *mens rea*, (in Article 25(3)(d)(ii)) is more specific. Although merely requiring knowledge of assistance, rather than an 'aim' to assist, the knowledge must be of 'the' crime.[117] It can therefore be argued that the requirements for the actions of the accused here are lower than in Article 25(3)(c). Again, this may be related to the fact that where a group of people are involved, the possibilities of harm become significantly higher. The justification that has been advanced in the UK for such liability is based on the dangers of group criminality.[118] As can be seen, Article 25(3)(d) is a highly complex provision, and will be difficult to interpret in practice.[119] What is clear, however, is that it is more limited than conspiracy, which, at least for genocide, is clearly established in international law as an inchoate crime, rather than one which comes under the heading of complicity.[120]

3. INCHOATE CRIMES[121]

When compared to the crimes discussed above, and customary international law, the provisions of the Rome Statute for inchoate crimes are highly parsimonious.[122] This is problematic, for two reasons. First, it means that there are inchoate crimes worthy of criminalisation that are not covered. Secondly, at least where the Rome Statute has used language based on the Model Penal Code (MPC), there has been a failure to understand that the MPC was a careful balance between principal, complicity-based and inchoate offences. To take one without the other upsets this balance.[123] Inchoate liability is particularly interesting, because it deals with the outer boundaries of criminal liability — how far away from the final harm we can go when appropriately criminalising behaviour?[124] It should be noted that the Statutes of the ICTY and ICTR take a far broader view of inchoate crimes. Both Statutes criminalise '[a] person who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of a crime'.[125] This is very broad when compared to the Rome Statute,

[117] Note how this differs from 'a' crime in sub-para (i). Again, though, we are thrown back to the problem of how much knowledge is required of 'the' crime, see for the customary position, *Tadić*, above n 35, para 228.
[118] Simester and Sullivan, above n 57 at 216–19.
[119] The position is similar in UK domestic law, where opinion differs as to whether this form of liability exists outside of aiding and abetting, see generally Smith, above n 16 at 160–61, *contra* Simester and Sullivan, *ibid* at 216–19.
[120] Schabas, above n 14 at 413.
[121] Crimes for which 'liability … may arise before, or indeed without, the commission of any principal offence', Simester and Sullivan, above n 57 at 237.
[122] See above relating to ordering offences.
[123] On the balance in the MPC see R Weisberg, 'Reappraising Complicity' (2000) 4 *Buffalo Criminal Law Review* 217 at 221–22.
[124] See Robinson, above n 97 at 611.
[125] Art 7(1) ICTY Statute, Art 6(1) ICTR Statute. Morris and Scharf appear to think that this is predicated on a completed crime, V Morris and MP Scharf, *The International Criminal Tribunal for Rwanda* (Transnational, New York, 1998) 235. However, this is inconsistent with the clear wording of the Statute, see Eser, above n 4 at 807–8.

which covers only two inchoate offences: inciting genocide and attempt for any of the crimes in Articles 6–8.

3.1 Inciting Genocide

Although conspiracy to commit genocide is not covered in the Rome Statute, Article 25(3)(e) criminalises the direct and public incitement of genocide, basically in the terms of the Genocide Convention.[126] There are a number of reasons for the inclusion of incitement, without the requirement that the crime be actually committed by those inciting. The first reason this step was taken in relation to genocide related to the fact that incitement was included in the Genocide Convention. The second is that there is a consistent history of the use of the media, in particular the mass media, to attempt to stir up genocidal feeling and action. This was the case, for example, in Nazi Germany, a fact attested to by the conviction of Julius Streicher, editor of the notorious *der Stürmer* at the Nuremberg IMT.[127] Cases from Rwanda relating to the RTLM station, such as *Ruggiu*,[128] show that this type of broadcasting has not been eliminated.

The offence, it should be noted, is not limited to broadcasting or the mass media, and the giving of speeches also clearly amounts to 'public' for this purpose.[129] As Eser notes, however, the notion of 'direct', which serves to exclude clear misinterpretations, will be subject to cultural differences.[130] At any one time, some cultures may rely more heavily on innuendo than others. Thus for prosecutions of this offence, linguistic and anthropological evidence will be important. An example of this is *Mugesera v Minister of Citizenship and Immigration*,[131] where evidence was given of the precise meaning of inflammatory speeches in the specific time and circumstances of Rwanda in 1994. The final possible reason that this was added, although incitement was not brought in as a form of offence for war crimes and crimes against humanity, is that the Statute has here set up an implicit hierarchy between the crimes, with genocide as its apex. Genocide being the 'crime of crimes'.[132] The singular opprobrium that attaches to genocide justified, to the drafters of the Rome Statute, expanding criminality even to unsuccessful incitements.[133]

[126] Art III(c). On this see generally, Eser, above n 4 at 803–5.
[127] Nuremberg IMT Judgment, above n 36 at 293–96. Although Hans Frizsche was acquitted on a similar charge, and the conviction of Striecher has not gone uncriticised, see T Taylor, *The Anatomy of the Nuremberg Trials* (Bloomsbury, London, 1993) 561–62.
[128] ICTR–97–32.
[129] See *Akayesu*, para 556.
[130] Eser, above n 4, at 805.
[131] See W Schabas, 'Mugesera v Minister of Citizenship and Immigration' (1999) 93 *AJIL* 529, especially at 530–31.
[132] W Schabas, *Genocide in International Law: The Crime of Crimes* (CUP, Cambridge, 2000).
[133] And, it would appear, incitements to genocide even when the inciter does not have the special intent necessary for a conviction of genocide *simpliciter*, see Eser, above n 4 at 806.

3.2 Attempts

Article 25(3)(f) is the first provision in positive international law expressly criminalising attempts (the ILC Draft Code, which also did so,[134] never became positive law). None the less, taking into account what was said above about the ICTY and ICTR Statutes, it seems clear that all the conduct that would otherwise be caught under Article 25(3)(f) was already criminal and punishable.[135] Indeed, in some ways, Article 25(3)(f) may be more limited than custom, as preparation for an offence, probably reaches further back from the final (unsuccessful) crime than Article 25(3)(f), because that Article requires that the crime has been 'commence[d] … by means of a substantial step'.[136] Although not directly applicable, this can be explained by reference to the criminal law of England and Wales, which requires, for an attempt to be punishable, that the perpetrator do an act that is 'more then merely preparatory' to the commission of the offence.[137] It must be said, however, that in UK law the precise point at which liability catches is by no means clear. The ICC will, as Eser notes, have considerable discretion here.[138] Owing to the extreme seriousness of the crimes provided for in the Rome Statute, and therefore the strong interest in preventing their occurrence as early as possible,[139] a fairly broad interpretation seems preferable. The case for such an interpretation is bolstered by the fact that the Rome Statute provides expressly for a defence of abandonment. Abandonment occurs where, after initiating an attempt, the perpetrator 'completely and voluntarily gives up the criminal purpose' and 'abandons the effort to commit the crime or otherwise prevents the completion of the crime'.[140] In addition, this provision may appear sensible, in that it gives a perpetrator a strong incentive to give up the offence (although as Fletcher notes, this is more easily asserted than proved to have that effect).[141]

Still, where a perpetrator is acting in concert with others, this removes at least some of the reason for not informing the authorities of a plan for fear of being held responsible for it. What is notable here, though, is a possible overlap between liability under this provision and the possibility of liability under Article 25(3)(d). If an act of assistance is done, which begins a group crime and the defendant voluntarily gives up the purpose, the latter course of action will suffice to remove attempt liability. The same is the case if the defendant goes as far as is humanly

[134] In Art 2(3)(g).
[135] Although see Eser, above n 4 at 808.
[136] Although Eser thinks the two phrases pull in different directions, it seems from the wording that the latter is dominant. In addition, he seems to take a very narrow view of 'substantial effect' equating it, in essence, with the 'last act', see *ibid* 812. Schabas, above n 132 at 283, is more balanced.
[137] Criminal Attempts Act 1981, s 1. It is notable that in the drafting of the Genocide Convention the drafters rejected the prohibition of 'mere preparatory acts'. See Schabas, *ibid* 281–82.
[138] Eser, above n 4 at 812.
[139] *Ibid* at 808.
[140] Art 23(3)(f).
[141] Fletcher, above n 16 at 186. Schabas, above n 132 at 282 is dubious about the inclusion of voluntary abandonment.

possible to prevent the offence from occurring. But if the group's activities already reach the level of an attempt, there will be liability for group participation under Article 25(3)(d), which does not have a defence of abandonment.

On the whole, it seems that Article 35(3)(f) is a sensible provision. For the first time, it sets out the principles relating to attempt. In addition, the standard it sets is one that may allow the ICC to react sensitively in individual cases.

4. *MENS REA*

Although as we have seen, various different offences require different specific forms of *mens rea*, it is also necessary to comment upon the general *mens rea* set out in the Rome Statute. Article 30 provides:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

This is not the place to set out the relationship of Article 30 to each of the elements of each crime. The Byzantine nature of the relationship between the mental, conduct, consequence and circumstance-based elements means that full examination, (as well as the relationship with the defences of mistake of law and of fact) lies far beyond the scope of this chapter.[142] This relationship is further complicated by the fact that Article 30 is a default provision, which applies absent specific provision elsewhere.[143]

Article 30 sets the mental element bar high. By requiring intention, in the clear subjectivist sense, the Rome Statute adopts, as a default, a highly culpable form of mental element for all elements of the offence. Therefore determination of the ambit of Article 30 is highly important. This is bound up with the interpretation

[142] For an exemplary analysis see RS Clark, above n 7. See also M Kelt and H von Hebel, 'General Principles of Criminal Law and The Elements of Crimes' in RS Lee (ed), *The International Criminal Law: Elements of Crimes and Rules of Procedure* (Transnational, New York, 2001) 19, 26–36; A Eser, 'Mental Elements-Mistake of Fact and Mistake of Law' in Cassese *et al* (eds), above n 4, 889.

[143] As will be seen, precisely where is not necessarily clear, see also Clark, above *ibid* 321. On Art 30's default position see also Elements of Crimes, general introduction, para 2.

of 'unless otherwise provided' in Article 30. The drafters of the Rome Statute appeared to exclude any lesser mental element, unless the Rome Statute expressly provided for one (such as in Article 28). There is a fair argument, therefore, that unless the Statute, in Articles 6–8, or 25 and 28, expressly provide otherwise, intention and knowledge are required.[144] On the other hand, States at the post-Rome PrepCom appeared to take a contrary view, that the Elements of Crimes could adopt a lower *mens rea* standard that might be implied by Article 30 in relation to certain elements.[145] This makes interpretation of the *mens rea* requirement very difficult in the abstract. However, the views of the States parties at Rome appeared to minimise the chance that the ICC could go outside the Statute and Elements of Crimes to determine, for example, that customary international law set a lower standard than the Statute or the Elements of Crimes. It has been suggested that it could,[146] but this seems unlikely since the coming into being of the Elements of Crimes.[147]

This may have a specific effect in relation to the offences for which customary international law and many domestic systems differ as to *mens rea* from the provision in the Rome Statute and the Elements of Crimes. The first of these is in relation to Article 8(2)(b)(i), attacking of civilians requires a higher *mens rea* (intention) than that required by customary international law, for which recklessness suffices.[148] The second area is in relation to rape, and other sex offences. It is a cardinal aspect of these offences that consent is not present. Thus there must be some form of mental element relating to this aspect of the crime. It would appear that, by requiring intention and knowledge in relation to all aspects (unless the Elements expressly provide otherwise) States have unintentionally made prosecution of these crimes more difficult than necessary.

In relation to the offence of rape, both as a war crime or a crime against humanity,[149] the Elements exclude the presence of consent in a number of circumstances. These are:

> [Where t]he invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment.[150]

[144] See P Saland, above n 14 at 205; Sadat above n 14 at 209; A Cassese, above n 13 at 153–54; Eser, above n 4 at 903.
[145] Kelt and von Hebel, above n 142 at 30.
[146] K Dörmann, 'War Crimes in the Elements of Crimes' in H Fischer, C Kress and SR Lüder (eds), *International and National Prosecution of Crimes Under International Law*: Current Developments (Arno Spitz, Berlin, 2001) 95, at 98.
[147] Kelt and Von Hebel, above n 142 at 29–30.
[148] See W Fenrick, 'A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the Prosecutor v Tihomir Blaskić' (2000) 13 *Leiden Journal of International Law* 931 at 936–43.
[149] Rome Statute, Arts 8(2)(b)(xxii) and 7(1)(g) respectively.
[150] In addition, natural, induced or age-related incapacity will exclude consent.

Of course, there must be *mens rea* to the absence of consent or the surrounding circumstances, which are taken to negate consent. Without this, there is an absence of *mens rea* or a mistake of fact claim under Article 32.[151] It is questionable whether knowledge, rather than some form of subjective recklessness is appropriate here. Although dealing with a slightly different issue (conscripting children), Eser's comment seems appropriate:

> [If] the perpetrator took and approved of the risk … there is no convincing reason against holding him responsible for the intentional commission of the crime.[152]

It is far from certain, though, that such advertence could be taken to fall under Article 30, given that it was not included in the Elements.[153] If it had been, the rather controversial aspects of the Elements of Crimes, that presume that there can never be consent in the above circumstances, yet require knowledge of these circumstances (that is, that there was duress, rather than there probably was), could have been avoided. This is because in these circumstances, where there was a strong suspicion that there had been such activity, there would, in all likelihood, be advertence to the risk of non-consent. In the (UK) case of *Olugboja*,[154] the fact that the victim had been held in circumstances 'redolent of threat'[155] meant that consent was vitiated and the court believed the defendant had adverted to this. It is also possible that knowledge may be taken to include wilful blindness, where a defendant deliberately closed his eyes to the truth. This would often lead to the same result but, given the definition of knowledge in the Statute, it is questionable if this route would be open to the court, especially as where wilful blindness suffices, it is stated in the Statute (for example, Article 28(b)(i)). What the ICC may do, however, is to invoke paragraph 3 of the general introduction to the Elements of Crimes and 'infer' knowledge from relevant facts and circumstances. It may only do so if it believes, however that the defendant did have knowledge.

As a final point it should be noted that the requirement that the defendant is 'aware … in relation to a consequence that it will occur in the ordinary course of events' seems to leave a lacuna. Awareness that something will occur in the ordinary course of events implies that a belief that this is the case must be borne out for a person to fall under Article 30. At the very least, by the time the consequence has manifested itself, there seems to be no necessary reason for this. The culpability of the state of mind is essentially the same.[156] As (at the relevant time) the consequence is not a fact, the matter is one of a value judgement (that D's actions will

[151] See E la Haye, 'Article 8(2)(b)(xxii)-1-Rape' in Lee (ed), above n 142, 187, 190. Eser, above n 4 at 934–40.
[152] *Ibid* at 933.
[153] See para 2 of the general introduction to the Elements of Crimes: 'exceptions to Art 30, based on the Statute, including applicable law under its relevant provisions, are indicated below'.
[154] (1981) 73 Cr App Rep 344.
[155] Simester and Sullivan, above n 57 at 406.
[156] Smith, above n 16 at 71.

bring something about). According to the Elements of Crimes, value judgements are not normally relevant.[157] However, Article 30 would appear to prevent a conclusion that such a person is responsible under the statute.

5. SUPERIOR RESPONSIBILITY

There is one area where the criticisms above relating to omissions and of *mens rea* are simply inapplicable. This is the principle of superior (or command) responsibility. The principle has a lengthy history,[158] although the first example of its use in the modern sense came about with the *Yamashita* case in 1945.[159] The precise content of customary international law here,[160] and the relationship between that law and the Rome Statute is a matter of debate.[161] It is not the intention of this chapter to revisit these matters. It will concentrate instead on the nature of liability under this doctrine and the appropriateness of the Rome Statute's provision from a criminal law standpoint. Article 28 reads:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes

[157] General Introduction to the Elements of Crimes, para 4.
[158] On which see WH Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1 at 1–20.
[159] *In re Yamashita* (1945) 327 US 1.
[160] See, eg, Parks above n 158; LC Green, 'Command Responsibility in International Law' (1995) 5 *Transnational Law and Contemporary Problems* 31; M Lippmann, 'The Evolution and Scope of Command Responsibility' (2000) 13 *Leiden Journal of International Law* 139; Bantekas, above n 4, chs 3–4.
[161] See eg, Cryer, above n 4 at 24–29; GR Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)' (2000) 25 *Yale Journal of International Law* 89; K Ambos, 'Superior Responsibility' in Cassese (ed), above n 4, 823 at 824–50.

within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The first matter that must be investigated is the nature of responsibility under Article 28. Is it, as the UK legislation implies, a form of complicity in the underlying offences?[162] Or is it, as some believe,[163] and the Canadian legislation implies, a separate offence of omission — in essence a more serious form of a dereliction of duty charge?[164] In other words, when dereliction of duty leads to the commission of international crimes, international law enters the frame and also criminalises the dereliction? It is notable that there was confusion about the basis of liability in the Secretary-General's report relating to the ICTY Statute, where he said that command responsibility is a form of 'imputed responsibility or criminal negligence'.[165]

In fact, Article 28 is a rather uncomfortable mix of the two concepts. Although much of Article 28 can be read as creating a dereliction of duty-type offence,[166] this is inconsistent with Article 28's notion that the superior is held responsible for the acts of others, irrespective of knowledge. The superior is thus considered responsible for the underling's crimes, which is more consistent with a form of complicity. Where there is a duty to intervene, and knowledge of an offence, it can be more easily seen that there is a complicity base. This is on the basis of traditional aiding/abetting ideas,[167] as recognised by section 4 of the German legislation.[168] The German legislation has separate offences of failing to supervise properly and failure to report a crime.[169]

As it stands, Article 28 is problematic, perhaps because it covers too many different forms of liability. It moves from knowing failures to intervene despite a duty, which are close to traditional complicity ideas, to, in essence, negligent dereliction

[162] ICC Act, above n 6, s 65.
[163] Ambos, above n 161 at 850–55.
[164] Canadian Act ss 5, 7. See Schabas, above n 6 at 342–43.
[165] Para 56.
[166] Ambos, above n 161 at 850–55.
[167] See Williams, above n 51 at 360–61. See also M Damška, 'The Shadow Side of Command Responsibility' (2001) 49 *American Journal of Comparative Law* 455 at 462.
[168] Code of Crimes Against International Law, s 4.
[169] *Ibid* ss 13,14.

of duty.[170] This is recognised by the German law relating to the subject, which deals separately with failure to know of offences in dereliction of duty, failure to report an offence, and knowing tolerance of offences when there is a duty and ability to intervene to prevent it. By making all akin to complicity, the ICTY and now the Rome Statute distort the concept of complicity considerably, extending it beyond knowledge of offences.[171] This also 'display[s] a measure of insensitivity to the degree of the actor's own personal culpability',[172] and, as Schabas notes, provides for the negligent commission of intentional offences.[173]

This conflation goes back to the first case dealing with command responsibility. The actual charge Yamashita was arraigned with was that:

> [He] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities … [and] … thereby violated the law of war.[174]

The US Supreme Court also appeared to conceive of it as such:

> The gist of the charge is an unlawful breach of duty by the petitioner as an army commander to control the operations of the members of his command.[175]

This can be supported by the review of the Yamashita case by the Staff Judge-Advocate, in which the charge was considered to be 'criminal dereliction of duty'.[176] Problems arose because the Tribunal trying Yamashita did not identify clearly whether he knew what was going on, or should have known.[177] The two are different.

This has important fair labelling implications, which are related to culpability. Those who knowingly and deliberately refuse to intervene are often far more culpable than those who are negligent.[178] The two should thus not be grouped together.[179] This was recognised by Judge Bernard of France, who asserted that culpability differed between the two in this situation.[180] In addition, it is accepted in UK Criminal law that those who engage in offences related to assisting a person

[170] For an extremely useful discussion of this matter, see Damska, above n 167 at 460–71.
[171] *Ibid*.
[172] *Ibid* at 456.
[173] Above n 14 at 417.
[174] *US v Yamashita*, Transcript, 23.
[175] Above n 159 at 66.
[176] Parks, above n 158 at 32.
[177] As Justice Murphy made clear, *Yamashita*, above n 159 at 59.
[178] Notably, and for unconvincing reasons, Art 28 differentiates military, and non-military superiors, and imposes a negligence standard only on military superiors. Non-military superiors are subject to a constructive knowledge level of culpability. This seems odd, in that either there is a duty to control (required for both) or there is not.
[179] In the UK, eg, the Law Commission, has recently suggested, on fair labelling grounds, distinguishing reckless and negligent manslaughter.
[180] *Ibid* at 492–93.

evade justice (that is, failure to punish) are not necessarily as responsible as those who commit, aid or abet offences.[181] It may be that this reflects a broader perception of the level of culpability of those who are involved after offences have occurred. Thus for the purposes of sentencing and fair labelling, the principle of superior responsibility as enunciated in Article 28 (and Article 7(3) of the ICTY Statute) elides very different concepts.[182]

This can be seen in a rather incautious statement of the *Blaškić* Trial Chamber, which held that:

> When a commander fails in his duty to prevent the crime or to punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime.[183]

This statement ignores the difference in culpability that there may be between commanders and subordinates in terms of *mens rea*.[184] In fact, commanders may appropriately get heavy sentences, even for negligence, owing to the nature of the offence(s).[185] Negligence liability is lower in culpability than intention or recklessness, as it is predicated upon what can be inadvertent state of mind. However, the fact that negligence is often not as bad as recklessness or intention does not mean that it is never serious enough to warrant criminalisation,[186] at least when negligence is 'gross'.[187] This is probably the level required here.[188]

The reasons why international criminal law may be appropriately invoked at this level of culpability relate to the possibility of causing remote harms. Although the underlying offences are committed by others, as commanders, soldiers[189] are charged precisely with the prevention of these offences. They are expected to be more responsible in their actions. And as General MacArthur stated in relation to General Yamashita, when confirming his sentence:

> The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates the sacred trust he not only profanes his entire cult but threatens the very fabric of international society.[190]

[181] Criminal Law Act 1967, s 4. Prior to the Act, such a person was regarded as an accessory after the fact, but as Williams said 'it seems strange to the modern mind', and in almost all cases, the sentence was less than that for the underlying offence above, n 51 at 409–10. Misprison of a felony was a misdemeanor, *ibid* 423.

[182] It is possible that this is, as Damska notes, often the case that the two are pled together, above n 167 at 467–68.

[183] *Blaškić*, above n 78, para 789.

[184] Damska, above n 167 at 467.

[185] Damska would probably not go this far, *ibid* 466, see also Schabas, above n 14 at 417, where whether international criminal law should go this far is considered 'questionable'.

[186] Simester and Sullivan, above n 57 at 144.

[187] See J Horder, 'Gross Negligence and Criminal Culpability' (1997) 47 *University of Toronto Law Journal* 495; AP Simester 'Can Negligence be Culpable?' in J Horder (ed), *Oxford Essays in Jurisprudence* (OUP, Oxford, 2000) 85; Fletcher, above n 16 at 262–63.

[188] See *The High Command Trial* above n 64, at 543–44.

[189] As mentioned above, the Rome Statute differentiates military and non-military superiors.

[190] Action of the confirming authority, General Headquarters, United States Army Forces, Pacific, in the case of General Tomoyuki Yamashita, Imperial Japanese Army, 7 Feb 1946.

Thus, where there is negligence-level command responsibility there is a violation of an extremely important duty. This is the reason for the qualification in Article 28 that the offences have to come about as a result of the superior's failure to exercise control. The harm (offences by the unsupervised) is a remote one, as it comes about through the agency of others. But it cannot be regarded as too remote, for this is precisely what there is a duty to prevent. Unfortunately history also shows how often offences are committed by those left to their own devices in war time. It should also be noted that the necessary superior-subordinate relationship only comes about for a limited class of person rather than the population as a whole. This is a group who are immensely unlikely to be unaware of their powers to control. Thus fair warning limitations are less relevant.[191] Given that their failure to intervene may also lead to large numbers of crimes, which are extremely serious in themselves, there seems to be no reason to consider negligence responsibility to fall below the bar of sufficient harm to criminalise at the international level. It also explains why sentences for command responsibility even at the negligence level may often be high. This is because although the level of culpability may be relatively low, the harm may be extremely great.[192] It could be countered, however, that whether a large number of offences occur is a matter of luck and therefore not an appropriate factor for criminal law.[193] However, a more nuanced form of dealing with luck can be taken, where intrinsic luck, the situation in which the defendant has, by his conduct, left a matter to luck, can be distinguished from extrinsic (pure) luck, where he does not. The former may be acceptably criminalised, the latter may not.[194] By neglecting the duty to prevent the specific offences, the defendant has left it to chance whether or not such things occur, and can be appropriately sentenced on the basis that that failure has resulted in a great deal of harm.

6. CONCLUSION

As we come to the end of our discussion, it seems apposite to mention that although there are many matters on which the Rome Statute does not adequately deal with culpable conduct, it was the outcome of tense negotiations. And those negotiations were not necessarily between delegates who were criminal law theoreticians, although many were attached to domestic justice ministries.[195]

[191] See A von Hirsch, above n 87 at 269–71. Fair warning being the idea that a person can be reasonably able to determine the criminal proscriptions he or she is subject to.

[192] Therefore, the German legislation, which gives a maximum of 5 and 3 years imprisonment for failure to supervise and failure to punish respectively may be insufficient, unless every time an offence is committed, there can be a separate charge.

[193] For an argument for the limitation of luck in criminal law see A Ashworth, 'Taking the Consequences' in S Shute, J Gardner and J Horder (eds), *Action and Value in Criminal Law* (OUP, Oxford, 1993) 107.

[194] See J Horder, 'A Critique of the Correspondence Principle in Criminal Law' [1995] *Criminal Law Review* 759; Simester and Sullivan, above n 57 at 178–81.

[195] Clark, above n 7 at 314.

In addition, problems of understanding between civil and common lawyers clearly made the negotiations more difficult, as a lack of familiarity with the conceptual framework of other parties made life extremely difficult. What intent means to a common lawyer is very different from what it means to a civil lawyer.[196] Where there was not a common language between delegates, translation shortcomings will not have helped. The fact that a general part was drafted at all is testament to the ability and tenacity of the delegates. None the less, admiration for the delegates does not mean that friendly critics cannot or should not counsel reasoned evaluation of the product of the negotiations.

The conceptual tools with which to evaluate criminal law have been developed at the national level. These include specificity and *nullum crimen sine lege*, which are well known in international criminal law. International criminal lawyers, however, have spent far less time thinking about other principles, such as personal responsibility,[197] conceptions of the harm principle, appropriate levels of culpability and fair labelling. It has been the purpose of this chapter to show how some of those principles can enhance our understanding of international criminal law. This feeds in to the question of whether or not a State should adopt the Rome Statute's general principles of liability, use its domestic ones, incorporate customary international law principles, or, perhaps, create an innovative amalgam of all three. Precisely what any individual State should do is for it to decide, subject to the limits imposed by the complementarity regime of the Rome Statute.[198] In deciding what to do, analyses would have to be made of the appropriateness, from a criminal law standpoint, of each State's domestic principles, and of customary international law. But those, of course, are far beyond the scope of this chapter.

[196] *Ibid* at 302; Saland, above n 14 at 198.

[197] As opposed to the possibility of holding individuals liable under international law.

[198] If the view is adopted that domestic prosecutions for international crimes involve a *dedoublement fonctionelle*, (see A Cassese, 'International Criminal Justice: Is it Needed in the Present World Community?' in G Kreijen et al (eds), *State Sovereignty, and International Governance* (OUP, Oxford, 2002) 239 at 258, then further considerations arise relating to the Rome Statute and possibly to customary international law. This is not the place to discuss them, however.

10

Defences in International Criminal Law

ILIAS BANTEKAS

1. THEORETICAL UNDERPINNINGS OF CRIMINAL DEFENCES

1.1 The Concept of Defence

THE CONCEPT OF 'defence' in international criminal law is neither self-evident, nor does it clearly possess an autonomous meaning. Instead, it derives its legal significance as a result of its transplantation from domestic criminal justice systems through the appropriate processes of international law. None the less, its definition, elaboration, evolution or application do not depend on the relevant processes of any single criminal justice system — nor combinations thereof — although these may have persuasive value. This is even more so in the context of a self-contained, highly elaborate and sophisticated legal system, such as the International Criminal Court (ICC), where reliance on domestic rules is the exception — or at least, a judicial act of last resort — rather than the norm.[1] Despite these observations, however, the fact remains that the underlying theoretical underpinnings of the concept of 'defences' is premised on well-established notions of criminal law, originating from both the common law and the civil-law traditions. Despite the elaborate character of the ICC Statute, its drafters have been wise in detecting the inadequacy of the fledgling international criminal justice system, thus necessitating recourse to national legal concepts and constructs. This is well evident as far as defences are concerned.[2]

1.2 Distinguishing Between Substantive and Procedural Defences

In its most simple sense, a defence represents a claim submitted by the accused by which he or she seeks to be acquitted of a criminal charge. The concept of defences is broad, and this may encompass a submission that the prosecution has not proved its case. Since a criminal offence is constituted through the existence of two cumulative elements, a physical act (*actus reus*) and a requisite mental

[1] Art 21(1)(c), ICC Statute.
[2] See Art 31(3), ICC Statute.

element (*mens rea*), the accused would succeed with a claim of defence by disproving or negating either the material or the mental element of the offence charged. Domestic criminal law systems generally distinguish between defences that may be raised against any criminal offence (so called general defences), and those that can only be invoked against particular crimes (so called special defences).[3] Another poignant distinction is that between substantive and procedural defences. The former refer to the merits, as presented by the prosecutor, while the latter are used to demonstrate that certain criminal procedural rules have been violated to the detriment of the accused, with the consequence that the trial cannot proceed to its merits. This distinction is not always clear-cut, but one may point to the following often-claimed procedural defences: abuse of process,[4] *ne bis in idem*,[5] *nullum crimen nulla poena sine lege scripta*,[6] passing of statute of limitations,[7] retroactivity of criminal law.[8] This chapter will focus only on substantive defences.

1.3 The Burden of Proof

Another seminal aspect of any discussion on defences relates to the allocation of the burden of proof. Article 66 of the ICC Statute postulates the 'presumption of innocence' until proven guilty beyond reasonable doubt. This means that, and in accordance with universal standards of justice, the prosecution carries the onus of proving the material and mental elements constituting an offence. On the other hand, facts relating to a defence raised by the accused and being peculiar to his or her knowledge, must be established by the accused.[9] Article 67(1)(i) at first glance seems to possibly attack the burden of proof set out in Article 66, by declaring that:

> The accused shall be entitled … not to have imposed on him or her any reversal of the burden of proof or any onus or rebuttal.

This would not be a correct interpretation, as it would run contrary to the object and purpose of the ICC Statute and general international law. The correct view is

[3] An example of a special defence is that of the 'battered wife syndrome'. See C Wells, 'Battered Woman Syndrome and Defences to Homicide: Where Now?' (1994) 14 *LS* 266.
[4] See *Barayagwiza v ICTR Prosecutor*, Appeals Decision (3 Nov 1999), Case No ICTR–98–34–S, as well as the reversal of parts of the latter decision by the Appeals Chamber in its decision of 31 March 2000.
[5] Art 20, ICC Statute.
[6] Arts 22 and 23, ICC Statute.
[7] Art 29, ICC Statute. The crimes contained in the ICC Statute are not subject to a statute of limitations under general international law. See 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73.
[8] Art 24, ICC Statute.
[9] *ICTR Prosecutor v Delalić et al* [*Celebici* case], Judgment (16 Nov 1998), (1998) 38 *ILM* 57 para 1172. In English law, the burden of proof is always on the prosecution even with regard to defences raised by

that Article 67(1)(i) should be read in conjunction with Articles 31(3) and 21, which as explained in the following section gives authority to the Court to introduce defences existing outside the Statute, only if they are consistent with accepted treaty and custom or general principles of domestic law. Thus, no defence introduced by the Court under Article 31(3) can ever override the burden of proof established in accordance with Article 66. In this context, therefore, it is crucial to determine what is and what is not a defence, since this would determine which party possesses the burden of proof. Alibi is usually referred to as a substantive defence, whereby the accused claims not to have committed the material elements of the offence with which he or she is charged on account of being elsewhere when the offence was committed. In the *Kunarać* judgment before the ICTY, the accused were charged, inter alia, with rape and other sexual offences. In assessing consent as a defence in cases of sexual assault under Rule 96(ii) of the ICTY Rules of Procedure, the Trial Chamber expressly pointed out that the reference to consent in Rule 96 as a defence is used in a non-technical sense, in that it does not shift the burden of proof to the accused. The Chamber likened this to the so-called defence of alibi, stating that it is not a defence in the sense that it must be proved by the defendant. A defendant:

> [W]ho raises an alibi is merely denying that he was in a position to commit the crime with which he was charged, and by raising that issue, the defendant simply requires the Prosecution to eliminate the reasonable possibility that the alibi is true.[10]

In any event, it is unclear how non-technical defences, such as the alibi, would be assessed by the ICC. In the *Musema* case,[11] before the ICTR, the accused was the director of a State-owned tea factory in one of Rwanda's poorest regions. He was convicted of genocide and crimes against humanity for the killings that took place in and around the premises of the factory. The accused presented an alibi claiming that on some crucial occasions he was not present at the factory. The majority of the Court, originating as they did from civil law traditions, assessed in chronological order each separate event and the alibi for each relevant period. Where the alibi was rejected, this only affected the alibi in so far as it concerned the period in issue and not the alibi as a whole. By contrast, Judge Pillay, assessed the evidence of alibi as a whole, stating that once the credibility of a witness had been impaired, the testimony of that witness would be rendered unreliable as a whole, unless it could be independently corroborated.[12]

the defendant, with the exception of insanity and certain statutory exceptions (including diminished responsibility). See R May, *Criminal Evidence* (Sweet & Maxwell, London, 1999) 53–60.

[10] *ICTY Prosecutor v Kunarać et al*, Judgment (22 Feb 2001), Case Nos IT–96–23–T and IT–96–23/1–T, para 463.
[11] *ICTR Prosecutor v Musema*, Judgment and Sentence (27 Jan 2000), Case No ICTR–96–13–T, para 649.
[12] See 'Case Note, *Prosecutor v Musema*', 1 *Melbourne Journal of International Law* (2000) 131 at 138–39.

1.4 Justification and Excuse

All substantive defences represent claims that the material element of the offence was indeed committed by the accused, but for a reason which is acceptable under the relevant criminal justice system. In this respect, domestic legal systems distinguish between two types of defence in which the accused claims to lack the requisite *mens rea* to commit the underlying crime; justification and excuses. Defences operating as justifications usually regard the act as harmful but not as wrong in its particular context, whereas excuses are grounded on the premise that although the particular act was indeed wrongful, its surrounding special circumstances would render its attribution to the actor unjust.[13]

Despite the existence of the aforementioned distinctions in both common and civil law traditions, they were not included in the ICC Statute, whose drafters agreed instead to use the general term 'exclusion of criminal responsibility', avoiding terminology distinguishing between the two. Whether this intentional omission has any legal significance remains to be seen, judged on the appropriate sources of the Court's jurisdiction. Rule 121(9) of the ICC Rules of Procedure and Evidence provides that the Prosecution and the accused must lodge his or her defence claim no later than three days before the date of the hearing. The next section, therefore, explores the general conception of defences in the ICC Statute, with particular emphasis on primary and secondary sources.

2. IS THERE A PLACE FOR DOMESTIC DEFENCES IN THE ICC STATUTE?

During the preparation of the PrepCom draft Statute there was strong divergence over the inclusion of an exhaustive or open list of defences. Naturally, the proponents of an exhaustive list were apprehensive of the Court's freedom and latitude were the Court to be authorised to determine defences beyond those enumerated in the Statute. The opposite side, however, stressed the impossibility of reaching precise definitions of all desired defences, thus necessitating an open list. There was considerable support for a middle ground, whereby although there would be an enumerated list, the Court could under special circumstances introduce viable defences existing outside the Statute, in such a way that it would not make but rather apply the law.[14] Preference for this latter solution was finally reflected in Article 31(3), which reads:

> At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 [that is, mental incapacity, intoxication,

[13] Several theories have been elaborated in this respect, such as the 'character theory' and the 'fair opportunity theory'. See W Wilson, *Criminal Law* (Longman, London, 1998) 206–19; Draft Code of Crimes Against the Peace and Security of Mankind, Art 14 (Comment 2), in ILC Report on the work of its forty-eighth session, UN GAOR 51st Sess, Supp No 10, UN Doc A/51/10 (1996), 14.
[14] UN Doc A/CONF183/C1/WGGP/L 4/Add1/Rev1 (1998), commentary to Art 31(3).

> self-defence, duress] where such a ground is derived from applicable law as set forth in Article 21.

Article 21 sets out the legal sources available to the Court in its judicial function, in the same fashion this is prescribed for the International Court of Justice in Article 38 of its Statute. Article 21 is premised on a hierarchy of rules, on top of which lie the Statute, supplemented by the Elements of Crimes and the Rules of Procedure and Evidence. Where these sources fail to produce an appropriate result, the Court may turn to treaties and the principles and rules of international law, and failing that, to general principles of law derived from the national laws of the world's legal systems. The examination of these sources does not fall within the purview of this chapter, but a brief discussion of the third source (that is general principles) is warranted, because of the potential use by the Court of defences existing outside the Statute. General principles of municipal law are practices or legal provisions common to a substantial number of nations encompassing the major legal systems (common, civil and Islamic law). Under customary international law, reliance upon principles deriving from national legal systems is justified either when rules make explicit reference to national laws, or when such reference is necessarily implied by the very content and nature of the concept under examination. However, even within these confines, the freedom of extrapolation of general principles by a Court is open to abuse, as was the case in the *Furundzija* judgment, decided by an ICTY Chamber. In that case, the Chamber found that forced oral penetration was not regulated under treaty or custom, and so shifted its focus on general principles. There, it discovered that some countries treated the matter as rape whereas others viewed it as a sexual offence of lesser gravity, and therefore could not logically arrive at an accepted general principle on the basis of this significant divergence. Turning to general principles of international law, the Chamber arbitrarily stated that since the quintessence of humanitarian law is the respect of human dignity regardless of gender, it classified oral penetration as rape.[15] It is evident that if the Court possesses authority to freely employ general principles, the theoretical underpinnings of the distinction between 'justifications' and 'excuses' (constituting part and parcel of any domestic discussion on defences) is pertinent when general principles are used.

As a result of a compromise reached during the 1998 conference, whereby some delegations insisted that domestic law, especially that of the accused's nationality or that of the territorial State, should be directly applicable apart from general principles,[16] the Statute extended the sources available to the Court. The compromise was basically a middle ground, whereby such domestic law could,

[15] *Prosecutor v Furundzija*, Judgment (10 Dec 1998), Case No IT–95–17/1, (1999) 38 *ILM* 317 paras 182–86. See I Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester University Press, Manchester, 2002) 28.

[16] See P Saland, 'International Criminal Law Principles', in RS Lee (ed), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer, The Hague, 1999) 214–15.

if the Court deemed it appropriate, be included in the pool of sources. Article 21(1)(c) articulates the following sources, to be resorted to failing those in Article 21 (1) (a) and (b):

> [G]eneral principles of law derived by the Court from national laws of legal systems of the world, *including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime*, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and principles. [emphasis added]

A logical and realistic interpretation of this clause suggests that in the event the Court is unable to fill a legal lacuna on an issue pertaining to international law — in both a broad and narrow sense — it may turn to individual legal systems. Therein, the Court may not choose a particular law or provision for application or transplantation before the ICC; rather, it is bound to extract relevant principles from the rules of the legal system under consideration. This is an exercise that may turn out to be so cumbersome that it negates the initial utility of recourse to a particular legal system. A more realistic interpretation would reflect ICTY practice such as where the ad hoc tribunals take heed of the sentencing practices and legislation of the former Yugoslavia and Rwanda, unless these conflict with general international law.[17] The ICC could extend the direct application of domestic law to determination of procedural matters that have taken place on the territory of a State, where this is relevant to ICC proceedings (for example, in relation to testimony and other evidence taken by the surrendering State), as well as to elements of defences that are ill-defined in the Statute, as will become apparent in this chapter.

Let us now proceed to examine in detail the substantive defences set out in the Statute, that is, superior orders, duress/necessity, self-defence, intoxication, mistake of fact and law, and mental incapacity. As a matter of safeguard against abuse by the defendant of the rule enunciated in Article 31(3), the Rules of Procedure and Evidence require that the defence give notice to both the Trial Chamber and the Prosecutor if it intends to raise a ground for excluding responsibility under Article 31(3). This must be done 'sufficiently in advance of the commencement of the trial'.[18] Following such notice, the Trial Chamber shall hear the Prosecutor and the defence before deciding whether the defence can raise a ground for excluding criminal liability. If the defence is eventually permitted to raise the ground, the Trial Chamber may grant the Prosecutor an adjournment to address that ground.[19]

[17] Art 24(1) of the ICTY Statute states that, '[i]n determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia'.
[18] Rule 80(1), ICC Rules of Procedure and Evidence.
[19] *Ibid* rr 80(2) and (3).

3. SUBSTANTIVE DEFENCES

3.1 Superior Orders

Article 33

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility, unless:
   (a) the person was under a legal obligation to obey orders of the Government or the superior in question;
   (b) the person did not know that the order was unlawful; and
   (c) the order was not manifestly unlawful
2. For the purposes of this Article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Since discipline is the cornerstone of military doctrine, it follows that obedience to superior orders is paramount. But a subordinate receiving an order may find that the order conflicts with his or her duty to obey criminal or military law. From the point of view of a strict hierarchy of rules, a neutral observer will have little problem in articulating an objection to the order, but for the ordinary military subordinate used to the discipline described, the choice is not obvious. The dilemma is simple; submit to the illegal order and you commit a crime, defy the order and face the wrath and penalties imposed by your superiors.[20] One should not forget that in time of war disobedience often carries a penalty of summary execution, with little time or credence given to the subordinate to make his or her claim during the exigencies of conflict. These thoughts represent personal moral imperatives. What sense does the law make of all this?

From the time that national authorities prosecuted violations of the *jus in bello*, and were subsequently faced with claims of 'superior orders', they themselves first encountered the dilemma of the military subordinate. As a result, two schools of thought emerged on the subject. The first, premising their argument primarily on notions of justice, opined the invocation of superior orders to constitute a complete defence,[21] while the second articulated a doctrine of 'absolute liability'

[20] Y Dinstein, *The Defence of Obedience to Superior Orders in International Law* (Sijthoff, Leyden, 1965) 5–7. See generally, MJ Osiel, 'Obeying Orders: Atrocity, Military Discipline, and the Law of War' (1998) 86 *California Law Review* 939; see generally, MJ Osiel, *Obeying Orders* (Transaction Publishers, London, 1999).

[21] 1845 Prussian Military Code. See also the adoption of the doctrine of '*respondeat superior*' by Oppenheim in his early treatises. L Oppenheim, *International Law: Disputes, War and Neutrality* (Longmans, London, 1912) 264–70; H Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31 *California Law Review* 556–58.

which gave no merit to claims of obedience.[22] Amidst these two extremes a more conciliatory position was adopted at both a national and international level. From the 1845 Prussian Military Code to the *Leipzig* trials at the close of World War I a consistent principle has emerged recognising the relevance of 'moral choice' in such circumstances. In accordance with the 'moral choice' principle, a subordinate would be punished, if in the execution of an order, he or she went beyond its scope, or executed it in the knowledge that it related to an act which was or which aimed at a crime.[23] The German Supreme Court affirmed this principle at the *Leipzig* trials, on the basis of Article 47 of the 1872 German Military Penal Code, which provided that superior orders were of no avail where subordinates went beyond the given order or were aware of its illegality.[24] In the *Dover Castle* case, the defendant Karl Neuman, the commander of a German submarine, claimed he was acting pursuant to superior orders when he torpedoed the Dover Castle, a British hospital ship. According to their orders the Germans believed that Allied hospital ships were being used for military purposes in violation of the laws of war. The accused was acquitted because he was not found to have known that the Dover Castle was not used for purposes other than as a hospital ship.[25] In the *Llandovery Castle* case, however, involving the torpedoing of a British hospital ship and subsequent murder of its survivors, the Supreme Court did not readily accept a defence of superior orders. It emphatically pointed out that although subordinates are under no obligation to question the order of their superior officer, this is not the case where the 'order is universally known to everybody, including also the accused, to be without any doubt whatever against the law'.[26]

Thus, the 'moral choice' principle encompassed an objective test, whereby an order whose illegality was not obvious to the reasonable man and was executed in good faith could be invoked as a viable defence. This was later also termed the 'manifest illegality' principle. Where the subordinate is aware of the unlawfulness of the order, although the order itself is not manifestly illegal, the subjective knowledge of the accused is relevant in the attribution of liability, as any other conclusion would lead to absurdity. It would, moreover, disregard the significance of *mens rea* in the definition of crimes. Similarly, no irrebuttable presumption exists in this field of law suggesting that universal knowledge of the order's illegality will automatically prove the accused's awareness of it.[27] Following the end of World War II, both the

[22] *R v Howe and Others* [1987] 1 AC 417, per Lord Hailsham, at 427. See also Dinstein, above n 20 at 68–70. Contemporary expressions of this doctrine, but for the varying reasons described below, are also Art 8 of the Charter of the International Military Tribunal at Nuremberg, Art II(4)(b) of Control Council Law No 10, as well as Arts 7(4) and 6(4) of the ICTY and ICTR Statutes respectively. In all these instruments, a successful plea of superior orders could serve to mitigate punishment.
[23] *USA v Ohlendorf and Others* [*Einsatzgruppen* case] (1948) 15 ILR 656.
[24] Cited in *USA v Von Leeb and Others* [*High Command* case] (1949) 15 ILR 376.
[25] *Dover Castle* case (1921) 16 *AJIL* 704.
[26] *Llandovery Castle* case (1921) 16 *AJIL* 708.
[27] Dinstein, above n 20 at 28.

'moral choice' and the 'manifest illegality' test were abandoned by the Allies in their quest for swift military justice. As already mentioned, the doctrine of absolute liability prevailed in the Nuremberg Charter, Control Council Law No 10, and did not feature either in the Genocide Convention[28] or the 1949 Geneva Conventions.[29] On this basis alone, it has wrongly been asserted that since 1945 the defence of superior orders has been abrogated.[30] The fallacy of this argument will be proven shortly. For one thing, international tribunals constitute self-contained systems, whose sources of law do not necessarily follow the evolution of law outside of that system; rather, their legal route is drawn by their drafters. The Nuremberg Tribunal was not an exception to this rule, since the Allies did not want to be faced with mass claims of superior orders, all leading back to Hitler. However, the Tribunal took it for granted that the accused all were fully aware of the orders received, and stated:

> The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether *moral choice* was in fact possible [emphasis added].[31]

Similarly, subsequent World War II military tribunals, especially those applying Control Council Law No 10, while upholding the validity of Article II (4)(b), did not fail to mention that to plead superior orders one must show an excusable ignorance of their illegality.[32] The tribunals in these cases made it clear that if a defence was available to an accused under such circumstances, that would be the defence of duress, which would be brought about as a direct consequence of the severity and force of the order. The concept of duress will be examined below in another section. Further evidence of the existence of the duress-related 'moral choice' doctrine re-emerged in 1950, when the International Law Commission (ILC) codified, after requested by the General Assembly, the Principles of the Nuremberg Charter and Tribunal.[33] Principle IV provided, or more importantly, reaffirmed, that obedience to superior orders did not relieve the subordinate from responsibility, provided a 'moral choice' was in fact available. The concept of 'moral choice' in Principle IV is somewhat removed from the defence of superior orders, constituting as it does a particular defence in

[28] 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.
[29] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (No I), 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Ship-wrecked Members of Armed Forces at Sea (No II), 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (No III), 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (No IV), 75 UNTS 287.
[30] P Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law'(1999) 10 *EJIL* 172. For the better view that the ICC Statute provision on superior orders is in conformity with customary law, see C Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied' (1999) 836 *IRRC* 785.
[31] IMT Judgment, 22 (1946), at 466.
[32] *Einsatzgruppen* case, above n 23; *In re Eck and Others* [*The Peleus*] (1945) 13 AD 248.
[33] Reprinted in Yearbook of the International Law Commission (2nd session, 1950), vol II, 374.

its own context.[34] Unlike the 'manifest illegality' principle associated with the defence of superior orders, where personal knowledge of the illegal nature of the order is crucial, the application of the 'moral choice' principle assumes from the outset such knowledge, predicating the defence instead on the possibility of action. After an intense Cold War period fuelled by endless disagreements, the final version of the Draft Code of Crimes against the Peace and Security of Mankind,[35] finally shelved in 1996, reverted to the absolute liability doctrine.[36] Interestingly, the Draft Code, especially in its final stages from 1981–96, was a significant influence on the ICC Statute, which as shall be seen, did not eventually adopt the stringent absolute liability doctrine.[37]

The evolution of national case-law since the end of World War II has seen the domination of the principle of 'manifest illegality'. This was clearly articulated in the judgment of the District Court of Jerusalem in the *Eichmann* trial, confirmed also by that country's Supreme Court.[38] Moreover, the United States, who is not a party to the ICC Statute, has consistently upheld the defence of superior orders under strict application of the manifest illegality test in both the Korean[39] and the Vietnam wars.[40] The 1956 US Military Manual, in fact, not only recognises the plea of superior orders as a valid defence,[41] it also obliges courts to take into consideration the fact that subordinates 'cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received'.[42] Similarly, the Canadian Supreme Court in the *Finta* case recognised the defence of superior orders to war crimes and crimes against humanity as having been incorporated in the Canadian criminal justice system, and firmly accepted the manifest illegality rule.[43]

We have already made reference to the fact that Article 33 of the ICC Statute permits, subject to certain stringent conditions, a defence of superior orders. Because of the divergence of doctrine — from absolute liability to manifest illegality before international and domestic tribunals — it is worthwhile examining the process leading to Article 33 from the purview of the participating States. During the 1996 PrepCom it was generally felt that the absence of the defence in

[34] This is confirmed by the fact that while the first ILC Rapporteur on the Draft Code of Crimes submitted his report in 1950 suggesting the viability of the defence of superior orders under certain circumstances, a subsequent report submitted in 1951 adopted the 'moral choice' principle found in Principle IV. See Dinstein, above n 20 at 241–51.
[35] UN Doc A/CN4/L522 (31 May 1996).
[36] Draft Art 5.
[37] Art 33, ICC Statute.
[38] (1962) 36 ILR 277.
[39] *United States v Kinder* 14 CMR 742, 776 (AFBR 1954).
[40] *United States v Calley* 46 CMR 1131 (1973), aff'd, 22 USCMA 534, 48 CMR 19 (1973). See also JJ Paust, 'My Lai and Vietnam: Norms, Myths and Leader Responsibility' (1972) 57 *Military Law Review* 99.
[41] US Dep't of Army FM 27–10, The Law of Land Warfare (1956). In accordance with para 509(a) the defence exists as long as the accused 'did not know and could not reasonably have been expected to know that the act ordered was unlawful'.
[42] FM 27–10, para 509(b).
[43] *R v Finta* (1994) 104 ILR 284.

three seminal contemporary instruments, that is the ICTY and ICTR Statutes, as well as the Draft Code, rendered any discussion on the matter redundant. With the insistence of Canada and France as regards the requirement of knowledge, supplemented with the 'manifest illegality' criterion, the matter gradually resurfaced.[44] By December 1997 the inclusion of the defence had gained strong support, but disagreement remained over the quantum of 'knowledge' required and whether or not the defence should cover orders received from the Security Council.[45] There was strong support, however, for excluding the defence vis-à-vis crimes against humanity and genocide.[46] During the Rome conference the two opposing schools of thought clashed for the final time. The USA and Canada vehemently argued that the defence of superior orders, in those cases where the subordinate was not aware that the order was unlawful or where the order was not manifestly unlawful, was widely recognised in international law.[47] This proposal was particularly criticised by the United Kingdom, New Zealand and Germany who argued that in cases where superior orders could otherwise be invoked, an accused could raise a plea of duress and mistake of fact or law. Although the parties came up with a compromise formula agreed by an informal working group, which became the basis of Article 33, the German as well as other delegations were still unsatisfied as a matter of principle. Having thereafter the support of the USA and its NATO allies, the US proposal was adopted by the Committee of the Whole by consensus, and finally also by the plenary of the Diplomatic Conference.[48]

What emerged as Article 33 of the ICC Statute recognises the defence on the basis of the three qualifications that exist in customary international law. The first presupposes an existing loyalty or legal obligation, while the other two refer to the requisite standards of knowledge, consisting of both the subjective knowledge of the accused, and an objective test based on the 'manifest illegality' rule. The presumption of knowledge inserted in Article 33(2) seems to be irrebuttable. However, since the commission of genocide and crimes against humanity involve large scale action, often requiring minor operations in which the offender cannot always be expected to be aware of the eventual aim, justice necessitates this presumption to be a rebuttable one.

Let us now proceed to examine the defence of 'duress', which has a strong affiliation and is closely related to the defence of superior orders.

[44] Report of the Preparatory Committee, UN Doc A/51/22 (12–30 Aug 1996), Art Q, at 518, cited in M Scaliotti, 'Defences Before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility (Pt I)' (2002) 1 *ICLR* 111, at 135–36.
[45] During the March–April 1998 PrepCom, the proposal absolving subordinates from liability for orders received by the Security Council was dropped. *Ibid.*
[46] Decisions Taken by the Preparatory Committee at its Session held from 1–12 Oct 1997, UN Doc A/AC249/1997/L9/Rev1 (1997), Art M, at 18–19, cited in Scaliotti, *ibid.*
[47] UN Doc A/CONF183/C1/WGGP/L2 (16 June 1998), *ibid* at 137.
[48] Scaliotti, above n 44.

3.2 Duress and Necessity

Article 31(1)(d)

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
   (d) the conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) either made by other persons; or (ii) constituted by other circumstances beyond that person's control.

The poor drafting of Article 31(1)(d) has its roots not in the ignorance of its drafters, but rather on the divergent and inflexible views of the negotiating parties. It, therefore, reflects, like many provisions in the Statute, a clause founded among other things on compromise. What is not clear in the text of subparagraph (d) is primarily the failure to distinguish between 'duress' and 'necessity' as two related but distinct concepts, as well as the question whether this defence is also available to a charge of murder. The legislative history of the Statute suggests that although initially the two concepts were included in different articles, by 1998 they had been moved to a single provision where, moreover, 'necessity' had been subsumed within the concept of 'duress'.[49] Furthermore, during discussions before the Committee of the Whole, it was decided that the combined defence encompassed in Article 31(1)(d) was available also to a charge of murder, since the prior requirement necessitating an intention not to cause death had been deleted.[50] Some isolated proposals to the effect that duress/necessity applied also in cases of threats to property were unanimously rejected.[51]

Subparagraph (d) offers a definition of an offence caused as a result of duress, where this 'result[s] from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person'. According to this provision, a person is exculpated from the underlying offence where a) the threat is not brought about by actions attributed to the accused, but by other persons, or as a result of circumstances beyond the control of the accused (necessity); b) the accused has taken all necessary and reasonable action to avoid this threat; and

[49] Saland, above n 16 at 207–8.
[50] Although under traditional English law, duress may never excuse the killing of an innocent person. See *R v Howe* [1987] 1 AC 417, and *Abbott v The Queen* [1977] AC 755.
[51] Saland, above n 16 at 208.

c) the accused does not intend to cause a greater harm than the one sought to be avoided. The ICTY Trial Chamber in the *Erdemović* case confirmed the conclusion of the post-World War II War Crimes Commission that duress constitutes a complete defence subject to the aforementioned conditions.[52] In fact, the ICTY recognised that one of the essential elements of the post-war jurisprudence was the 'absence or not of moral choice'. In the face of imminent physical danger, a soldier may be considered as being deprived of his moral choice, as long as this physical threat (of death or serious bodily harm) is clear and present, or else imminent, real and inevitable.[53] The ad hoc tribunal, moreover, spelled out certain criteria which are to be used by the Court in order to conclude whether or not moral choice was in fact available. These are: the voluntary participation of the accused in the overall criminal operation; the rank held by the person giving the order as well as that of the accused, which includes the existence or not of a duty to obey in a particular situation.[54]

Cassese has convincingly argued that since law is based on what society can reasonably expect of its members, it:

> [S]hould not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal behaviour falling below these standards.[55]

This philosophical approach to duress merits consideration because of its practical implications. In the *Erdemović* Appeals Decision, the Chamber agreed that no special rule of international law existed regulating duress where the underlying crime was the taking of human life. However, its members strongly disagreed on whether the general rule on duress should apply or whether some other domestic principle should be introduced. Judges McDonald and Vohrah unsuccessfully argued that in the absence of a special rule on duress, common law (as it turned out) was applicable, concluding thus that duress does not afford a complete defence to homicides. Judges Cassese and Stephen made the case that the general rule applies, which based on a case-to-case examination did afford a defence. The dissenting opinion of Judge Cassese that the general international law rule on duress be applied[56] was not only internationally respected but moreover influenced ICC developments. One of the essential elements in a successful plea of duress is that of proportionality (doing that which is the lesser of two evils). In practical terms this will be the hardest to satisfy, the burden of proof being on the accused, and may never be satisfied where the accused is saving his own life at the

[52] *Prosecutor v Erdemović*, Sentencing Judgment (29 Nov 1996), para 17. These were identified in the *Trial of Krupp and Eleven Others*, 10 LRTWC (1949), 147.
[53] *Ibid* para 18 citing post-World War II case-law.
[54] *Ibid* paras 18–19.
[55] *Erdemović* case, Appeals Chamber Decision (7 Oct 1997), Dissenting Opinion of Judge Cassese, at para 47.
[56] *Ibid* paras 12, 40.

expense of his victim. Conversely, where the choice is not a direct one between the life of the accused and that of his victim, but where there is high probability that the person under duress will not be able to save the life of the victim, the proportionality test may be said to be satisfied.[57] Although duress has been admitted as a defence against homicides,[58] post-World War II case-laws suggests that courts have rarely allowed duress to succeed in cases involving unlawful killing, even where they have in principle admitted the applicability of this defence. This restrictive approach has its roots in the fundamental importance of human life to law and society, which follows that any legal endorsement of attacks on, or interference with, this right will be very strictly construed and only exceptionally admitted.[59] The result would be different where the homicide would have been committed in any case by a person other than the one acting under duress.[60] This was the case with Erdemović who argued that had he not adhered to his superiors to execute Bosnian civilians, not only would he have been shot but others would have taken his place as executioners. In such cases the requirement of proportionality is satisfied because the harm caused by not obeying the illegal order is not much greater than the harm which would have resulted from obeying it.[61] This requirement of proportionality is clearly a subjective one, irrespective of whether the greater harm is in fact avoided.

The concept of necessity is broader than duress, encompassing threats to life and limb generally, and not only when they emanate from another person.[62] There is a subjective element in the definition of necessity in that the person should reasonably believe that there is a threat of imminent or otherwise unavoidable death or serious bodily harm to him or to another person. This should be combined with an objective criterion, that the person acted necessarily and reasonably to avoid the threat and moreover did not voluntarily expose himself or herself to the threat or danger. Since the defence of 'necessity' is encompassed within the general concept of duress in subparagraph (d), it necessarily follows that it used to merely qualify the 'threat or danger' giving rise to a defence of duress. Therefore, duress in subparagraph (d) is broader than the equivalent concept found in general international law. This is not, however, the end of the story, since, as already noted, Article 21(1)(c) of the Statute empowers the Court to delve into domestic law in cases where all other sources have failed to extract satisfactory solutions. In such cases the Court would find itself unable to extrapolate general principles because of the divergence of national legislation

[57] *Erdemović* Appeals Decision, Dissenting Opinion of Judge Cassese, at para 42.
[58] It was only in the *Holzer* case, cited *ibid* para 26, that both the Prosecutor and the Judge-Advocate contended that duress can never excuse the killing of innocent persons, relying however on English law.
[59] *Erdemović*, Appeal Decision, Dissenting Opinion of Judge Cassese, at para 43.
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid* para 14. See also British Manual of Military Law, *The Law of War on Land* (1958) para 630, which puts forward the case of one who in extremity of hunger kills another person to eat him or her.

on necessity between the common law[63] and civil law systems.[64] Depending on relevant circumstances, and after deeming it appropriate, the Court in a scenario of this type might very well be inclined to decide that the application of the principles of a particular legal system be applicable before the case at hand.

3.3 Self-Defence

> Article 31(1)(c)
> In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
> (c) the person acts reasonably to defend himself or herself or another person, or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this sub-paragraph.

A contemporary international definition of self-defence, provided by an international tribunal, is that propounded by the ICTY in the *Kordic* case. The tribunal pointed out that the notion of self-defence:

> May be broadly defined as providing a defence to a person who acts to defend or protect himself or his property (or another person or person's property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack.[65]

The Trial Chamber in that case noted that although the ICTY Statute did not provide for self-defence as a ground for excluding criminal responsibility, defences form part of the general principles of criminal law that are binding on the Tribunal. It went on to note that the definition of self-defence enshrined in

[63] The failure of this defence in English law is premised on unclear and ill-defined case law that requires reinterpretation. In the classic case of *Dudley and Stephens* (1884) 14 QBD 273, necessity was not upheld to a charge of murder where a cabin boy was eaten by other shipwrecked crew members. The justification for the decision, however, is not clear. That case did not say that a deliberate killing could not be justified, only that a person could not justifiably kill an innocent to save his life. 'Neither did it say that a deliberate killing could not be excused, only that an excuse would not be available where there was no immediate necessity'. Wilson, above n 13 at 289.

[64] Civil law systems generally allow this defence. See eg, Arts 122–27 of the French Penal Code, and Art 54(1) of the Italian Penal Code, cited in Scaliotti, above n 44 at 143–45.

[65] *ICTY Prosecutor v Kordić et al* [*Kordić* case], Judgment (26 Feb 2001), Case No IT–95–14/2–T, para 449.

Article 31(1)(c) of the ICC Statute reflects provisions found in most national criminal codes, 'and may be regarded as constituting a rule of customary international law'.[66]

Despite this general definition which is almost identical to that found in the ICC Statute, there are issues related to this defence that are not straightforward. These problem areas include the relationship between the UN Charter and self-defence,[67] the invocation of self-defence with regard to property, proportionality, and whether force can be used in cases of pre-emptive self-defence or only when the danger is present or imminent. We shall examine each of these issues individually.

Where a State entity commits an act of aggression in violation of Article 2(4) of the UN Charter, that country will incur responsibility pertaining to States. Moreover, under the ICC Statute,[68] if a definition on aggression is agreed, the initiators of the aggression could be held criminally liable. Since a definition of aggression is bound to be premised on the relevant provisions of the UN Charter, persons in the highest civilian and military echelons of a State apparatus resorting to the use of military force will be able to invoke self-defence (as a claim aiming to exclude criminal liability) only where the force used is lawful, that is, it is permitted under Articles 42 and 51 of the UN Charter. What is more, such force, even if lawful, will exclude criminal liability only where it satisfies the requirements for self-defence, that is, it is proportionate, the danger is present, and the response does not constitute a crime against humanity or genocide. Article 31(1)(c) is clear that:

> The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility [under the rubric of self-defence].[69]

It is clear under the terms of subparagraph (c) that it is open to persons engaged in legitimate self-defence to commit war crimes, even on a large scale, including the use of nuclear weapons,[70] as long as the danger is present and the response is proportionate.

As for pre-emptive self-defence, there is no indication in the Statute nor in the *travaux preparatoires* that it is considered legitimate. This is indicated by the

[66] *Ibid* para 451.
[67] Of particular relevance is the concept of unlawful use of force under Art 2(4) of the UN Charter, as well as legitimate responses to such force in accordance with Arts 42 (collective enforcement action) and 51 (unilateral or collective self-defence).
[68] Art 5(2), ICC Statute.
[69] Enunciated also in the *Kordić* judgment, above n 65, para 452.
[70] The Advisory Opinion of the ICJ on the *Legality of the Use or Threat of Use of Nuclear Weapons*, (1996) 35 *ILM* 809, would give credence to this view. Although nuclear weapons have been excluded from the ICC Statute, their use might constitute an offence under Art 8(2)(b)(iv), which prohibits intentional attacks causing incidental loss of civilian life or property, or disproportionate widespread, long term and severe damage to the environment in relation to the concrete and direct overall military advantage anticipated.

words 'imminent', referring to the use of force against the defender, as well as from the fact that the response must be proportionate, thereby recognising that some form of force has already been used.

Although most delegations raised reservations as regards the availability of self-defence to defend property, at the insistence of the United States and Israel, reference to this effect was eventually included. Subparagraph (c) reflects the unanimous feeling of all delegates that the commission of crimes against humanity and genocide can never justify the protection of property. Self-defence with regard to property can only be raised where the defensive action involved the perpetration of war crimes, where the property concerned 'is essential for the survival of the person or another person or property which is essential for accomplishing a military mission'. Thus, stringent and narrow criteria apply. The result is not a happy one, at least as far as the second part of the sentence is concerned, since under customary international law the concept of 'military necessity', which is akin to 'property which is essential for accomplishing a military mission',[71] does not permit the commission of war crimes.[72] Since the concept of 'belligerent reprisals' is not encompassed within the notion of self-defence,[73] it stretches the imagination to conceive of a war crime committed in defence of property essential for military operations, which is moreover proportionate! The only possible scenario would be where an unlawful attack against military property was repelled with unlawful weapons used against the attackers — the defending party possessing no other or appropriate weaponry — or where protected property was counter-attacked as a result. The use of unlawful weapons or the perpetration of attacks in defence of such property against innocent civilians is not only contrary to *jus cogens*, it is certainly not warranted by any construction of the principle of 'proportionality'.[74]

As far as the decision to engage in defensive action is concerned (which includes the determination that force has been used), the test applied in subparagraph (c) is an objective one. The person must act 'reasonably'. This will depend on relevant external circumstances, but the Court is not excluded from assessing the personal state and characteristics of the accused, on the basis of domestic law permitting the evaluation of such subjective criteria, in accordance with Articles 31(3) and 21(1)(c). Similarly, the degree of force applied is predicated on the objective test of proportionality.

[71] *Kordić* Judgment, above n 65 at para 451.

[72] Art 51(4) and (5) of the 1977 Protocol I [Protocol I] to the Geneva Conventions of 1949 (International Armed Conflicts), 1125 UNTS 3. Kalshoven has correctly argued that deviations from the rules contained in Protocol I cannot be justified with an appeal to military necessity, unless a given rule expressly admits such an appeal. See F Kalshoven, *Constraints on the Waging of War* (Nijhoff, Dordrecht, 1987) 73.

[73] It is unlawful to subject civilians to belligerent reprisals, in accordance with the customary rule encapsulated in Art 51(6) of the 1977 Protocol I.

[74] Y Sandoz *et al* (eds), *Commentary on the Additional Protocols of 8 June 1977* (Nijhoff, Geneva, 1987) 625–26.

3.4 Intoxication

Article 31(1)(b)

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
   (b) the person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court.

Legal systems usually distinguish between voluntary and involuntary intoxication. Moreover, English law differentiates, for the purposes of the present discussion, between *mens rea* offences and non-*mens rea* offences. The former, known also as specific intent offences, are characterised by the requirement of intention in the definition of their mental element, where adducing evidence of voluntary intoxication will negate *mens rea*, although voluntary intoxication does not generally excuse criminal liability. For crimes of negligence, strict liability and crimes of recklessness, adducing such evidence will be ineffective. Likewise, involuntary intoxication does not generally excuse criminal liability, unless the effect of the involuntary intoxication is to negate the *mens rea* of the underlying crime, but this would find application only with regard to crimes of specific or basic intent.[75] A claim of involuntary intoxication would be unsuccessful with regard to crimes of negligence and strict liability.[76] The ICC Statute does not purport to make this distinction, but it is clear that all the offences in the Statute require some form of intent, although depending on the form of participation in these offences strict liability may suffice.[77] The terms of the defence of intoxication contained in Article 31(1)(b) are simple, and the provision does not make such a distinction of *mens rea* and strict liability offences. Intoxication will be considered involuntary under English law if it is coerced,[78] or the accused entirely mistakes what he is consuming. Doubt exists whether a self-induced mistake renders intoxication involuntary, or whether the mistake must be induced by the unlawful acts of another person. Both causes should excuse as long as the accused is deprived of a fair opportunity to conform.[79]

[75] Crimes of basic intent in English law are those that can be committed recklessly, including those forms where foresight or awareness must be proved. This encompasses assault, malicious wounding, manslaughter and rape, among others. See Wilson, above n 13 at 258.
[76] Wilson, *ibid* at 253–56.
[77] See I Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *AJIL* 573 at 586, regarding liability of superiors who are commanders of occupied territories.
[78] GR Sullivan, 'Involuntary Intoxication and Beyond' (1994) *Crim LR* 272.
[79] Wilson, above n 13 at 254–55.

The aforementioned state of the law in England reflects in general terms the practice of most states, and hence its inclusion in Article 31(1)(b) of the ICC Statute does not depart from these principles. Thus, involuntary intoxication will excuse liability where *mens rea* is negated as a result, whereas involuntary intoxication will only produce the same effect if,

> [T]he person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime.[80]

3.5 Mistake of Fact or Mistake of Law

> Article 32
> 1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
> 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Article 33.

There were widely divergent views on this provision. Two options were initially inserted on whether mistake of law or fact should be a ground for excluding liability or not. Some delegations were of the view that mistake of fact was not necessary because it was covered by *mens rea*.[81] The view eventually accepted was that both mistake of fact and law constitute valid grounds for excluding criminal responsibility only if the mistake under consideration negates the mental element required by the crime.[82] However, a mistake of law 'as to whether a particular type of conduct is a crime' shall not be a ground for excluding criminal responsibility.[83] Paragraph 2 of Article 32, moreover, makes the necessary connection between mistake of law and superior orders. Where a subordinate receives an unlawful order which is not manifestly unlawful and which he or she is under an obligation to obey, the subordinate will be exculpated where he or she believed the order to lie within the confines of legitimacy.

[80] During the preparatory discussions two approaches to voluntary intoxication surfaced: if it was decided that voluntary intoxication should in no case be an acceptable defence, provision should none the less be made for mitigation of punishment with regard to persons who were not able to form a specific intent, where required, towards the crime committed due to their intoxication. If voluntary intoxication were to be retained as a valid defence, as was finally accepted, an exception would be made for those cases where the person became intoxicated in order to commit the crime in an intoxicated condition. UN Doc A/CONF183/2/Add1 (14 April 1998), 57.
[81] *Ibid* 56–57.
[82] Art 32, ICC Statute.
[83] Art 32(2), ICC Statute.

A situation not covered in Article 32 is that of the doctrine of 'transferred intent'. Where A plans to kill B, but mistakenly assumes C for B, and proceeds to kill C, A's mistake as to a charge of murder is irrelevant. His mistake did not prevent him from forming *mens rea* for the crime of murder. The 'transferred intent' doctrine should also find application before the ICC in situations analogous to the conduct just described. As for the applicable test for either a mistake of fact or of law, the wording of the Statute suggests that this is a subjective one. This is in line with English law, for example, where mistakes as to justificatory/definitional defences[84] need only be honest.[85]

3.6 Mental Incapacity

Article 31(1)(a)

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
   (a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.

A defence of mental incapacity necessarily develops and evolves alongside medical/psychiatric advances. Although this is recognised in domestic legal systems, in essence because serious mental incapacity negates the mental element of crime, law-making institutions and courts are not bound in incorporating such scientific evidence into the criminal law. Article 31(1)(a) of the ICC Statute exculpates from criminal responsibility where the defence of mental incapacity is proven. However, besides a general qualification of the scope of mental incapacity, none of the variants recognised in the different legal systems are employed, and for good reason. In the limited spatial confines of the PrepCom, agreement would have been impossible, and by that time, paragraph 3 of Article 31 had been inserted, or was imminent, whereby the Court could *proprio motu* derive any additional appropriate defence by reference to general principles of law. In fact, it is very likely that the elaboration of this defence before the ICC will depend almost exclusively on such principles.[86]

The defence was raised in the *Celebici* case, where an ICTY Trial Chamber established a two-tier test of 'diminished responsibility'. This consists of an

[84] That is, defences operating within the parameters of the offence definition, such as consent.
[85] *Williams* (1984) 78 Cr App R 276; *Beckford v R* [1988] AC 130. See Wilson, above n 13 at 203.
[86] The lack of international jurisprudence was also evident during the drafting of the ICTY Statute, where the UN Secretary-General's Report, although silent on the specific issue, left it to the Tribunal to decide the fate of 'mental incapacity, drawing upon general principles of law recognised by all nations'. UN Doc S/25704 (1993), reprinted in (1993) 32 *ILM* 1159, at para 58.

'abnormality of mind' which the accused must be suffering of at the time of the crime, which must moreover 'substantially impair' the ability of the accused to control his or her actions.[87] This test was essentially constructed on the basis of English law.[88] On the facts of the case, the Court although recognising that the accused Landžo suffered from an abnormality of mind, it rejected his claim because in its opinion he failed to prove that the impairment was substantial. The basis of this judgment does represent at a minimum the incorporation of the defence in the various legal systems, and as such was deemed appropriate for the purposes of the ICC Statute. It may successfully be raised where:

> The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.

It is uncertain whether this may serve as a complete or partial defence, but there is no reason why both cannot be applicable. As for the burden of proof, based on discussions in previous sections of this chapter, this is an affirmative defence whose elements must be raised and satisfied by the accused on a balance of probabilities.[89]

In its determination of the factual criteria relating to this defence, the Court will have recourse to expert witnesses, provided by both parties,[90] and also from a list of experts approved by the Registrar, or an expert approved by the Court at the request of a party.[91] This intricate interplay between law and psychiatry/forensics, coupled with a) the relatively wide definition of Article 31(1)(a), and b) the liberal rules on the production of evidence (as long as probative value can be demonstrated), ensures that the role of technical consultants will be a substantial guide for the Court.[92]

4. INADMISSIBLE DEFENCES

As already explained, the Court may allow the introduction of defences that are not provided for in the Statute. These would most probably be derived from domestic criminal justice systems, developed and refined through the advancement of medico-legal processes. The Statute clearly excludes two possible defences; that of the passing of a statute of limitations, in Article 29, and that of immunity granted under treaty, custom or domestic law, in accordance with Article 27. The former is in any event grounded in treaty law,[93] as indeed in

[87] *ICTY Prosecutor v Delalić et al* [*Celebici* case], Judgment (16 Nov 1998), Case No IT–96–21–T, paras 1165–70.
[88] *R v Byrne* (1960) 3 All ER 1, at 4.
[89] *Celebici* Judgment, above n 87 at paras 78, 1160, 1172.
[90] Rule 135 (1), ICC Rules of Procedure and Evidence.
[91] Rule 135 (3), *ibid.*
[92] See generally, P Krug, 'The Emerging Mental Incapacity Defence in International Criminal Law: Some Initial Questions of Implementation' (2000) 94 *AJIL* 317 at 322–35.
[93] See above n 7.

customary law, whereas the latter is not self-evident. The ICC Statute establishes a regime of immunity (or the exclusion thereof), apart from the existing regime under customary and treaty law, which would in certain cases preclude other courts from exercising jurisdiction over such offences. Therefore, this is an exceptional regime, and the defence of immunity that could be raised in accordance with customary law is inadmissible.

The defence of *tu quoque* (literally, 'you also') is moreover inadmissible. First raised and rejected in subsequent World War II military trials, it seeks to demonstrate that although the accused committed the charged acts, these acts were committed in retaliation of similar crimes committed by the forces of the prosecuting State. Thus, the Germans argued that the USSR and the Allies conducted indiscriminate bombing raids during World War II, and so if they were not prosecuted, then the Germans should not be either.[94] The ICTY Trial Chamber in *Kupreskić* had a chance to further elaborate the inadmissibility and the *tu quoque* defence. In that case, the accused was a member of the Bosnian-Croat paramilitary group HVO, which was found responsible for the massacre of the Bosnian-Muslim village of Ahmici, resulting in the murder of 116 civilians and the obliteration of the village itself. The accused argued in the alternative that Croatian villages had been attacked in similar manner by Muslim forces. The Chamber pointed out that *tu quoque* was incompatible with international law for two reasons: a) because retaliation (reprisals) against civilian targets is illegal, and; b) because international humanitarian law is not based on contractual obligations, but is instead establishes *erga omnes* obligations vis-à-vis the entire international community.[95]

5. CONCLUSION

The ICC Statute recognises a number of defences that existed under customary law, such as that of superior orders, duress, necessity and self-defence, as well as others that are found predominantly in domestic criminal laws, such as intoxication and mental incapacity. The Court has the discretion to introduce other defences that do not appear in the Statute, if it finds this appropriate, so it is possible that other defences that have surfaced in a number of jurisdictions, such as the battered wife syndrome, to make their appearance before the ICC docket. What, however, distinguishes a defence from all other assertions that may perhaps be aimed at disproving the prosecution's evidence, is that the invocation of a defence, such as those listed in the ICC Statute, results in the reversal of the burden of proof regarding the particular point raised in the defence claim from the prosecution to the accused. In all other cases, the onus of proving particular facts is on the prosecution.

[94] *United States v Von Leeb* (*High Command* case), 12 LRTWC 1, at 64.
[95] *ICTY Prosecutor v Kupreskić*, Judgment (14 Jan 2000), Case No IT–95–16, paras 515–20.

PART V

Evidence and Victims

11

Evidence Before The ICC

KEVIN R GRAY[1]

1 INTRODUCTION

THIS CHAPTER WILL explore how the ICC will deal with matters of evidence. The topic of evidence before international tribunals in general will be first explored. International tribunals generally lack detailed rules of evidence, retaining a great deal of discretion for the judges to apply the law to the relevant facts. This contrasts sharply with international criminal courts that are governed by extensive rules on evidence and procedure. Such rules represent a hybrid of common and civil law traditions, which can differ greatly on questions of admissibility. The experience of the ad hoc tribunals appears to bear a strong influence in designing the rules of evidence for the ICC.

The matter of evidence before the ICC is a significant factor in its development as an effective judicial institution. How facts are proven can have a significant bearing on the liberty of the accused. By crafting predictable and fair rules for the ICC to follow, this can impact on the delivery of justice.[2] Moreover, the development of rules and procedures on evidence demonstrates the sophistication of the tribunal, lending symbolic legitimacy to the tribunal itself. The original international criminal tribunals at Nuremberg and Tokyo contained only a small cluster of rules of evidence with little countenance to the rights of the accused.[3] However, both international human rights law and international humanitarian law have rapidly evolved, requiring a much more comprehensive approach to trying individuals accused of committing international crimes. The impact of the former can have a strong bearing on how a trial proceeds with

[1] I would like to express thanks for the valuable research efforts of Laure Huntzbuchler and Sabrina Mahati who contributed greatly to the completion of this chapter.

[2] PL Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia' (2000) 11 *EJIL* 569.

[3] The Nuremberg and Tokyo Tribunals were not bound technical rules of evidence, and were to apply 'to the greatest extent possible expeditious and non-technical rules of evidence' and 'administer any evidence which (they) deem to be of probative value'. See *Charter of the International Military Tribunal*, Arts 18–21, annexed to 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers', 8 Aug 1945, 56 Stat 1544, 82 UNTS, p 284 and *Charter of the International Military Tribunal for the Far East*, Art 13, 19 Jan 1946, T/AS No1589, 4 Bevans 20 (as amended on 26 April 1946, 4 Bevans 27).

rulings aiming for consistency with international human rights obligations having a determinative value.

The ICC *Rules and Procedure of Evidence (RPE)*[4] are assessed in this chapter, noting the experience gained in the ad hoc tribunals. What emerges in the *RPE* is a tension between prescriptively limiting the judges in ruling on evidentiary matters and instilling flexibility so that the judges can tailor their rulings to the unique circumstances of the case. This mirrors the differing perspectives to the operation of the trial between civil and common law systems. Some of the categorical exceptions to admissibility such as hearsay evidence, privilege and national security information are also canvassed, demonstrated the balancing between retaining certain limitations for legitimate purposes against the need to have all information before the tribunal.

Another issue raised is how to reconcile evidence before the ICC with the rights of the accused or even the victims. Does the egregious nature of the international crimes demand a rebalancing between the rights of the individual and international justice objectives of the prosecution? Moreover, the high sensitivity towards victims and witnesses to horrific events can influence the balancing of the rights of the accused with other interests.

2. EVIDENCE BEFORE INTERNATIONAL TRIBUNALS

The study of evidence before international tribunals has received recent attention.[5] Although the literature was rich in assessing the evidentiary regimes in domestic legal systems, there was little discussion about how matters of evidence were addressed by international tribunals. Some analysis existed that either looked at the practice of particular tribunals or certain types of evidence. However, no systematic and comprehensive research had been undertaken. The British Institute of International and Comparative Law study represented a new way forward in thinking about evidence, based on the realisation that matters of evidence can have a significant impact on the substantive development of the law. Decisions were becoming more dependent on the resolution of factual matters, irrespective of their complexity. Without the opportunity to review the evidence in a preliminary judicial proceeding or Court of First Instance, international tribunals are being asked to take on both trial and appellate court functions.

Comparing the experiences of various tribunals demonstrated various commonalities among those surveyed, in addition to the differences inherent with dispute settlement bodies that deal with varying subject-matter pursuant to their respective treaty mandates. Most international tribunals do not feature

[4] United Nations Doc PCN/CC/2000/INF3/Add1 of 12 July 2000.
[5] See *'Evidence Before International Tribunals — Pilot Project'* (2002, British Institute of International and Comparative Law, prepared for the Leverhulme Foundation).

complicated rules regarding evidence, instilling a considerable amount of discretion with the adjudicators. International tribunals have historically avoided formulating rules of this kind, relying instead on broad principles generally derived from domestic law. This can potentially lead to contrasting and, in some cases, contradicting procedures, partly attributed to the diversity of legal traditions that international jurists are left to draw from.

In contrast to other international bodies, evidence plays a prominent role in the decision-making of international criminal tribunals. Evidence is used to determine the criminal liability of an individual rather than the responsibility of a State. The facts that need to be proven are, depending on the nature of the charge, primarily based on the testimony of witnesses rather than the documentary evidence used to demonstrate that an international legal wrong by the State has been committed.

International criminal tribunals stand in firm distinction from domestic criminal proceedings. First, they can deal with particular crimes, such as genocide or crimes against humanity, that have a systematic character and, therefore, the corresponding *mens rea* character is difficult to prove. Investigations can be extremely time-consuming for these types of systematic crimes and involve a great number of witnesses. Secondly, the nature of the crimes itself may set it apart from other less heinous crimes, especially in relation to the traumatic impact on the witnesses and victims. Thirdly, there is no corresponding international police force that engages in the investigation and compilation of evidence. Most of this depends on the efforts of national authorities. As a result, the 'automatic transposition of domestic legal practices would be inappropriate since they do not operate in the context of prosecuting persons responsible for gross violations of international humanitarian law'.

2.1 Drafting of Rules

The UN Preparatory Commission was charged with the task of preparing draft texts of the *Rules of Procedure and Evidence and the Elements of Crimes (RPE)*. The PrepCom was set up in Resolution F of the *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*.[6] The need to have rules of evidence and procedure was critical, since the presentation, admissibility and disclosure of evidence can have institutional consequences, impacting on the efficiency and effectiveness of the Court's proceedings. Investigators would benefit from procedural guidance when amassing evidence so that their investigations can be tailored to adduce evidence that is admissible and carry the greatest weight. There is only one article in the *ICC Statute,* which deals with evidentiary matters.[7] The Preparatory

[6] See GA Res 53/105, 8 Dec 1998.
[7] Art 69.

Committee had the rules of evidence and procedure of the ad hoc tribunals before them, as well as benefiting from the interpretations and applications of such rules by the tribunals. This also included the analyses of the shortcomings or lacunae in the ICTY and ICTR procedures.[8]

Considering that the positions of the State parties would be primarily influenced by their legal systems and cultures, this complicated the negotiations. However, the rules for the ad hoc tribunals did form the initial template to base the discussions. These rules represented a hybrid of the two dominant legal systems in the world — civil and common law, with many of the other legal traditions playing a lesser role.[9] Some literary attention has been directed towards the idea of the compatibility of common and civil law systems in matters of evidence and procedure in international criminal law.[10] Although international criminal tribunals and the rules thereof reflect both the common and civil law traditions, it is arguable that because of this amalgamation of both legal traditions, it forms a system that is *sui generis.*[11]

There are 225 rules stipulated in the *RPE*, which were to enter into force after their adoption by a two-thirds majority of the members of the Assembly of States Parties.[12] Overall, the *RPE* are seen as providing more clarity in the rules and better certainty in procedure.[13] However, the *RPE* does not contain the comprehensive evidentiary rules that are seen in many national, especially common law, systems where evidentiary rules are in place to regulate the admission of evidence and avoid any prejudicial effect from such evidence before a jury.[14] The *ICC Statute* is to prevail when there is a conflict with the *RPE.*[15]

The experience of the ICTY and the ICTR is relevant in understanding the history behind the judge-made rules on evidence and procedure. In fact, the main source of inspiration for the *RPE* was the rules developed by the ad hoc tribunals.[16] Under the ICTY, the judges were to adopt rules of procedure and evidence for the

[8] K Roberts, 'Aspects of the ICTY Contribution to the Criminal Procedure of the ICC' in R May *et al* (eds), *Essays on ICTY Procedure and Evidence — In Honour of Gabrielle Kirk McDonald* (Kluwer, The Hague, 2001) 559–572 at 561.

[9] See LN Sadat, *The International Criminal Court and the Transformation of International Law: Justice for a New Millennium* (Transnational Publishers, New York, 2002). Amman, n 10 below, notes that the Sharia law on evidentiary rules in criminal law are not developed to the same degree as they are in the western legal traditions.

[10] See DM Amann, 'Harmonic Convergence? Constitutional Criminal Procedure in an International Context' (2000) 75 *Indiana L J* 809.

[11] See *Prosecutor* v *Delalić et al,* Decision on the Motion on Presentation of Evidence by the Accused, (1 May 1997) Case No IT–96–21–T. See also Robinson above n 2 at 580.

[12] Art 51 (1), *Statute of the International Criminal Court.*

[13] See Roberts above n 8 at 569.

[14] See International Centre for Criminal Law Reform and Criminal Justice Policy (2002) *International Criminal Court: Rules of Procedure and Evidence — Implementation Considerations,* (Vancouver, Canada) <http://www.icclr.law.ubc.ca/Publications/Reports/ICC%20Reports/RPE_2nd_ed_English.pdf> at 34.

[15] Art 51 (4)(5).

[16] H Friman, 'Inspiration from the International Criminal Tribunals when Developing Law on Evidence for the International Criminal Court', (2003) 2 *Law and Practice of International Tribunals.*

conduct of the proceedings before them, including the admission of evidence, the protection of victims and witnesses and other appropriate measures.[17] The rules could be amended at the initiative of a judge, the prosecutor or the Registrar and adopted if agreed to by a minimum ten judges at a plenary meeting of the Tribunal.[18] The rules were adopted by the judges on the basis of proposals submitted by States and organisations and by the judges themselves. Such participation allowed for consideration of the general principles of criminal procedure and rules of evidence that were recognised in different legal systems, without having to evaluate the merits of each one, so that the 'the moulding of rules of evidence and procedure which encapsulate fundamental principles specific to the trying of international crimes' could take place.[19] This was deemed essential considering that the rules governing the ad hoc tribunals were the first international criminal procedural and evidentiary codes ever adopted and therefore had no precedent to learn from in addressing all circumstances arising at trial.[20]

There were 125 rules that were adopted in advance of the establishment of the ICTY by the Security Council.[21] Some commentators note the inherent value of the ability of judges to amend the rules, considering that the, 'judges of the court are often in the best position to understand the needs of the institution whilst considering the balancing of the various issues in play — issues which should be primarily legal and not political'.[22]

The ability of judges to design new rules is preserved in the ICC. Amendments to the *RPE* can be made by any State party, judges acting by an absolute majority, or the prosecutor, although any amendments are not in force until it is adopted by a two-thirds majority of the members of the Assembly of the States Parties.[23] In urgent cases where the *RPE* does not provide for a specific situation, the judges can draw up provisional rules to be applied until it is adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.[24] With this element of political control, it can be expected that only a few amendments will arise through this process. What becomes problematic is the effect of the rules developed by the judges to deal with the exigencies of a situation where the *RPE* is silent, but which are subsequently not adopted by the Assembly of the Parties.

[17] Art 15 *ICTY Statute*. Where the rules of evidence did not provide any guidance, the Chamber was to apply, 'rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law', r 89(b), *ICTY Rules*. Amendments to the rules could be otherwise adopted if they received the unanimous approval of the permanent judges. See r 6(b), *ICTY Rules*.

[18] Rule 6(a), *ICTY Rules*.

[19] See G Boas, 'Comparing the ICTY and the ICC: Some Procedural and Substantive Issues' (2000) 48 *NILR* 267 at 273.

[20] See A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *EJIL* 158.

[21] UNSC Res 955 (8/11/94).

[22] See Boas above n 19 at 275.

[23] Art 51(2).

[24] Art 51(3). There must be a two-thirds majority among the judges.

Will this create grounds for an appeal from conviction since it may have impacted either the procedural protections for the accused (such as the right to a fair trial) or even the substantial proof of a fact that is prejudicial to the accused?

2.2 Flexibility versus Prescription

A conceptual difference between civil and common law legal traditions exists in relation to the admissibility of evidence. The former system appears to accept all evidence, followed by adjudication on its relevance. Common law jurisdictions conduct trials often before juries and, therefore, the disclosure of prejudicial evidence to the accused can irreversibly taint the objectivity of the jury members. Canons of evidence rules were built into the trial process so that certain evidence, where the probative value was outweighed by its prejudicial effect, would be inadmissible. Other rules were developed to deal with unreliable evidence and preclude the use of hearsay (information based not on the knowledge of the person giving evidence but on what was heard or based on a document) evidence or similar fact evidence (consistent pattern).

It has been argued that retaining more flexibility to admit all evidence will lead to a greater attainment of the truth.[25] Civil law systems differ from their common law counterparts, with the judges assessing the value of any evidence in its final determinations. The threat of potential adverse effects is absent without jury determination. Where the balance between the probative value and the prejudicial effect is grossly disproportionate, favouring the latter, the judge can attach little weight to the evidence, if not ignore it altogether. Relevancy and probative value are usually considered in tandem. As a result, with the application of similar judicial scrutiny as seen in common law courts, the same result is likely to be reached.

The practice of the ad hoc international criminal tribunals appeared to reveal a civil law tradition of admitting all evidence followed by determinations of relevance and reliability. The ICTY and the ICTR adhere more closely to the principle of *la liberté de la preuve* as understood in the French criminal law system.[26] All evidence is deemed to have probative value as long as it is relevant and is not affected by an 'exclusionary virus'.[27] Judges are deemed to be well equipped to frame their decisions based on the facts and weeding out the irrelevant evidence not needed to make their determination.

Under the ICTY, all relevant evidence deemed to have probative value is admissible.[28] A Chamber may exclude evidence where the probative value is

[25] See GA McClelland, 'A Non-Adversarial Approach to International Criminal Tribunals' (2002) 26 *Suffolk Transnational L Rev 26*.
[26] See Boas above n 19 at 265.
[27] *Prosecutor* v *Delalić, Mucić, Delić and Landžo,* Decision on the Prosecution's oral requests for the admission of exhibit 155 into evidence and for an order to compel the accused, Zradavko Muci, to provide a handwriting sample, (19 Jan 1998) Case No IT–96–21.
[28] Rule 89 (c).

substantially outweighed by the need to ensure a fair trial.[29] This has been used to avoid consideration of any evidence deemed to be wholly unreliable.[30] The ICTY has the power to rule on the relevance or admissibility of any evidence, taking into consideration the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.[31] The rules of evidence to be applied are ones that 'best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law'.[32] This discretion is preferred by the judges themselves, concerned with rules that hinder the ability to obtain the truth.[33]

However, the initial civil law predisposition of the ad hoc tribunals transformed into the codification of new rules and procedures, which were to guide future trials. There was some open criticism about the judicially initiated rules, which too closely resembled the common law traditions.[34] Others noted that the rules that were developed in the jurisprudence resembled the greater concentration of power for the judges in a civil law inquisitorial fashion.[35] The inherent ability of the judges to create new rules in light of the circumstances at trial was subject to criticism although Justice Cassese of the ICTY reported to the General Assembly that the power to amend the rules was necessary since it would be impossible for the first international criminal tribunal to have a perfect draft covering all the diverse issues that may come before the tribunal.[36] Absent such authority, the ICTY would not have been able to compose new rules to address the exigencies of the trial such as the need for video link testimony in light of balancing the rights of the accused with protections afforded to the victim.

Given the extensive experience of the ad hoc tribunals and the broad coverage of the *RPE*,[37] there may be less scope for a judge to identify areas where the existing rules are silent. The State Parties to the *ICC Statute* were cognisant of the unlimited check on judge-made rule-making. They therefore subjected new rules made at trial to review and approval by the Assembly of State Parties.[38] This might render

[29] Rule 89 (d).
[30] See *Prosecutor* v *Dario Kordić and Mario Cerkež,* Decision on Appeal Regarding Statement of a Deceased Witness, (21 July 2001) Case No IT–95–14/2–AR73 5 at 24. The Court, in another proceeding relating to the same defendants, ruled that if evidence is unreliable, it can neither be relevant nor have any probative value and is therefore inadmissible, see *Delalić et al,* Decision on the Admissibility of Evidence, (19 Jan 1998) Case No IT–96–21, para 17.
[31] *ICC Statute,* Art 69(4).
[32] See the *Tadić* Decision regarding Protective Measures for Victims and Witnesses, (10 August 1995) Case No IT–94–1–T, para 74.
[33] See R May and M Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha' (1999) 37 *Columbia J of Transnational Law* 727.
[34] J Dugard, 'Obstacles in the Way of an International Criminal Court' (1997) 56 *Cambridge Law Journal* 329.
[35] V Tochilovsky, 'Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the *Ad Hoc* Tribunals' (1999) 46 *Neth Int L Rev* 343.
[36] 132 *Bulletin of the International Criminal Tribunal for the Former Yugoslavia* 2 (18 Dec 1996).
[37] There are 225 rules under the *RPE* in comparison to the 152 rules governing the ICTY.
[38] Art 51(2).

it unlikely that the ICC judges will be inclined to adopt new rules under the urgent amendment provision.[39] However, Boas notes that the *ICC Statute* permits the Court to apply principles and rules of law as interpreted in its previous decisions, thus allowing for the development of new rules and procedure through its jurisprudence rather than formally adopting new rules.[40] Moreover, there is the residual application of rules from national systems[41] that might be used to fill the lacunae in the *RPE* or inform the exercise of judicial discretion.

The *RPE* reveals the preference for admitting all evidence followed by the judge's determination on probative value, reliability and relevance. However, the Trial Chamber still retains the power, on application of a party or on its own motion, to rule on the admissibility or relevance of evidence. Article 69(4) states that:

> The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

Furthermore, the Court has the power to 'request the submission of all evidence that it considers necessary for the determination of the truth'.[42] This instils a considerable degree of discretion for the free evaluation of evidence, or *intime conviction,[perhaps explain what this means]* found in civil law systems, to determine the weight to be accorded to such evidence, based on probative value, as opposed to whether the evidence is admissible.

There are some limitations to this outright discretion. For instance, the Court cannot consider evidence obtained in violation of the *ICC Statute* or internationally recognised rights in certain circumstances. Paragraph 4 of Article 69 does not contain an exhaustive list of factors to account for. Absent any more proscriptive criteria on the admissibility, relevance or reliability of evidence, there is a danger of inconsistent outcomes in each case even where similar evidence is considered. The lack of criteria may render it difficult for the Appeals Chamber to have a proper basis to challenge the discretion of the Trial Chamber whose ability to hear and assess the evidence first hand would be deferred to.

2.3 Restrictions on Admissibility

2.3.1 Hearsay Evidence

Hearsay evidence is normally not admissible in common law courts. This is based on its potential to undermine the accused's rights to challenge the evidence through cross-examination. The ICTY has permitted hearsay evidence subject to

[39] See Boas above n 19 at 275.
[40] *Ibid* at 276.
[41] See r 73, *RPE.*
[42] Art 69(3).

the tests of it being voluntary, truthful and trustworthy.[43] The ICTY has even gone further, recognising the utility of hearsay evidence. In *Kordić*,[44] the Court used the dossier approach, allowing the introduction of evidence of other persons who are not testifying in court through the testimony of a witness giving evidence in Court. The prosecution attempted to admit into evidence a dossier of evidence relating to the attack on the town of Tulica, which contained live maps, a video containing footage, eight witness statements, four court transcripts, exhumation documents, photographs and 13 photographic stills. A report prepared by an investigator from the Office of the Prosecutor, summarising the dossier, was also submitted. The investigator would be available for examination in Court but the persons giving the statements were not. The Chamber did not admit the statements by the witnesses as it constituted hearsay evidence untested by cross-examination. As a result, it had no probative value.[45] However, the Court was mindful of Rule 89(4) of the ICTY Rules, which allows for affidavit evidence proving facts in dispute and corroborating the testimony of another witness as long as the other party does not object within five working days after the witness' testimony. Where there is an objection, the witness can be called for cross-examination.[46]

In the *Tadić* case, the Trial Chamber noted that there was no 'blanket prohibition' on the admission of hearsay evidence, consistent with what occurs in national courts. Restrictions on the admission of hearsay were simply those founded upon the probative value of relevant evidence under Rule 89(d) as well as the requirement that the evidence is reliable. When considering reliability, the Court will consider whether the statements are 'voluntary, truthful and trustworthy'.[47] This approach was affirmed in the decision of the Trial Chamber in the merits stage of the *Tadić* case, where the Chamber concluded that hearsay did not operate to exclude evidence from a category of admissibility.[48] In the *Blaškić*[49] case, the Chamber added that the ICTY was a *sui generis* institution with its own rules of procedures, which do not transpose the rules of domestic legal systems. As a result, hearsay evidence rules were determinative since the tribunal can consider all relevant evidence.

2.3.2 Corroboration

There is no requirement for corroboration of evidence under customary international law, with the real test being whether the evidence's probative value

[43] See *Prosecutor* v *Aleksovski*, (16 Feb 1999) Case No IT–95–14/1–AR73.
[44] *Prosecutor* v *Kordić et al,* Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, (29 July 1999) Case No IT–95–14/2–T.
[45] Para 23. The Court added that the evidence could not be submitted under the Court's discretionary power to allow the entry of victims' statements pursuant to Rule 89 (C).
[46] Rule 94*bis*.
[47] *Aleksovski*, above n 43, para 16.
[48] Case No IT–94–1–T, at para 555.
[49] *Prosecutor* v *Blaškić* (5 November 1996) Case No IT–95–14–T.

substantially outweighs the need to ensure a fair trial.[50] The ICTY held that the rule against corroboration in cases of sexual assault does not imply that corroboration is required for other international crimes. The ICTY in *Akayesu* agreed with this ruling noting that single testimony can be the basis for a conviction as long as it is relevant and credible. However, this cannot interfere with the obligation to prove a case beyond a reasonable doubt.[51] Sole reliance on hearsay evidence to convict an accused could amount to a violation of human rights to a fair trial with the accused not afforded an opportunity to cross-examine.[52] Furthermore, hearsay evidence cannot be given the same weight as direct testimony of events witnessed first hand.[53]

The requirement of no corroboration is stated expressly under Rule 63.4 of the RPE. This rule is excepted in the cases of child witnesses so that a conviction cannot rest solely on their testimony. Although the ICC will most likely not require corroboration, they will still retain the flexibility to determine the credibility and reliability of the evidence, so that cases entirely based on questionable evidence cannot support a conviction.

2.3.3 Privilege

Rule 73 of the RPE stipulates rules governing privileged communications and information. Only a small number of privileges are affirmed. For instance, communications between a person and his or her lawyer are privileged.[54] Other professional relationships such as physician-patient,[55] counsellor-client and confessor-penitent are not specifically provided for. Moreover, marital communications and other intra-family communications are not protected.[56]

Considering that there are no other explicit types of privileges in the *RPE*, the Court will be left to its own devices to determine which types of communications would be privileged. The Court is entitled to consider other privileges based on other classes of professional or confidential relationships.[57] This might lead the Court to engage in an analysis weighing the interests of the accused and other

[50] See *Tadić*, Case No IT–94–1–T, at paras 535–39.
[51] See R May and M Wierda above n 33 at 756. Note that this reflects the common law position for the standard of proof, unlike what is generally expressed in international human rights instruments ('guilty according to law') or even the ad hoc tribunals.
[52] A Rodrigues and C Tournaye, 'Hearsay Evidence' in May, *Essays on ICTY Procedure and Evidence*, above n 8 at 302–3.
[53] *Prosecutor* v *Aleksovski, Decision on Prosecutor's Appeal on Admissibility of Evidence*, (16 Feb 1999) Case No IT–95–14/1–AR73, A Ch, para 15.
[54] Rule 73(1).
[55] Medical records of a witness who had seen a psychiatrist was held not to be privileged by the ICTY in *Furundzija*, (16 July 1998) Case No IT–95–17/1.
[56] This is arguably in violation of the human right to private and family life that might protect the disclosure of familial communication.
[57] Rule 73(2) and (3).

parties to the proceedings against the public interest attached to protecting such communications.

The International Committee on the Red Cross (ICRC) is also seen as a source of privilege, perhaps in anticipation of its special role it might play with the ICC. The extension of privilege to the ICC reflects its *sui generis* nature as a non-State actor in international law[58] as well as its exemplary neutral role in protecting victims of armed conflict therefore mandating the need for confidentiality in its communications with victims. Under the *ICC Statute*, any information that is given to a representative of the ICC is deemed to be privileged and therefore not subject to disclosure. This reaffirms existing practice of the ICTY, where the Trial Chamber ruled that the ICRC has an absolute right to non-disclosure of information under customary international law. As a result, the Trial Chamber in the *Prosecutor v Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*,[59] held that the ICRC was not required to testify before the ICTY.

Privilege for the ICRC is still subject to a few conditions — where the ICRC does not object to the disclosure; where the information is already made public; or where the same information has also been collected by another source, independent of the ICRC.[60] There may be other privileges that are necessary to be protected in light of the unique nature of international crimes. For instance, the ICTY has recognised a non-absolute privilege for war correspondents being a distinct type of journalist.[61] The standard test for privileges in the common law is that they are made in a confidential relationship with a reasonable expectation of privacy and non-disclosure. The confidentiality must be essential to the nature and type of the relationship. This might include UN agencies, since they also perform humanitarian functions pursuant to an international mandate and even have an international legal personality. However, UN peacekeepers were compelled to testify at the ICTY.[62] Where a limited protection is only afforded to the ICRC, this might have the effect of limiting the assistance provided to victims where the victims may be reluctant to discuss matters with agencies knowing that the discussions may be introduced at an ICC proceeding.

2.3.4 National Security

Article 72 and 68 of the RPE addresses the need to balance the admission of evidence with the need to respect the State's right to withhold such evidence that

[58] The ICRC is referred to in various international humanitarian law instruments as well as being a party to agreements with States, which are arguably treaties. See S Jeannet, 'Non-disclosure of Evidence Before International Criminal Tribunals: Recent Developments Regarding the International Committee of the Red Cross' (2000) 50 *ICLQ* 643.

[59] Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, (27 July 1999) Case No IT–95–9–PT. In that case, the witness, who had been an agent of the ICRC, had volunteered to testify but was prevented from doing so by the ICRC.

[60] Rules 73(4)(a); 73(4)(b) and 73(5).

[61] See *Brdanin and Talić*, Appeal Chamber's Decision, (11 Dec 2002) Case No IT–99/360.

[62] See the *Todorović* case, Decision of Trial Chamber III, (18 Oct 2000) Case No IT–95–9–PT.

would jeopardise its national security.[63] A State that is ordered to provide evidence to the Court or the Prosecutor, may refuse to comply where there might be an alleged threat to its national security as a result of the disclosure. This concern was not considered when the rules and procedures were drawn up for the ad hoc criminal tribunals. The Courts were obliged to establish the rules when the matters arose during trial. In the *Blaškić* case, the Appeals Chamber of the ICTY ruled that the Tribunal could order the transmittal of documents directly relevant to the proceedings but that such order must be reconciled with the legitimate security interests of States.[64] Permitting national security considerations to prevent the ICTY from obtaining documents that are of decisive importance to the conduct of the trial was noted to rob the Tribunal of the essence of its functions.[65] In response, the Court developed its own rules to govern the situation, allowing the Court to appoint a member of the bench to examine the evidence in question, in camera, and retain the confidential character of the evidence. The result may be to accept expurgated versions accompanied with a declaration stating the reason for such expurgation.[66] The onus would be on the prosecutor to prove its claim that the national security exception is applicable[67] and that the disclosure would prejudice other investigations or for any other reasons may be contrary to the public interest or affect the security interest of any State.[68]

Another factor to be considered in this balancing may be the need to bring those responsible for international crimes to justice as stipulated in paragraph 4 of the preamble to the *ICC Statute*.[69] Importance for national security reasons attached to a particular piece of evidence may be used as a shield to protect certain actors from prosecution.

Article 72 covers three situations: (i) cases where the disclosure of information or documents of a State would prejudice national security interests; (ii) person refuses or has not been authorised to submit information or evidence because disclosure would jeopardise the national security interests of the State; and, (iii) the State learns that information or documents are likely to be disclosed, and where the State deems that the disclosure would harm its security interests. In these cases, the State will contact the Prosecutor or the Court, in an attempt to reach an agreed solution. This may include a modification of the Court's request for assistance or even looking to ways where the evidence can be obtained from a different source. Where no solution can be reached and the State upholds its

[63] There may be a situation where a third party may have provided documents or information to a State in confidence. The same procedure noted above would apply although the State can refuse to do so citing a pre-existing obligation of confidentiality. See Art 73.
[64] Judgment of 29 Oct 1997 on a request by the Croatian Government for review of a decision made on 18 July 1997 by Trial Chamber II. See Case No IT–95–14–AR 108 *bis*.
[65] *Ibid* para 64.
[66] Art 54 *bis* of the *Rules of Procedure and Evidence of the ICTY* (Nov 1999).
[67] *Blaškić*, para 147.
[68] Rule 66(C).
[69] See Amnesty International, *The International Criminal Court: Drafting Effective Rules Concerning the Trial, Appeal and Review,* AI Index: IOR 40/12/99 (1999), at 24.

position that disclosure would prejudice its security interest, the State notifies the Prosecutor or the Court of its reasons. At that point, it is up to the Court to determine whether the information or document is relevant and necessary for the case and then request further consultations with the State. The Court can make proper inferences as appropriate or refer the matter to the Assembly of States Parties.[70]

Overall, the ICC lacks the power to order a State to provide national security information. In cases of refusal, the Chamber will alert the Assembly of States Parties or, under certain conditions, the UN Security Council since there is a potential situation of non-co-operation.[71] This transfers the political dimension of such a question to a body that may more appropriately deal with the sensitivities of national information since all State parties have a vested interest in the question. Moreover, it may reflect the need for further legislative guidance by the State Parties to circumvent further procedural delays.

3. EVIDENCE AND HUMAN RIGHTS

It is generally expected that the establishment of the International Criminal Court will contribute to the protection of international human rights.[72] However, the uniquely grievous nature of the crimes that will be tried may establish situations where the rights of the accused are being infringed upon during trial in order to achieve a conviction. The balancing of the needs of international criminal justice and the rights of the accused may require some flexibility to accommodate the special character of international criminal tribunals.[73]

The ICC trial, at the outset, will closely resemble the adversarial procedure used in common law countries, highlighted by the need for *viva voce* testimony. The basic structure is that the prosecutor will have the burden to prove the guilt of the accused with the judge ensuring that the accused is accorded all rights that guarantee the presumption of innocence. The qualification is that as the Court's docket increases, there may be a need to streamline the caseload through the adoption of a more investigatory role for the judges as was seen with the ICTY and ICTR.

International human rights instruments are inherently vague in determining the scope of accused's rights relating to either the inquisitorial or adversarial process. Little guidance is provided, leaving it to the national legal systems to develop rules and procedures.[74] These instruments do not account for the

[70] Art 87(7). Some have cited concern with this procedure since it may jeopardise an accused's right to a fair trial because of the inherent delay involved in such procedure. See L Caflisch, 'The Rome Statute and the European Convention on Human Rights' (2002) 23 *Hum Rts Law J* 1 at 6.
[71] Arts 73 (7)(a)(ii), 87(7).
[72] L Caflisch, above n 70.
[73] *Ibid* at 5.
[74] C Warbrick, 'International Criminal Courts and Fair Trial' (1998) 3 *JACL* 64.

egregiously severe nature of international crimes thereby suggesting that a different balance between the rights of the accused and the need for achieving international justice may be justified.

Although the rights expressed in, for instance the *ICCPR*,[75] may provide a floor of protection to the accused, such rights operate relative to the context of its application in the trial itself. In the *Tadić* Trial, the Chamber held that they had to interpret human rights provisions within its own legal context and in balance with victims' rights that had not been included in international human rights instruments. Victims are provided with the opportunity to appear before the ICC in various stages of the case.[76] This can be done through legal counsel with the opportunity to have it provided by the Registry where the victim or the group of victims lack the necessary means to pay for a common legal representative.[77] The advent of tripartite considerations (accused, prosecutor and victim) potentially distinguishes the jurisprudence from not only national,[78] regional and international human rights tribunals, but also from the ad hoc international criminal tribunals that did not enshrine strong protection for victims' rights.

3.1 Presumption of Innocence

The presumption of innocence is the hallmark of the legal systems, placing the burden of proof solely on the prosecution to prove the guilt of the accused.[79] It is one of the ultimate bench-marks of a right to a fair trial, set out in Article 14 of the ICCPR, although several human rights instruments can be referenced to add greater context to this right.[80] An accused is entitled to the presumption of innocence and the trial is to be in an open forum before a 'competent, independent

[75] *International Covenant on Civil and Political Rights,* 16 Dec 1966, (1967) 999 UNTS 171.
[76] See Arts 15(3), 19(3), 68(3), 75 and 82(4).
[77] Rule 90(5).
[78] In the *Erdemović* case, Judge Cassese of the Appeals Chamber noted that 'legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanistically imported into international criminal proceedings'. Case No IT–96–22–A para 2. He added, at para 4, that it would be 'inappropriate mechanically to incorporate into international criminal proceedings ideas, legal constructs, concept or terms of art which only belong, and are unique, to a specific group of national legal systems'. The ICC has residual authority to consider the principles and rules of general international law under Art 21(1)(c) of the *ICC Statute,* which can allow for the introduction of domestic rules and procedures on evidentiary matters (where the rights of the accused are accounted for), as well as the rules developed by the ad hoc tribunals, where the *RPE* may be silent. See also Art 21(1)(b) and Rule 63(5) of the *RPE.*
[79] Civil law systems do not apply the same standard although its application is seen in those systems' free evaluation of evidence. See Robinson above n 2 at 577.
[80] See Arts 9, 10, and 11, *Universal Declaration of Human Rights,* Arts 9, 14 and 15 of the *ICCPR, UN Standard Minimum Rules for the Treatment of Prisoners; UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment;* Arts 7, 15, *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN Basic Principles on the (Independence of the Judiciary; UN Basic Principles on the Role of Lawyers;* and the *UN Guidelines on the Role of Prosecutors.* In addition, the four *Geneva Conventions* of 1949 and their *Protocols* include guarantees of the right to a fair trial for persons charged with war crimes or crimes against humanity.

and impartial tribunal established by law'.[81] An accused must know the charges against him or her, have time and facilities to prepare a defence, be tried in the presence of his accuser and to have legal assistance for his defence. In addition, the accused is to be able to examine witnesses at trial and enjoy the privilege against self-incrimination.

3.2 Fair Trial

However, these rights are not absolute and must be assessed in light of all of the circumstances of the proceedings. This places a relative standard for defining the right to a fair trial.[82] Jurisprudence under the European Convention on Human Rights notes that the right to a fair trial is not wholly contingent on the application of evidential or procedural rules, but on a wider global perspective of the trial process so that fairness can be adequately observed.[83]

The *Tadić* case attempted to address the relationship between international human rights standards such as Articles 14 of the *ICCPR* and Article 6 of the *ECHR* (right to a fair trial) and trials before international criminal courts. The Trial Chamber noted that such provisions are of only 'limited relevance' when applying the *ICTY Statute* and its rules since the ICTY is to interpret its provision in the context of its legal framework. This would necessitate a comprehension of different considerations, as the Judges must undergo this, 'within the context of its own unique legal framework'.[84] This contrasts with the Trial Chamber's subsequent ruling that decisions under the *ICCPR* and *ECHR* are authoritative and applicable when interpreting the provision of the *ICTY Statute* and the *Rules of Procedure*.[85]

Article 67 of the *ICC Statute* stipulates several specific rights of the accused in the context of the trial process.[86] Overall, the judges are to ensure that a trial is

[81] Art 14, *ICCPR*.
[82] See Warbrick above n 74 at 54.
[83] See *Barbera, Messegue and Jarardo v Spain* (1988) 11 EHRR 360. This reflects the role of the Court not to reassess the evidence, which is within the sole purview of the national courts, but only to determine whether the proceedings as a whole, including the way in which evidence was taken, was fair. See *AM v Italy,* (14 Dec 1999) ruling by the European Court of Human Rights.
[84] *Prosecutor v Tadić,* Decision on the Prosecutor's Motion Requesting Protection for Victims and Witness, (10 Aug 1995) Case No IT–94–1–T, paras 26, 27.
[85] *Prosecutor v Delalić and others,* Decision on the Motion by the Prosecutor for Protective Measures for Prosecution Witnesses Pseudonym 'B' Through 'M', (28 April 1997) Case No IT–96–21–T, at para 27, 28. The Trial Chamber considered various cases from other human rights bodies, such as *Pretto & Ors v Italy*, (Series A, No 71 (1984) 6 EHRR 182) (benefit of a public hearing mainly for the accused and not necessarily the public), the fact that Art 14(1) of the *ICCPR* and Art 6(1) of the *ECHR* allow the press and the public to be excluded in certain circumstances, *Kostovski v The Netherlands* (1990) 12 EHRR 434, (reasoning for disclosing identity of witness to the accused) and *Unterpertinger v Austria* (1991) 13 EHRR 175 (non-confrontation of the accused with his accuser could constitute a violation of Art 6(1) of the ECHR).
[86] See also Art 20 of the *ICTR Statute* and Art 21 of the *ICTY Statute*.

fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.[87] Indeed, Judge Cassese has noted that this formula can set an, 'exemplary standard for future international criminal trials'.[88] However, there may be unanticipated circumstances that come up during the trial that may prejudice an accused to a point where the right to a fair trial is violated without there being a specific abridgement of the accorded rights under the *ICC Statute* or even under the *ICCPR*. In relation to the latter, the UN Human Rights Committee has noted that abiding by the minimum guarantees under the *ICCPR* does not always provide sufficient protection to ensure the fairness of a hearing.[89]

3.3 Victims' Rights

As mentioned, the fairness of the trial is not solely concerned with the accused. The emergence of victims' rights has reduced this exclusivity so that fairness is owed to all parties including victims and/or witnesses. The need for this is critical in achieving justice for international crimes when the gross atrocities of the particular activities render impacts on victims of a ghastly nature. This represents a paradigmatic shift in the trial process where the adversarial nature of the criminal trial, in addition to the guarantee of due process to the accused, is equivocated with the concerns for victims. Victims are accorded certain protections in addition to the ability to seek reparation, restitution, compensation and rehabilitation.[90]

Under Article 43(6) of the *ICC Statute,* a Victim and Witnesses Unit is to be established.[91] This Unit works with the Office of the Prosecutor to provide protective measures and security arrangements, counseling and other assistance for witnesses and victims who appear before the Court, as well as others at risk on account of testimony given by such witnesses. It is anticipated that the Unit will work with many individuals traumatised by crimes of sexual violence. Both the ICTY and the ICTR had similar units but the significance of their experience can be seen as modest considering they were arbitrarily established lacking the necessary structure, relations with other organs and a proscribed mandate.[92]

The fundamental rights of crime victims are also being advanced in various national jurisdictions. By the early 1990s, many jurisdictions had introduced such

[87] Art 64(2).
[88] A Cassese, 'Opinion: The International Criminal Tribunal for the Former Yugoslavia and Human Rights' (1997) *European Human Rights Law Review* 329 at 338–39.
[89] See *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,* UN Doc HRI/GEN/1 (1992), General Comment 13.
[90] Art 75(1), *ICC Statute.* The proceedings to determine damages for the alleged injuries are actually joined to the proceedings determining the culpability of the accused. This practice is evident in civil law procedures. See Boas above n 19 at 284.
[91] See also r 34 of the *RPE.*
[92] See T Ingadottir, F Ngendahayo and P Sellers (2000) *The International Criminal Court: The Victims and Witnesses Unit (Art 43.6 of the Rome Statute), A Discussion Paper,* (PICT: ICC Discussion Paper No 1) at 6. However, in those two tribunals, victims and witnesses units have broad powers to

reforms for victims' rights and the introduction of various methods in the trial process, such as video evidence, restrictions on cross-examination and restorative justice systems. There is consideration underway to amend the *US Constitution* so that the fundamental rights of crime victims to be treated with dignity, fairness and respect will be recognised.[93]

The notion of victims' rights has also received recognition at the international level. Under the *UN Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power*,[94] crime prevention was seen as a victim's rights issue including the right to access to justice and fair treatment, right to information, assistance and access to informal dispute resolution methods. Victims are to be treated with compassion and respect for their dignity while judicial systems are called upon to take 'measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation'.[95] Principle 6(b) urges States to allow, in the judicial process, 'the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where the personal interests are affected, without prejudice to the accused'.[96] Victims' impact statements represent one effective way to introduce victims' evidence and are more commonly used in US and Canadian Courts. However, the use of such statements is mired in controversy, as they are perceived as unduly influencing the sentencing process.[97]

Instruments affording protection to victims are also seen at the regional level. The Council of Europe, through Recommendation 85(11), included provisions relating to information, practical assistance and compensation for victims.[98] *Recommendation 93(13)* calls for a range of measures for intimidated witnesses, as well as the ability to give evidence through alternative methods that protect a

advise, provide and *motu proprio* request that a Trial Chamber order appropriate measures for the privacy and protection of victims and witnesses unlike the VWU at the ICC, which can only advise the Court. This may include the authority at the ad hoc tribunals to file motions for protective measures with the Court.

[93] J Doak, 'The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals' (2003) 23 *Legal Studies* 1.

[94] UN Doc A/40/53 (1985). Another instrument is the *Vienna Declaration on Crime and Justice*. This requires State parties to introduce, where appropriate, national, regional and international action plans in support of victims of crime, such as mechanisms for mediation and restorative justice. See *Vienna Declaration Crime and Justice: Meeting the Challenges of the 21st Century,* A/CONRF 187 4 (2000).

[95] Principles 4, 6(d).

[96] Art 3 of the EU *Framework Decision on the Standing of Victims in Criminal Procedures,* (15 March 2001), L 082 (2001) provides for victims right to be heard and supply evidence.

[97] See A Aaige Dugger, 'Victim Impact Evidence in Capital Sentencing' (1996) 23 *Am J Crim Law* 375; M Stevens, 'Victim Impact Statements Considered in Sentencing: Constitutional Concerns' (2000) 2 *Calif Crim LR* 3. Note, however, the decision in *McCourt v United Kingdom*, Decision of the European Commission on Human Rights, 2 Dec 1992 (Application No 20433/92), where the Commission held that the refusal to accept a mother's victim witness statement was not contrary to Art 8 of the *ECHR,* relating to her right to family life.

[98] *Recommendation (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure* (1985).

witness from being intimidated by face-to-face confrontation.[99] The EU *Framework Decision on the Standing of Victims in Criminal Proceedings* was adopted in 2001 by the Justice and Home Affairs Council. This entrenches victims' rights as a central pillar of criminal justice policy. Article 5 notes that victims are to be considered and addressed in a comprehensive, coordinated manner so that secondary victimisation is avoided. There is also a European Parliament resolution concerning a *Commission Communication on Crime Victims in the EU: Reflections on Standards and Action.*[100]

The ICTY, under Article 20(1) provides for the relationship between the rights of the accused and the need to protect victims and witnesses. The right to a fair and public hearing is set out in Article 21(2) but it should be read in conjunction with Article 22, requiring that the ICTY provide for in its rules of procedure and evidence, the protection of victims and witnesses. Such rights include the conducting of *in camera* proceedings as well as the measures to protect the victim's identity. Overall, the Trial Chamber is to ensure that the trial is fair and expeditious with full respect to the rights of the accused, while having due regard for the protection of the victims and witnesses.[101]

Can the right to a fair trial be afforded to the accused while offering various trial protections and comfort for witnesses and victims? Such a conflict may arise in the restrictions on rigorous cross-examination of a witness or victim by the accused. Robust cross-examination of witnesses was perceived as sufficient mistreatment leading to many survivors of the Rwandan genocide to refuse to testify to the ICTY.[102] Although ICC judges need to be cognisant of the differing and perhaps conflicting interests of the accused and victims, decisions will be made in the context of the trial providing little clarity on how to fortify the balance between the two rights.

3.4 Anonymous Witnesses

One issue that is highly controversial and problematic in relation to the right to a fair trial is protecting the anonymity of the witness. This right has been rejected in common law jurisdictions, where the judges do not have discretion to grant

[99] *Recommendation No (97) 13 on the Intimidation of Witnesses and Rights of the Defence.* Para 28 notes that in a cross-examination, especially in cases regarding allegations of sexual offences, that might have an unduly traumatic effect on the witness, the judge is to consider taking appropriate steps to control the manner of questioning.

[100] COM (1999) 359. This instrument appears to differ from the predecessors at the UN and the Council of Europe, being more rights-based rather than service-based. See B Williams, 'The Victim's Charter: Citizens as Consumers of Criminal Justice Services' (1999) 38 *Howard L J* 384.

[101] Art 38(2).

[102] See KC Moghalu, 'Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda' (2002) 26 *Fletcher Forum of World Affairs* 21 at 29–30.

such anonymity.[103] This is due mainly to the principle of orality, considered to be a fundamental tenet in the common law adversarial law system.[104] However, in many common law jurisdictions, the screening of the identity of witnesses from both the public and the accused is now being used.[105] Anonymity is not so much a concern in civil law jurisdictions where the inquisitorial approach of proceedings and higher volumes of documented evidence renders anonymity less of an issue. However, considering that international tribunals marry both traditions in addition to others, many commentators have raised concerns about whether anonymity can threaten due process rights as well as the fair administration of justice.[106] Anonymity concerns the right to fair trial since an accused would be prevented from impugning the reliability of a witness's testimony, contravening the right of the accused to challenge evidence that may incriminate him or her.

International law has recognised the right of anonymity. Article 13 of the *Convention Against Torture* states that steps are to be taken by State Parties to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given. The ECHR has ruled that where there are counter-balancing measures in place, anonymity orders would not be in violation of Article 6.[107] In *Kostovski,* the Court held that the countermeasures were inadequate since the defence was only permitted to submit written questions to the magistrates' hearing and the magistrate was available only at the trial for proper questioning.[108] Anonymity was upheld in cases interpreting the obligations under the *European Convention Against Torture*,[109] with the ECHR applying a test of necessity for such measures[110] as well as ruling whether the evidence had a decisive extent.[111]

[103] See *Re Socialist Worker Printers and Publishers Ltd; ex parte Attorney-General* [1975] QB 637; see also *R v Hughes* [1986] NZLR 129 and *S v Leepile* (1985) 4 SA 187.
[104] See *Scott v Scott* [1913] AC 417. See also *California v Green* 399 US 149 (1970).
[105] See *Canadian Criminal Code,* s 442(3).
[106] See R Costigan and P Thomas, 'Anonymous Witnesses' (2000) 51 *NILQ* 326; Amnesty International, 'Fairness to Defendants at the International Criminal Court: Proposal to Strengthen the Draft Statute and its Protection of Defendant's Rights' (1996) 1 *International Criminal Court Briefing Series* 2.
[107] See *Unterpertinger v Austria* (1986) 13 EHRR 175; *Kostovski v Netherlands* (1989) 12 EHRR 434. Specific countermeasures were held to be adequate in *Baegen v Netherlands*, Decision of the Court, 27 Oct 1995 (App No 6696/90)107 and in *Doorson v Netherlands* (1996) 22 EHRR 330.
[108] Countermeasures include the ability of the accused's counsel to attend the magistrates' hearing and put questions to the anonymous witnesses through the magistrates. The Court ruled that the conviction cannot solely rest on the evidence from the anonymous witness. The obligation that evidence of any anonymous witness must be corroborated is consistent with the approach of the European Court of Human Rights. See *Isgrò* case (1991), Ser A, No 194-A, p 12. Where the anonymous witness evidence constitutes the sole basis for conviction, it can result in the denial of a fair trial. See *Saïdi v France* (1993) Ser A, No 261-C, p 57, para 44.
[109] *Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment* (1985) 243 ILM 535.
[110] See *Van Mechelen v The Netherlands* (1997) 25 EHRR 647. The Court in this case had also applied the least restrictive measure rule that the rights of the defendant can only be restricted in the absence of a less restrictive measure. See at para 59.
[111] See *Doorson v Netherlands* (1996) 22 EHRR 330.

The use of anonymous witnesses can inhibit the accused's ability to mount a proper defence. The right of cross-examination against witnesses[112] is undermined by such practice.[113] Some argue that the right to adequately prepare a proper defence and to cross-examination will always be affected by granting anonymity.[114] The European Court of Human Rights in the *Kostovski*[115] case questioned how a fair and equitable trial can be facilitated where the defence is unaware of the prosecution witnesses, not knowing from where and by whom he is accused. In practice, challenging the credibility of an anonymous witness would be difficult.[116]

The *ICTY Rules* allow for a judge or a Chamber, on its own motion or at the request of either party or of the witness him or herself, to order appropriate measures for the privacy and protection of certain witnesses, providing that such measures do not interfere with the rights of the accused.[117] When this is requested, a Chamber can hold a *voir dire* hearing to determine which measures may be necessary. These can include expunging names and identifying information from the Chamber's public records; non-disclosure of certain information to the public; use of image/voice altering devices or CCTV; and the assignment of a pseudonym.[118] Rule 69 provides that witnesses' identities that may be at risk should not be disclosed to the accused until the time when the witness can be brought under the protection of the Tribunal. Evidence may be submitted by deposition for witnesses who are unable or unwilling to testify in an open court setting.[119]

The compatibility of anonymous witnesses and the accused's right to a fair trial was addressed in the *Tadić* case, where the non-disclosure of the accused's identity was extended to the trial itself.[120] The Trial Chamber upheld a measure that kept certain witnesses' names and identifying data confidential although it allowed its release to the defence. This was upheld as being in accordance with the right to public hearing under Article 21(2) of the *ICTY Statute*, in pursuance of the balance to be sought between the duty to protect victims and witnesses and the right to a public hearing. Total anonymity for certain witnesses, even from the accused, was also held to be consistent with the right to fair trial, which also

[112] Art 6(3)(d), *ECHR*. The right of cross-examination is also reflected in Art 8(2)(f) of the *American Convention on Human Rights,* as well as Art 14(3)(e) of the *ICCPR*.
[113] See the dissenting opinion of Judge Stephen in the *Tadić* case who noted the irreconcilability between having unnamed witnesses and fair trial requirements. See also M Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused' (1996) 90 *AJIL* 236.
[114] Judge F Mumba, 'Ensuring a Fair Trial Whilst Protecting Victims and Witnesses — Balancing of Interests?' in May, *Essays on ICTY Procedure and Evidence,* above n 8 at 369.
[115] *Kostovski v Netherlands,* 1989 Series A No 166, ECHR, para 25.
[116] See Mumba above n 114 at 370.
[117] Rule 75.
[118] See M Shaw, 'The International Criminal Court — Some Procedural and Evidential Issues' (1998) 3 *J Armed Conflict L* 65 at 88.
[119] Rule 79.
[120] *Prosecutor v Tadić* (1996) 35 ILM 32.

has regard to fairness to the prosecution and the witnesses. The right to cross-examination was only able to be restricted in exceptional circumstances, but the armed conflict in former Yugoslavia was held to be an 'exceptional circumstance par excellence'.[121] Moreover, the Chamber identified five criteria relevant to the balancing of all interests:

a) existence of a real fear for the safety of the witness or the witness's family;
b) testimony must be sufficiently relevant and important to the prosecutor's case to make it unfair to compel him to proceed without it;
c) there must be no prima facie evidence that the witness is untrustworthy;
d) there is no effective protection programme for the witness or the witness' family; and,
e) the measures must be strictly necessary.[122]

The Trial Chamber held that all of these criteria were met in this case.

In the *Blaškić*[123] case, the ICTY upheld the criteria but restricted what is meant by 'exceptional circumstances'. The Chamber held that victims and witnesses should be protected during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself. Following that time, the right of an accused to a fair trial must take precedence, thereby lifting the veil of anonymity unless there were exceptional circumstances.[124] The existence of exceptional circumstances dictated by the conflict itself, as noted in the *Tadić* case, was no longer applicable in light of the conclusion of the 'enduring armed conflict'. Exceptional circumstances were found however, since the accused had been a senior officer and was charged with serious war crimes committed by personnel under his command. Moreover, the prosecutor had experienced difficulties in prosecuting the case since the majority of the witnesses lived in, or were required to be moved through, territory under the control of the army that the accused was a senior officer in. However, the prosecution was only allowed to withhold the names from the defence during the pre-trial stage with the information to be disclosed to the defence in sufficient time before the actual trial.

Some have criticised the rulings of the ICTY, holding that accused's right to a fair trial should not be subject to balancing in order to provide anonymity.[125] The accused's right to a fair trial is not explicitly sacrosanct under international human rights law when considering victims' rights and specifically the anonymity of the witness.[126] The role of anonymous witnesses is to address the exigencies of the

[121] Para 61.
[122] Similar criteria have been developed in the Courts of the United Kingdom, see *R v Taylor* [1994] TLR 484.
[123] *Prosecutor v Blaškić*, (5 November 1996) Case No IT–95–14–T.
[124] Para 24.
[125] See Leigh above n 113.
[126] See Doak above n 93 at 23. In any event, as Doak points out, the ICTY in *Tadić* did not feel that it was bound by international human rights jurisprudence. See para 28.

case, especially where crucial witnesses still live in volatile areas and reasonably hold a fear of retaliation.[127] Retaliation can take on a special meaning in cases of sexual violence, where societal attitudes may fuel the intimidation. An absence of a witness protection programme or other support mechanisms can interfere with the interests of justice where witnesses will refuse to come forward.

Under the *ICC Statute,* Article 87(4) stipulates that the ICC must take appropriate measures to protect the safety, physical and psychological well being, dignity and privacy of the victims and witnesses. A Prosecutor can withhold evidence or information regarding material that may lead to the grave endangerment of the security of a witness or his or her family, as long as such measures are done that do not prejudice or are otherwise inconsistent with the rights of the accused to a fair trial.[128] Special attention is to be granted to victims of sexual violence or child victims/witnesses, consistent with the ICTY reasoning in the *Tadić* case. Measures must not be, 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.[129]

The need for anonymity may have a special importance in cases of witnesses who were victims of sexual violence. By maintaining anonymity, this would preclude any retraumatisation as a result of testifying against the accused. Because evidence regarding a victim's prior or subsequent sexual conduct is inadmissible,[130] there may be little reason to know the victim's identity.[131] This may seem far-reaching but it is one of the possible consequences of granting anonymity to witnesses albeit subject to the right to a fair trial.

With the usage of methods to protect a witness from the crippling effects of giving *viva voce* testimony, such as video-link evidence as well as *in camera* proceedings, this might lessen the need for anonymity when pitted against the rights of the accused.[132] The ICC has at its disposal several measures that can be taken to protect victims and witnesses including: expunging the names of victims, witnesses and other persons at risk from the public record; enjoining the Prosecutor, the defence or other participants in the proceedings from disclosing the names; using electronic or other special devices for receiving testimony (video-conferencing, close-circum TV; and sound manipulation); having resource to pseudonyms; and making *in camera* proceedings.[133] Overall, the victims should

[127] M Momeni, 'Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia' (1997) 41 *How LJ* 155.
[128] Art 68(5), *ICC Statute.*
[129] Art 68(1).
[130] Rule 71.
[131] C Chinkin,'Due Process and Witness Anonymity' (1997) 94 *AJIL* 77.
[132] See *Prosecutor v Tadić,* Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (10 Aug 1995) Case No IT–94–1–T, p 11.
[133] Rule 87(3), *RPE.* In the *Tadić* case, it was ruled that where evidence of a victim's consent is admitted, the accused must satisfy the Chamber *in camera* that the evidence is relevant and credible. Under the RPE, there is a presumption of the need for *in camera* proceedings involving victims of sexual violence or when children are victims or witnesses. See Art 68 (2).

be kept informed of the proceedings and be permitted to participate in the proceedings in a meaningful way.[134] This, however is not to be prejudicial to or inconsistent wth the rights of the accused.[135]

There is no explicit authorisation to conceal the identity of witnesses under the *RPE*. Article 68(5) permits the non-disclosure of evidence or information that might jeopardise the security of a witness or his or her family. This is restricted up to the time prior to the commencement of trial. The *RPE*, as well as the *ICC Statute*, do not speak to whether such measures, like anonymity, can prevail following the commencement of the trial and may reflect the boundaries established by the ICTY.[136]

3.5 Prior and Subsequent Sexual Conduct

The introduction of prior, as well as subsequent sexual conduct appears to be a strong exception to the general admissibility of all potentially relevant evidence. This reflects the limited probative value of the evidence of sexual conduct obscured by the overwhelmingly prejudicial value of the information.[137] International and national jurisprudence has increasingly severed the link between the credibility of a victim's testimony and their sexual history. Moreover, evidence of consent cannot be based on previous sexual experiences of the victim. Judge Mumba of the ICTY has noted that the pattern of sexual violence in the former Yugoslavia and Rwanda showed that the defense of consent and evidence of prior sexual conduct was even less relevant than in most cases before national courts.[138]

Rule 70 of the *RPE* appears to codify some of the composite jurisprudence from the ad hoc tribunals. Consent cannot be inferred by reason of the silence of or lack of resistance by a victim.[139] Moreover, credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred from prior or subsequent conduct of the victim.[140] Evidence of prior or subsequent sexual conduct of a victim or witness is not admissible.

[134] Amnesty International, (1999), *The International Criminal Court: Drafting Effective Rules*, above n 69, p 12.
[135] Art 69(2). Some have argued that the test is more balanced under the ICC Statute. See G Robertson, *Crimes Against Humanity* (Penguin, London, 1999).
[136] There is support in the academic literature against the possibility of maintaining anonymity after the trial begins. See RS Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, and Results* (Kluwer Law International, Dordrecht, 1999); F Guariglia, 'The Admission of Documentary Evidence and of Alternative Means to Witness Testimony in Proceedings Before the International Criminal Tribunal for the Former Yugoslavia', in H Fischer *et al* (eds), *International and National Prosecution of Crimes Under International Law* (Verlag, Berlin, 2001) at 1126.
[137] *Prosecutor v Delalić, Mucić, Delić and Landžo*, Judgment, (16 Nov 1998) Case No IT–96–21–T, para 70, holding that evidence of prior sexual conduct was irrelevant and inadmissible.
[138] See Judge F Mumba above n 114 at 376.
[139] Rule 70(c).
[140] Rule 70(d).

What will pose a challenge for the ICC, and the complementary national systems, is ensuring that the taking of evidence from victims of sexual violence outside the courtroom will be consistent with the protections afforded to victims under both the *ICC Statute* and the *RPE*. Will the national authorities adhere to the principles of the *RPE* regarding evidence of sexual conduct?[141] Will national authorities be fully cognisant of the irrelevance of evidence relating to prior or subsequent sexual activity when making the proper inquiries and taking statements? Where they have not, will this evidence be expunged from the record without the defence having the ability to review such statements? By taking an inappropriate line of questioning, this may impose undue stress on the victims, rendering them less interested in testifying before the ICC.[142]

3.6 Video-link Testimony

The use of video-link evidence as well as other special electronic means or otherwise is more frequently used in domestic criminal proceedings. Child witnesses, sexual assault complainants and witnesses who are fearful about the consequences of testifying may be permitted to provide evidence outside the courtroom setting.

In national courts, such means have been interpreted as being consistent with the accused's right to a fair trial.[143] International criminal courts are also cognisant of the rights to a fair trial that can be infringed when allowing for the use of video-link testimony. Originally, the ICTY was not authorised to receive video-link evidence. The ability to hear evidence in this manner was established by the judges of the ICTY due to the inability and unwillingness of some witnesses to attend the proceedings. Subsequently, Rule 90(A) of the *ICTY Rules* was drafted allowing for testimony by video-link in exceptional circumstances and in the interests of justice where the Chamber has authorised it.

In the *Tadić* case, the Trial Chamber declared that the testimony of a witness must be shown to be sufficiently important to make it unfair to proceed without the testimony and that the witness is unable or unwilling to come to the ICTY.[144] If this is done, there is the need for: an agreement between the parties on the appropriate location; the appointment of a presiding officer to attend with the witness and ensure that the testimony is given freely and voluntarily; and the use of technology allowing the witness to see the questioner, judges and the defence, and vice versa. The rules of perjury and testimony under a solemn oath are to prevail. The right to cross-examination is to be preserved.[145]

[141] See s 57 of the *International Criminal Court Act (UK)* (2001).
[142] See International Centre for Criminal Law Reform and Criminal Justice Policy, above n 14 at 36.
[143] *X v United Kingdom* (1981) 4 EHRR 188.
[144] (25 June 1996) Case No IT–94–1–T, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and of the Giving of Evidence by Video-Link.
[145] *Delalić et al*, Case No IT–96–21–T, Decision on the Motion to Allow Witnesses K, L, and M to Give Their Testimony by way of Video-Link Conference. In this case, the Chamber added a third condition

The ICC Statute allows for evidence to be given through electronic or other special means, especially in cases of sexual violence against children, as well as the introduction of documents or written transcripts.[146] This is pursuant to Article 69(2) of the *ICC Statute* where the Court will allow recorded testimony, as well as the introduction of documents or written transcripts, subject to the measures not being prejudicial to or inconsistent with the rights of the accused.[147] In those cases, the Court will allow evidence to be given in this way unless directing otherwise.[148] Witnesses cannot be compelled to travel to the Court so that State Parties could facilitate the taking of witness testimony under oath in their territories.[149] Rule 68 of the *RPE* allows for the submission of pre-recorded audio or video testimony, as long as the witness is present before the Court and does not object to the previously recorded testimony and can be examined. Where the disclosure of evidence of information may lead to a witness's security (or his/her family) being gravely endangered, such information can be withheld before trial with only a requirement to present a summary of such evidence, subject again to the obligation not to be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[150]

However, the ICC may need to exercise different standards of reliability relating to evidence given by video-link or any evidence given out of court. The judges will not have the opportunity to assess the witness' demeanor or other characteristics while the evidence is given. Moreover, its reliability may be questioned when provided out of Court, with limited or no opportunity for cross-examination.

to the *Tadić* criteria, requiring that the accused must not be prejudiced in his or her right to confront witnesses. In that case, video-link evidence was held to be suspect so that the Chamber could not find the evidence to be reliable when evaluating the evidence in total. See para 18.

[146] See Art 68(2). There are general rules permitting the Pre-Trial Chamber to gather evidence that would be admitted at trial although such measures are only to be used when strictly necessary and the defence has a right to be present and to cross-examine the witness. The measures must be necessary to ensure the efficiency and integrity of the proceedings. See Art 56 of the *ICC Statute*. See also r 71 (c) of the *ICTY Rules*.

[147] See Art 69(2) of the *ICC Statute* and Rules 67-68 of the *RPE*. Rule 89F and Rule 92 *bis* of the ICTY Rules allow for written evidence to be admitted where such a statement seeks to prove a matter other than the acts and conduct of the accused as charted in the indictment. Factors that would favour the admission of such a written statement include, but are not limited to, circumstances in which oral testimony of facts similar to the evidence in question has already been admitted, where the evidence relates to relevant historical, political or military background, or consists of a general or statistical analysis of the ethnic composition of the population in the places to which the charges relate. Other factors that would favour admission of such written statements include: where it concerns the impact of crimes upon victims or relates to the character of the accused or to factors to be taken into account in determining sentence. However, a preference for written statements may evolve, as seen with the ICTY, in the interests of efficiency and speedier trials. See Guariglia above n 136.

[148] Art 68(2)(4).

[149] Art 93 1(b). Some have suggested that ICC States have legislation in place which permit the prosecution of a witness for ICC offences or for false statements before a national judicial officer for contempt. See Amnesty International, above n 134 at 19.

[150] Art 68(5). Material information in the Prosecutor's possession or under his control may only be used in evidence during the trial if they have been previously disclosed to the defence.

National court experience can be referred to so that such bias against the video testimony could be precluded. In the *Sawoniuk* case for instance, the prosecution and the defence submitted witnesses to examination and cross-examination in Belarus before local officials, under the penalties of perjury under local law, with the video-taped testimony played back to the jury in a London courtroom.[151]

4. APPEALS ON MATTERS OF EVIDENCE

What distinguishes the International Criminal Court from other international tribunals is that the judges are composed of people having specific litigation or bench experience. At a minimum, half of the Courts' 18 judges are required to be criminal lawyers with 'relevant experience' as judges, prosecutors, or advocates, or in another 'similar capacity'.[152] The other half can be experts in international law but the judges who sit at trial or the Pre-Trial Divisions must predominantly be composed of judges with criminal trial experience.[153] This is important since the inherent discretion of the judge regarding complicated matters of evidence and its relationship with the need for a fair trial, will require astute reasoning benefiting from experience on the bench. Moreover, it may provide greater justification for deferring to trial judges in making evidentiary rulings.

Appeals on evidentiary matters in international criminal courts resemble what is seen in national courts. There is a general understanding that the Courts of First Instance are best equipped to assess the evidence considering they are hearing or receiving it first hand. They can place the evidence in its the proper context in the totality of the proceedings, gaining the best appreciation of how the evidence fits into the need to determine the guilt or innocence of the accused, as well as whether the accused has been afforded a fair trial.

In addition to the general deference afforded to decisions made at trial, most rulings on evidential matters do not appear on the face of the written judgement. This can render it more difficult to successfully appeal a decision based on an erroneous or prejudicial ruling on evidence. The ICTR for instance, was not required to provide reasons concerning their evidentiary rulings resulting in relatively few successful appeals on this basis.[154] At the ICC, rulings will only to be about the guilt or innocence of the accused, the jurisdiction of the Courts, sentencing and decisions concerning admissibility. Decisions are only required to have a 'full and reasoned statement' of the findings on the evidence and the conclusions.[155] Decisions under Article 74 acquitting or convicting a person on

[151] See *R v Sawoniuk*, Court of Appeal (Criminal Division), 10 Feb (2000) 2 Criminal Appeal Reports 220.
[152] Art 36, *ICC Statute.*
[153] Art 39(1), *ICC Statute.*
[154] Amnesty International above n 134 at 15.
[155] Art 74(5).

the grounds of a procedural error, error of fact or error of law can be appealed by a Prosecutor.[156] Similar grounds for appeal exist for the convicted person with an additional ground that affects the fairness or reliability of the proceedings or decision.[157]

Overall, Article 83(1) provides for the standards under which the Appeals Chamber are to operate — 'whether the proceedings were unfair in a way that affected the reliability of the decision or sentence'.[158] This Appellate Chamber will be subject to Article 14(5) of the *ICCPR,* which guarantees the rights of everyone, convicted of a crime to have the conviction and sentence being reviewed by a higher tribunal according to law.

How evidentiary matters will be addressed at the appellate level of the ICC is difficult to ascertain. One would suspect that the Appellate Chamber would appreciate the insight of trial judges who have observed the trial in total and provided rulings on evidence with this perspective in mind. Some level of intervention may occur however where the rights of the accused have been infringed absent a justifiable reason for such infringement.

5. CONCLUSIONS

This chapter has provided a summary of some of the principal evidentiary issues that may be encountered by the ICC. It is impossible to envisage all trial matters where prescriptive rules of evidence would cover every possible scenario. There is built in discretion so that the rules can accommodate unanticipated developments. This is exactly what transpired with the ad hoc tribunals, leading to noble achievements in the rules of evidence.

What will be interesting to monitor is how the ICC's jurisprudence unfolds in relation to matters of evidence. This will have to account for international human rights law accorded to victims and the accused, as well as some of the substantive developments relating to international criminal law. Considering that the ICC is a permanent institution, the potential for a strong body of law on procedural and evidentiary matters is imminent. Its influence could even contribute to establishing foundations delineating how evidence is dealt with in other international criminal tribunals.

[156] Art 81(1)(a). Amnesty International has argued that allowing for appeals from acquittals might violate the principle of *non bis in idem*, unless appeals can only be made on points of law with remedies available only to the point of correcting the legal error for future cases. See Amnesty International, (1997) 'The International Criminal Court: Making the Right Choices — Part II: Organising the Court and Guaranteeing a Fair Trial', (AI Index: IOR 40/11/97). This is consistent with State practice such as that of the United Kingdom, see s 36 of the *Criminal Justice Act* (1988).
[157] Art 81(b) *ICC Statute.*
[158] Art 83 *ICC Statute.*

12

Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?

EMILY HASLAM[1]

1. INTRODUCTION

THE ROME STATUTE[2] has been noted for its innovative provisions regarding the treatment of victims.[3] These 'landmark'[4] sections grant victims a right to participate in proceedings (other than as witnesses). These provisions are said to have transformed victims from the 'object-matter' of international criminal proceedings to potential yet significant participants in them in their own right.[5] Along with the right to reparations they denote a major departure from a hitherto limited theory of international criminal justice, which is centred on punishment and international order.[6] The Rome Statute is taken to embrace a more expansive model of international criminal law that encompasses social welfare and restorative justice.[7]

This dominant account of the position of victims in the Rome Statute is based upon a widespread assumption that victims either do or can benefit from participating in international criminal proceedings. These ideas have a long pedigree.

[1] This chapter applies to the ICC ideas which were developed with Marie-Bénédicte Dembour in an earlier article relating to the ICTY entitled, 'Silencing Hearings? Victim-witnesses at War Crimes Trials:' (2004) 15 *EJIL* 1. I am grateful to her for her encouragement to pursue this line of inquiry in relation to the ICC. My thanks go to Marie-Bénédicte Dembour and Rod Edmunds for their insightful comments on earlier drafts of this chapter.

[2] Rome Statute of the International Criminal Court 1998, UN Doc A/CONF 183/9 (hereafter Rome Statute).

[3] SA Fernández de Gurmendi, 'Elaboration of the Rules of Procedure and Evidence' in Lee (ed), *The International Criminal Court Elements of Crimes and Rules of Procedure* (Transnational Publishers, Ardsley, 2001) 235 at 255.

[4] G Bitti and K Friman, 'Participation of Victims in the Proceedings' in Lee (ed), above n 3 at 456.

[5] C Jorda and J de Hemptinne, 'The Status and Role of The Victim' in A Cassese, P Gaeta and JRWD Jones (eds), *The Rome Statute Of The International Criminal Court: A Commentary* (OUP, Oxford, 2002) 1387 at 1389 ff.

[6] Eg, see SA Fernández de Gurmendi, above n 3 at 256; V Nainar, 'Giving Victims A Voice In The International Criminal Court' (1999) *UN Chronicle* at <www.iccwomen.org/resources/unchronicle.htm>

[7] Above n 4 at 457. WA Schabas, *An Introduction to the International Criminal Court* (CUP, Cambridge, 2001) at 147. For criticism of this view see R Henham, 'Some Issues For Sentencing In The International Criminal Court' (2003) 52 *ICLQ* 81 at 110.

The contention that victims benefit by taking advantage of the legal — and supposedly superior — platform from which to recount their stories has been expressed by a range of commentators. During the *Papon* trial:

> One lawyer contended that the simple fact of holding the trial had an 'assuaging' value for the civil parties. And one survivor testified in court, 'We have been survivors, we hope to become living people' — voicing in vivid terms the hope that transmission would eventually achieve a selfhood released from the singular identity of the survivor.[8]

In relation to the trials of the military junta in Argentina, Carlos Nino has written of victims:

> What contributes to re-establishing their self-respect is the fact that their suffering is listened to in the trials with respect and sympathy, the true story receives official sanction, the nature of the atrocities are publicly and openly discussed, and their perpetrators acts' are officially condemned.[9]

Building on specific experiences such as these, Osiel argues more generally that:

> A criminal trial is a congenial public opportunity for collective mourning of the victims of administrative massacre. It provides a ritual that is helpful for family members and a sympathetic public in coming to terms with melancholia in even the most traumatic cases.[10]

Dissenting voices are occasionally heard.[11] However, it follows from the majority opinion that the legal profession should work to ensure the maximum participation of victims in international criminal proceedings provided that their participation is consistent with the rights of the accused and the demands of expediency. The French Minister for Justice, Elisabeth Guigou's statement at the Paris Seminar on Access of Victims to the International Criminal Court illustrates this view:

> Such is the magnitude of our mission: to put the individual back at the heart of the international criminal justice system, by giving it the means to accord the victims their rightful place. A noble task, but one whose difficulty is readily appreciable by all. Since the aim is to allow the victims, concretely, to become parties to the international criminal proceedings, without undermining the effectiveness of the International Criminal Court, without diverting it from its task of law enforcement.[12]

[8] N Wood, 'The Papon Trial in an "Era of Testimony"' in R Golsan (ed), *The Papon Affair: Memory and Justice on Trial* (Routledge, London, 2000) 100.
[9] M Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers, New Brunswick, 2000) at 273.
[10] *Ibid* at 67.
[11] See H Arendt's repeated criticisms of Adolf Eichmann's prosecutors for allowing victims to recount events that were not directly related to the indictment, H Arendt, *Eichmann in Jerusalem — A Report on the Banality of Evil* (Penguin Books, London, 1994).
[12] Opening Speech by E Guigou, Keeper of the Seals, Minister of Justice at the International Meeting on 'Access of Victims To The International Criminal Court' Paris, 27 April 1999 at <http://www.france.diplomatie.fr/actual/dossiers/CPI/cpi5.gb.html>

The idea that is expressed here is that an appropriate procedure can and ought to be found even if the path to finding it is controversial and painstaking. This view appears to be based upon the belief that if victims have not benefited from testifying in international trials to date it is largely because the procedure of international criminal tribunals has been deficient; concomitantly if some victims have, in fact, benefited from testifying how much more could they (or others) benefit by participating in proceedings in their own right. This conviction leads some commentators to claim that participating in ICC proceedings can help to rehabilitate victims,[13] and enable them to regain their 'equanimity'.[14]

The problem in accepting these claims is that, as the Women's Caucus has correctly identified, there is:

> … a wide gap in the information available concerning the ways in which victims have experienced their participation in justice processes of the ad hoc tribunals. Their accounts, as well as the accounts of those who work directly with survivor communities in these settings, are crucial to the development in the ICC of effective procedures ensuring victim participation and protection in ways which not only do not further compound or reinforce their victimisation but which respect their experiences and facilitate their rehabilitation.
>
> First hand information about the ways in which victims have specifically encountered the processes and procedures of the ad hoc tribunals has been slow in surfacing…. [15]

2. THE EXPERIENCE OF VICTIM-WITNESSES: OBJECTIFICATION?

This chapter seeks to draw upon the experience of victim-witnesses before the United Nations ad hoc War Crimes Tribunals in order to reflect upon the challenges facing victim participation at the ICC. It develops earlier research into the treatment of victim-witnesses at the ICTY.[16] That research focused on the transcript evidence of victim-witnesses for the prosecution in one case before the ICTY, *The Prosecutor v Radislav Krstić*.[17] These proceedings dealt with the responsibility of General Krstić for his part in the atrocities associated with the fall of Srebrenica in July 1995. Krstić was found guilty of genocide, crimes against

[13] D Donat-Cattin, 'The Role of Victims in ICC Proceedings' in F Lattanzi and WA Schabas (eds), *Collection of Essays On The Rome Statute Of The International Criminal Court* (Ripa di Fangano, Alto (Il Sirente), 1999) 251 at 258.
[14] Above n 5 at 1401.
[15] 'Victims and Witnesses in the ICC Report of Panel Discussions on Appropriate Measures for Victim Participation and Protection in the ICC'. This report was based on two panel discussions hosted by the Women's Caucus for Gender Justice during the 26 July – 13 August 1999 Preparatory Commission meeting on the ICC at the UN headquarters in New York. The report can be found at <http://www.iccwomen.org/resources/vwicc/index.htm>
[16] M-B Dembour and E Haslam, 'Victim-Witnesses at War Crimes Trials: Silencing Hearings?' above n 1.
[17] *Prosecutor v Radislav Krstić* (2 Aug 2001), Case No IT–98–33–T.

humanity and violations of the laws and customs of war and sentenced to 46 years imprisonment. Our examination of the transcript evidence led us to identify three tensions inherent in the legal process. These are first, the need to focus narrowly upon the person of the accused whilst establishing a wider historical record of past events; secondly, the need to adhere to the legal process and simultaneously to heed the suffering of individual victims and finally, the need to make traumatic past events the focus of the trial at the same time as aspiring to a more hopeful future. We argued that these tensions were all too often resolved to the detriment of victim-witnesses.[18] The result was that victim-witnesses were unable to tell their stories in their own words. Consequently, only a partial story was elicited from their testimony, and the Tribunal often failed to respect their consciousness. The transcript evidence of the *Krstić Case* led us to suggest that testifying at the ICTY, far from having a curative effect for all, can be damaging for some victim-witnesses. We did not arrive at this conclusion because the Tribunal was required to make difficult decisions about witness protection measures. On the contrary, the *Krstić Case* was not noted for its procedural controversy in this respect. This led us to suggest that some victim objectification is inherent in the international criminal process and, as such, is unavoidable.

In drawing upon this experience to reflect upon the ICC victim participation scheme it is recognised that transcript evidence of one case is only ever partially representative. The transcripts do not fully convey atmosphere, tone, emotion and silences. The ICTY's experience is geographically and politically restricted. However, many of our conclusions are supported by other research into victims' experiences at the ad hoc War Crimes Tribunals.[19]

The introduction of victim participation at the ICC is intended to alter significantly the position of victims in international criminal law. Since the Statute and Rules of Procedure of Evidence of the ICTY provide for victims only in their role as witnesses, ICTY practice might appear to be of little relevance to victim participation at the ICC. However, in the *Krstić Case* the ICTY used the evidence of victim-witnesses not only to establish the guilt or innocence of the accused but also to fulfil a number of other purposes. These functions are expressed in the Tribunal's Statute or have been assumed in practice. They include the establishment of a broader historical record of atrocity,[20] the achievement of international peace,

[18] See above n 16.

[19] See eg, the Report published by the *Fédération Internationale des Ligues des Droits de l'Homme* entitled 'Entre illusions et désillusions: les victimes devant le Tribunal Pénal International pour le Rwanda (TIPR)' (Oct 2002, no 343) and the Report of Panel Discussions on Appropriate Measures for Victim Participation and Protection in the ICC above n 15. An examination of the effect of cultural differences on the way in which victims experience testifying and participating is essential to an analysis of the success or otherwise of the provisions on victims. It is, however, beyond the scope of this present essay.

[20] Accordingly, at para 2 of its judgment in the *Krstić Case* the Trial Chamber states that it '… concentrates on setting forth, in detail the facts surrounding this compacted nine days of hell and avoids expressing rhetorical indignation that these events should ever have occurred at all. In the end, no words of comment can lay bare the saga of Srebrenica more graphically than a plain narrative of the events themselves, or expose more poignantly the waste of war and ethnic hatreds and the long road

the rendering of justice and deterrence.[21] These purposes resonate with many of the justifications for victim participation put forward before and after Rome. Moreover in the *Krstić Case*, the Judges gave victim-witnesses an opportunity to speak freely at the end of their testimony, establishing in effect an informal and ad hoc victim participation regime. This aspect of the *Krstić* trial was particularly deficient. The attempts of the judges to express sympathy with the victims sat uneasily alongside their desire to emphasise the benefits that international criminal proceedings bring to individuals and collectivities. The result was that the pain of individual victims was often glossed over and, however unintentionally, denied. This experience provides a salutary lesson for those implementing the formalised participation scheme at the ICC.

It is difficult to imagine that victim participation at the ICC will not be plagued by similar tensions that led to the objectification of victim-witnesses in the *Krstić Case*. This chapter does not take issue with the idea that international criminal justice should accord victims 'their rightful place'[22] which if not 'at the heart of the international criminal justice system'[23] is very close to it. The argument advanced here that victim objectification may be inherent in the legal process is not of itself a reason to neglect procedural reform. Despite its limitations, procedural reform may mitigate some of the worst effects of the objectification of victims. This chapter welcomes the introduction of a right to participate in principle. It disagrees with those who argued during negotiations for the ICC that victims' concerns were irrelevant to international criminal justice.[24] However, unless these concerns are faced head-on, there is a danger that, even with the introduction of the right to participate, the international criminal justice system will continue to objectify victims for its own ends whilst paying lip-service to the notion of an empowered victim. This chapter argues for *effective* participation procedures and for an honest acknowledgment (including to victims) of the limitations of the legal process to restore every victim's sense of self-respect.[25] And this chapter is a plea to the international community not to neglect alternative platforms for both victims and the wider community to come to terms with atrocity.[26]

that must still be travelled to ease their bitter legacy', above n 17. Admittedly, some historical analysis may be necessary to establish that crimes against humanity and genocide have taken place. However, the Tribunal's approach here seems to go beyond the need to establish the offence. See further above n 16. For controversy on the role of historians and history for establishing crimes against humanity see Wood, above n 8 at 105–11.

[21] S C Res 827, U N SCOR, 48th Year, 1993 S C Res & Dec at 29 UN Doc S/INF/49 (1993). In interpreting its mandate the Tribunal also considers itself as a 'tool for promoting reconciliation', ICTY Annual Report 1994 UN Doc A/49/342-S/1994/1007, at para 16.

[22] Above n 12.

[23] *Ibid.*

[24] Eg, the Women's Caucus notes that the view was expressed that responding to victims' concerns was a task for 'social work', see above n 15.

[25] From a psycho-therapeutic point of view it is essential that victim-witnesses do not have expectations of the legal process that it is unable to fulfil.

[26] The danger is that the international community will rely upon victim participation in the ICC as a substitute for developing (and providing resources for) alternative and multiple platforms for individual and collective memory.

3. THE DEVELOPMENT OF VICTIM PARTICIPATION

The provisions on victim participation in the Rome Statute are based upon a belief that victims have their own distinct interests in international prosecution that cannot be satisfactorily represented by another party. This radical change in the approach of international criminal law towards victims represents an attempt to avoid the problems that victims encountered when they testified before the ad hoc War Crimes Tribunals.[27]

The ad hoc War Crimes Tribunals relied upon the Prosecutor to safeguard victims' welfare. However, the coupling of victims' requirements with the demands of successful prosecution had the result that the interests of victims were often overlooked.[28] This was because the ICTY and ICTR took account of victims solely in their role as witnesses. During proceedings a victim could only be heard as a witness for the prosecution or defence. He or she had no independent right to intervene nor was he or she entitled to refuse to give evidence.[29] In order to facilitate victim-witness testimony the Tribunals adopted protective measures.[30] These measures have been criticised from both defendants' and victim-witnesses' perspectives.[31] Although the Tribunals could order restitution of property, they could not compensate victim-witnesses for harm suffered.[32] This was left to national courts or to another competent body.[33] These provisions appear to render the victim in the words of one commentary, 'extraneous to the conduct of the proceedings, which are entirely confined to a contest between the Prosecutor and the defence',[34] despite the fact that international criminal proceedings could not take place without victims' co-operation. It was the failure of these Tribunals to take the interests of victims sufficiently into account that motivated many NGOs, individuals and some governments to argue for a new approach that would safeguard the interests of victims at the ICC.[35]

[27] D Donat-Cattin, 'Art 68 Protection of Victims and Witness and their Participation in the Proceedings' in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes Article by Article* (Nomos, Baden-Baden, 1999) 869 at 871.

[28] See Jorda and de Hemptinne, above n 5 at 1394; and above n 19.

[29] Rule 85 Rules of Procedure and Evidence of ICTY; Jorda and de Hemptinne, above n 5 at 1390–91.

[30] See Art 22 of the ICTY Statute and rr 34, 69, 75 and 79 Rules of Procedure and Evidence of ICTY; F Mumba, 'Ensuring a Fair Trial Whilst Protecting Victims and Witnesses — Balancing of Interests' in R May *et al* (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer, The Hague, 2001) at 359.

[31] On the limitations of ICTR protection in practice above n 15 and M Bachrach, 'The Protection and Rights of Victims Under International Criminal Law' (2000) 34 *The International Lawyer* 7 at 19. For the view that some protection measures have violated the accused's right to a fair trial see M Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused' (1996) 90 *AJIL* 235.

[32] Rule 24(3) Rules of Procedure and Evidence of the ICTY and r 23(3) Rules of Procedure and Evidence of the ICTR; see further, CPJ Muttukumaru, 'Reparations for Victims' in F Lattanzi and WA Schabas (eds), above n 13 at 302.

[33] Rule 106 Rules of Procedure and Evidence of the ICTY.

[34] Jorda and de Hemptinne above n 5 at 1390.

[35] The following instruments in the human rights field were particularly influential for those seeking to improve the situation of victims in international criminal law: the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Victims Declaration); UN Doc A Res/40/34

As is well known, the Rome Statute was a compromise package. But to its credit, it adopted a number of provisions on victims' rights, which are set out in more detail in the Rules of Procedure and Evidence.[36] Most of the procedural rules on victims' rights were developed at the Second Preparatory Commission of the ICC, which took place between July and August 1999. Draft rules of procedure which had been developed in an earlier seminar initiated by the French Government, 'The International Seminar on Victims Access in the International Criminal Court' formed the basis of these negotiations.[37] The advocacy of non-governmental organisations, some of which formed themselves into the Victims' Rights Working Group of the Coalition for an ICC, also helped to ensure the Rome Statute and Rules of Procedure and Evidence incorporated strong provisions on victims' rights.[38] Some non-governmental proposals were developed in consultation with victims, leading the Women's Caucus to claim that for the first time in the ICC process victim accounts were offered directly to negotiators.[39]

The Rome Statute and RPE contain a number of provisions dealing directly with victims.[40] They distinguish between victims and witnesses, thereby acknowledging victims' distinctive interests in international prosecution. Victims are defined broadly,[41] and may benefit from protective measures.[42] The establishment of the Victims and Witnesses Unit also safeguards the interests of victims.[43] In an improvement on the situation before the ad hoc Tribunals, victims may

(1985) and the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law (van Boven Principles) UN Doc E/CN 4/Sub 2/1996/17 (1996).

[36] The Draft Rules of Procedure and Evidence were finalised on 30 June 2000. They were adopted by consensus by the Assembly of State Parties at its third meeting on 9 Sept 2002 in accordance with Art 51 Rome Statute and Resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries of the Establishment of an International Criminal Court, A/CONF 183/10, (17 July 1998); see Finalised draft text of the Rules of Procedure and Evidence, Addendum to the Report of the Preparatory Commission for the International Criminal Court, PCNICC/2000/INF/3/Add 1, (12 July 2000) (hereinafter RPE).

[37] Report on the International Seminar on Victims' Access to the International Criminal Court, PCNICC/1999/WGRPE/INF/2, (6 July 1999).

[38] D Donat-Cattin above n 13 at 273 and 268. He also notes that NGO position papers were considered by State delegates to be extremely useful. See eg, Amnesty International, *The International Criminal Court: Ensuring an effective role for victims,* IOR 40/10/99 (July 1999); Redress, *Rules of Procedure and Evidence for the International Criminal Court, Recommendations to the Preparatory Commission Regarding Reparation and Other Issues Relating to VICTIMS* (March 2000).

[39] Above n 15.

[40] In addition victims' interests are protected in other 'less obvious contexts', eg, Art 36 Rome Statute see M Bachrach, 'The Protection and Rights or Victims Under International Criminal Law' (2000) 34 *The International Lawyer* 7 at 17.

[41] Rule 85 RPE. The equivalent rule in the ICTY context, r 2(a) Rules of Procedure and Evidence, defines victims more narrowly.

[42] Arts 68, 54(1)(b) Rome Statute; rr 87 and 89 RPE; see further JRWD Jones, 'Protection of Vicims and Witnesses' in Cassese, Gaeta and Jones, above n 5 at 1355.

[43] Art 43(6) Rome Statute; rr 16–19 RPE.

receive reparation for injury. The establishment of a trust fund for the benefit of victims and their families enhances these provisions on reparations.[44] It is of particular relevance to this chapter that the Rome Statute introduces a system of victim participation. Before the potential effect of the rights conferred by this regime is explored it is necessary to outline briefly the scope of the provisions on victim participation.

4. THE OPERATION OF THE VICTIM PARTICIPATION SCHEME

Victim participation is envisaged at each stage of the proceedings before the ICC and operates in the following way. At the pre-trial stage victims can make representations to the Pre-Trial Chamber when it is determining whether there are grounds for prosecution. Victims must be informed if the Prosecutor or Pre-Trial Chamber decides not to proceed with an investigation.[45] Victims are also entitled to submit observations to the Court during proceedings on jurisdiction or admissibility.[46] During the trial, victim participation is governed by Article 68(3).[47] This reproduces the earlier text of Article 6(b) of the UN Declaration on Victims' Rights.[48] Article 68(3) provides that:

> [where] the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate in accordance with the Rules of Procedure and Evidence.

At the final stages of proceedings victims have a right to participate in reparations hearings[49] and appeals against reparation orders.[50] However, they are not entitled to argue against the accused on an appeal generally because they have no right of appeal themselves.[51] Since this chapter is concerned, above all, with the way in which victims are likely to experience participation during the trial stage of proceedings, it is worth examining the scope and operation of these provisions in more detail. It will soon become apparent that, as well as being uncertain, participation is subject to significant constraints.

[44] Art 79 Rome Statute. The reparation provisions are an important related but separate aspect of improving the legal treatment of victims but are beyond the scope of the present chapter.
[45] Art 15 Rome Statute.
[46] Art 19(3) Rome Statute.
[47] Art 68(3) applies at all open stages of the proceedings. Donat-Cattin, above n 27 at 880.
[48] *Ibid* 879.
[49] Art 75(3) Rome Statute.
[50] Art 82(4) Rome Statute.
[51] Above n 5 at 1406.

4.1 Restraints and Uncertainties

A number of procedural rules constrain both when and how victims participate. Victims are required to apply in writing to the Registrar before they can address the Trial Chamber.[52] Although victims are entitled to choose their own legal representative, they may be requested to select a common legal representative in order to enhance the effectiveness of the proceedings.[53] A victim's representative may examine witnesses, experts and the defendant only with leave of the Trial Chamber and he or she may be restricted to making written observations.[54] The impact of victim participation may be diminished in practice because victims do not have access to prosecution or defence evidence; they are not entitled to call their own witnesses and they cannot participate in nor initiate investigations.[55] In practice, therefore, participation will be restricted.

The drafters of the Statute rejected an earlier text authorising the Court to grant participation in favour of the mandatory expression, 'the Court shall permit' participation.[56] Even so, victim participation is subject to substantial judicial discretion. The judges will determine not only whether a victim's 'personal interests are affected' but also whether the proceedings are at an 'appropriate stage' for victim intervention.[57] Since the purpose of participation is not apparent from the wording of Article 68(3), it is unclear what principles will guide the exercise of this discretion. The potential effect of this uncertainty upon the way in which victims may experience participation is dealt with more fully in the following section of this essay. It suffices here to highlight the fact that this discretion endangers the consistency that formalised participation should achieve.

Further uncertainty arises out of the injunction to the Trial Chamber to consider the rights of the accused and to guarantee a fair and impartial trial. The need for a fair trial is central to the achievement of the ICC's purposes. The emphasis placed upon victims' rights cannot but affect the balancing act that the concept of a fair trial requires. But the precise effect of this in practice remains to be seen. Article 68(3) therefore leaves substantial power in the hands of those judges implementing the participation scheme. They may use it to expand or restrict victim participation.

Since the Court is not required to give reasons for its decisions on participation, these uncertainties are likely to continue at least in the short term. The Court's decisions on these issues will affect the way in which victims encounter participation at the ICC. Central to victims' experiences will be the tension between the instrumental and non-instrumental use of their stories.

[52] Rule 89 RPE.
[53] Rule 90 RPE.
[54] Rule 91 RPE.
[55] Jorda and de Hemptinne, above n 5 at 1406. The prosecutor can, however, initiate investigations from any source including victims, Art 15 Rome Statute.
[56] Donat-Cattin, above n 27 at 860.
[57] Donat-Cattin argues that the inappropriateness of participation can only justify postponement *ibid* at 880 and above n 13 at 271 his note 49.

5. INSTRUMENTAL PARTICIPATION

Victims who testify narrate a story for a particular purpose: to determine the guilt or innocence of the accused, to establish a broader historical record of atrocity, to contribute to peace and reconciliation. However their testimony is used, a tribunal is hardly ever interested in hearing their stories for their own sake. Its ability to provide therapeutic healing is, therefore, limited. Victim-witnesses have no control over the purpose of their testimony, nor the strategic use that is made of it. They are usually prevented from dealing with matters that are considered to be irrelevant to those purposes — either because resources are limited or because these parts of their stories do not interest the law. The result is that a victim-witness may be forced to neglect significant events in his or her testimony. The following exchange, which took place during the *Krstić Case,* illustrates how Witness DD was thwarted in her desire tell *her* account of the disappearance of her children:

> A. I was going to tell you the whole story from Tuesday to Thursday. Can I do that?
> Q. Witness, the Judges have already heard quite a lot of evidence in this case about the events in Potocari, so for the purposes of my examination, I'm not going to ask you questions about those days.[58]

The narratives of victim-witnesses are essential to the international criminal process. The fact that these narratives are cut short suggests that the space that will be accorded to participating victims (whose participation is dispensable) at the ICC will be at least, if not more, restricted. Limitations on the right to participate are not in themselves unreasonable. Victims cannot enjoy an unlimited right to participate in a legal forum. Limitations on participation are unavoidable and even essential. They are, however, likely to lessen the relief that it was intended participating victims would feel at the ICC. They cannot but affect the ability of the legal process to put victims at the 'heart of our preoccupations'.[59] Some restrictions have already been built into the provisions on participation, such as the requirement of a fair trial.[60] Other limitations on participation are less explicit. It seems clear that the parameters of victim participation will be determined by the view that the Court takes of the purpose of participation.

5.1 The Purpose of Participation

Both the Rome Statute and the Rules of Procedure and Evidence set out when victims may participate. They say little about the purpose of participation. The arguments advanced before and after Rome in favour of victim participation varied, but

[58] At 5752 of the transcripts of the *Krstić Case* which can be found at <http://www.un.org/icty/inde-htm>
[59] Above n 12.
[60] Art 68(3) Rome Statute.

they had a common strand. Proponents were reacting to a belief that international criminal law had hitherto objectified victims. Whereas some of the supporters of victim participation appeared to view it as an inherent good, others related its merits more closely to the demands of the legal process. According to Jorda and de Hemptinne, reasons in favour of participation include truth finding, individual and collective healing, morality, the reintegration of the criminal and victim reparations.[61] The following examples illustrate the different emphasis that supporters placed upon the inherent as opposed to the instrumental value of victim participation.

In her opening address to the Paris Seminar in 1999 the French Minister of Justice, E Guigou stated that:

> The *raisons d'etre* of our fight are the victims, those who have suffered and are still suffering, those who are waiting for us to find and punish their tormentors, to listen to them and acknowledge their pain and try to mitigate its consequences through fair reparations.
>
> Indeed, the victims are, and must remain at the heart of our preoccupations. The recognition of their rights and reparation for any damage, loss or injury to, or in respect of them, are both the reason for and objective of international criminal justice. If we were tempted to forget that requirement, the extremely tragic current events would remind us of it.[62]

Amnesty International seemed to link victim participation to the most immediate functions of a criminal trial with its statement that:

> … it should be largely up to the Trial Chamber, in the light of experience, to determine the scope of participation by victims and how they can best contribute to the determination of guilt or innocence, the appropriate sentence and the amount and manner of reparations.[63]

On the other hand, claiming that the provisions on victim participation are 'indicative of a broader and more evolved concept of justice',[64] the Women's Caucus linked participation to wider objectives:

> Victims' participation would bring experience and perspectives which can prove useful and critical to the impact of ICC on the establishment of the rule of law, peace and security and reconciliation.[65]

Whether the Court will acknowledge a particular victim's interest in the proceedings will be determined by the view that it takes of the purpose of participation.

[61] Jorda and de Hemptinne, above n 5 at 1400–1.
[62] Above n 12.
[63] Amensty International Report IOR 40/06/99 United Nations (UN) The International Criminal Court: Ensuring an Effective Role for Victims — Memorandum for the Paris Seminar, April 1999 at <http://www.jochen-birk.de/icc_ai-london1.htm>
[64] Above n 15.
[65] Statement of M Balikungeri to Women's Caucus meeting, *ibid.*

5.2 Establishing a Personal Interest in Participation

Victims need to demonstrate a judicially recognisable personal interest in order for the Trial Chamber to grant them participation. What kinds of personal interests the Court will recognise is not entirely clear, but whether the Court interprets personal interests narrowly or broadly, they remain a construction. Donat-Cattin suggests that victims have a 'personal interest' in participation where the prosecution has not fully disclosed victims' evidence.[66] However, it is doubtful if the Trial Chamber can afford to take this view. The prosecution will always select strategically amongst the available evidence and the Trial Chamber may not be in a position to determine whether or not the omission of evidence is material. Even if the Trial Chamber accepts Donat-Cattin's approach the Prosecution may decide not to pursue those aspects of the case that relate to a particular victim's evidence, so that the issue of full disclosure is not pertinent. In these circumstances (unless Art 65(4) Rome Statute applies), there seems little that a victim could do.[67] Moreover, legal story-telling is itself partial. Even if full disclosure were possible, it is unlikely to satisfy fully a victim's desire to recount his or her story in his or her own way.

Personal interests will be recognised in so far as they relate to an ICC function (for example, the determination of criminal responsibility, the granting of individual or collective reparations, the contribution to reconciliation). The Court is unlikely to be interested in hearing a story for its own sake. Consequently, victims are still likely to be prevented going beyond these purposes in much the same way as victim-witnesses were compelled to skim over significant events in their testimony in the *Krstić* proceedings, as illustrated by the above exchange between witness DD and the prosecutor.[68] Since the Court may vary the emphasis that it places upon these functions at different stages of the proceedings, apparently like victims may not be treated alike. It can be assumed that for the reasons of expediency (and possibly a fair trial)[69] the Trial Chamber will not grant a victim's application to participate where his or her personal interests have been raised by another victim's intervention or, by witness testimony. In cases of crimes with multiple victims the Court is also likely to conflate individual victim's interests with the interests of a wider collective victimhood. Participation must be rejected delicately (or accepted subject to conditions sensitively) so that turning down (or restricting) participation does not deny victims the official acknowledgment they

[66] Above n 13 at 271 n 48.
[67] Article 65(4) gives options to the Trial Chamber when it is of the opinion that 'a more complete presentation of the facts in the case is required in the interests of justice, in particular the interests of the victims'.
[68] See above text to n 58.
[69] Donat-Cattin suggests that for reasons of fair trial and expediency, victims should not participate where the substance of their putative intervention has been dealt with by another participant in the trial, above n 27 at 881. However, it is unclear why he comes to this conclusion and doubtful whether victim participation poses a greater danger to a fair trial than victim-testimony would in these circumstances.

may seek of their suffering. Otherwise, the danger is that victims may come to consider effective participation as a remote and unlikely prospect.

5.3 Distinguishing Between Victims and Victim-Witnesses

The view that the Court takes of the purpose of participation will affect the manner in which victim-witnesses testify. The Rome Statute and Rules of Procedure and Evidence do not clarify the relationship between participating victims and victim-witnesses. It has been argued that for reasons of a fair trial participating victims should not be allowed to act as victim-witnesses in the same case.[70] It remains to be seen whether the Court will adopt this view. The problem is that many of the reasons that have been advanced in support of victim participation resonate with the justifications put forward for victim-witness testimony. These include the need to establish the truth, to provide an opportunity for individuals and their societies to begin a process of healing and reconciliation.[71] The acts of participating and testifying share similar functions. How decisions are made as to whether a victim appears as a witness or is left to be a potential participant in proceedings will be crucial because the quality and amount of space granted to participating victims cannot but affect the parameters within which victim-witnesses testify. The pressures that led to the instrumentalisation of victim-witnesses before the ICTY will remain (and grow) despite the introduction of victim participation with the danger that victim-witnesses may be accorded even less quality space in which to testify. This issue does not relate simply to the question of whether there is sufficient time in a trial to do justice to both victims and victim-witnesses. The core question is whether victim participation and victim testimony are interchangeable. The answer to this question determines the manner in which victims participate, how their credibility is assessed and how, if at all, they can expect to benefit from participating in proceedings.

6. THE FORM OF PARTICIPATION

Once participation is granted (on whatever grounds), it would be a mistake to imagine that a victim will be able to express his or her views and concerns freely in his or her own words. In his commentary on Article 68 of the Rome Statute, Donat-Cattin emphasises the centrality of victims' rights to the ICC conception of justice which requires the Prosecutor to establish the truth.[72] The participation of victims, who are purportedly in the best position to know what happened, can

[70] Jorda and de Hemptinne, above n 5 at 1409.
[71] See above text to nn 8–12, 61.
[72] Donat-Cattin, above n 13 at 256.

help to ensure that the truth is revealed.[73] However, it would be misguided to assume from this that anything other than a partial truth can be elicited from victim participation.

6.1 Legal Truth

Law understands the notion of truth restrictedly. Legal evidence is based on apparently objective or positive facts at the expense of other kinds of facts, even if they can contribute to an understanding of what happened. In the courtroom, lawyers use facts which are 'precise, pedantic and quantifiable' and which 'fall under a true/false dichotomy'. The legal process grants victim-witnesses little scope to raise other kinds of facts, such as those that express 'emotions, impressions, general reminiscences, renditions of atmosphere, interrogations of a philosophical or ethical nature'. Instead, victim-witnesses are asked 'the where, when, who, and how of events'.[74] These questions elicit answers which can be cross-examined because they appear objective. They tend to privilege the sense of sight over other senses.[75]

Lawyers grant special weight to these facts because they can withstand the forensic challenges of the legal process. These facts become evidence because they can be subject to and can survive disputation. Donat-Cattin describes this juridical truth as follows:

> We are, indeed, dealing with the concept of 'juridical truth', which is the result of an advanced and sophisticated procedure of verification of facts: namely, the trial. The due process of law is a method for understanding reality in cases in which 'justice' requires the affirmation of the principle of individual criminal responsibility and the consequent determination of penalties for the convicted person. Therefore, the so-called interests of justice, which should inform the work of all the organs of the ICC, including the Prosecutor, must be interpreted primarily as the interests of victims to know the truth through a fair trial of the accused.[76]

This chapter argues that far from being an advanced and sophisticated procedure of fact finding, the legal process constrains the way in which victims testify so much that the truth it establishes is only partial. Legal truth is often known in advance of war crimes trials (and even at the time of atrocity) and often subject to minimal contestation at trial. In the *Krstić Case* victim-witnesses were hardly cross-examined on their evidence. So too, the use of victim-witnesses in the *Eichmann Case* had little to do with fact-finding, because most of the facts that they addressed were well known before the trial. Instead victim-witness testimony

[73] Jorda and de Hemptinne, above n 5 at 1394.
[74] M-B Dembour and E Haslam, above n 16.
[75] Haldar 'Acoustic Justice' in L Bently and L Flynn (eds), *Law and the Senses: Sensational Jurisprudence* (Pluto Press, London, 1996) at 122–36.
[76] Donat-Cattin, above n 13 at 255.

appears to have been used to create 'a national saga that would echo through the generations'.[77] In these circumstances story-telling has little to do with truth finding. Legal story-telling is, however, often the pre-condition of the official acknowledgment of atrocity.[78] However, as the following paragraphs illustrate, this acknowledgement can also be partial.

Victim-witnesses have little control over the way in which their narratives are framed. Legal criminal stories focus upon the responsibility of individual defendants. During the *Krstić Case* some victim-witnesses alluded to the role of the international community in failing to prevent the massacre at Srebrenica. Witness Mr Mandžić stated that:

> And even as I was on the road, I already was quite fearful. I didn't know what might happen to me. And I was thinking about the worst possible outcome, that I might be arrested and forced to — I don't know what. But I thought one thing, and one thing only, and that was to try, to try to do my best on behalf of the population which was left completely without any protection, because I could really see that the enclave was being taken and that an area which had been protected by the UN was being taken. On the other hand, the United Nations kept silent. And even the mildest type of reaction that they could have done, they could have sent in teams of the International Red Cross at least there, or the UNHCR, to try to mitigate, to allay, to ease this difficult, this horrible situation, especially the humanitarian disaster. And in such good faith, to try to alleviate the suffering of the population, is that [sic] I went to Bratunac, but I was really frightened.
>
> Mr CAYLEY [the prosecutor]: Mr President, at this point we're going to move into some video evidence, and if it's your wish, we might take a short break at this time.[79]

It seems all too clear from this transcript account that, in the view of the lawyers, this aspect of the fall of Srebrenica had no place in the ICTY's attempt to discover what happened, however important it might be for witness, Mr Mandžić, and for the wider concerns of establishing an official and permanent record of the truth. Nor was the ICTY the place to acknowledge the comparison between the bravery of the man and the fearfulness of the international community.

Notwithstanding the different procedural context, these constraints upon story-telling at the ICTY are relevant for ICC victim participation. It is unlikely (but not impossible) that the ICC will allow participating victims to introduce the perspectives that legal evidence excludes. First, the recognisable personal interests of the victims that trigger participation will limit participation. This point has been dealt with in the previous section of this chapter.[80] Secondly, for the Tribunal

[77] Segev, quoted in Osiel, above n 9 at 16.
[78] L Weschler, 'A Miracle, A Universe: Settling Accounts with Torturers' in NJ Kritz (ed), *Transitional Justice How Emerging Democracies Reckon With Former Regimes* vol I *General Considerations* (United States Institute of Peace, Washington DC, 1995) 491–92.
[79] Above n 58 at 967–68.
[80] See Pt 5.2 above.

to achieve its other purposes, it may need to take a restricted view of the range of available evidence. Osiel points out:

> The choice of where to begin the story and where to end it often determines who will play the villain, who the victim. Yet there are no consensual criteria for locating a story's beginning and end. In fact, sophisticated historians now readily concede that these temporal resting points 'do not flow from the events but are in fact strategic ruptures chosen for specific purposes'. And people differ in their purposes.[81]

It is impossible to predict what kind of framing decisions will form the backdrop to proceedings at the ICC, although the provisions on non-retroactivity and jurisdiction will certainly play a part.[82] Framing can only be truly effective if applies to all of the participants in a case. But these restrictions on participation may be antithetical to the granting of space to a victim to express his or her truth, one of the reasons put forward to justify participation in the first place. They may also interfere with individual and collective healing, a point to which this chapter now turns.

6.2 Legal Story-telling and the Individual Victim

Even if it can be said with some degree of certainty that the ICC procedures will have the effect of restricting victims' participation, the exact manner in which they will do so, and how the victim's truth will interact with the processed truth elicited from examination-in-chief, cross-examination and judgment is unclear. It is likely that the ICC will determine the credibility and weight of victims' interventions by the law's traditional approach towards evidence. Therefore, if victim interventions are to be legally weighty they may need to embrace legal narratives. It was argued above (part 6.1) that legal narratives are partially representative. Of just as much concern is that the manner of collecting legal evidence may violate the consciousness of the victim and the workings of his or her memory.[83] An example from the *Krstić case* illustrates this point.

Q. [by the Prosecution] … how long were you behind the Transport, in this area?
A. Some 10, maybe 15 minutes.
Q. And did you see anything happening nearby?
A. I saw a machine, a tractor or something. I wasn't particularly keen on checking that. And I saw dead, heaped one on top of the other …

[81] Osiel, above n 9 at 133.
[82] Controversy surrounding the Argentian junta trial illustrates the importance of timing and jurisdiction in legal frameworks. According to Osiel: The temporal frame adopted by the court discredited the entire proceedings, in the view of the officer corps and most civilian conservatives, by not extending sufficiently backward in time to before the 1976 *coup d'état* (or outward in space, to the near-revolutionary situations in neighboring states like Brazil and Chile). See also Osiel, above n 9 at 135.
[83] See above n 16.

Q. And how many dead did you see?
A. I should say some 20 to 30 pieces.
Q. And could you see any injuries to those dead people?
A. I could see that they were lying one on top of the other, but I could see that they had — that their necks had been slit, cut, behind.
Q. And can you describe, if you recall, what this machine that you've described as a tractor was doing?
A. Well, it looked like a tractor. I wasn't really paying much attention, because when I saw all these dead, it seemed — or perhaps it was an excavator or something like that. It was digging.

This was followed by cross-examination.

Q. [by the Defense] … I'm referring to your statement of the 27th of November, 1998. It is your statement, is it not?
A. Yes, it is.
Q. On page 4 of that statement, the third paragraph from the bottom, let me read you the first sentence of this paragraph: 'Near to Gavric I also saw a red-coloured digger, making a hole, and to this I saw a pile of approximately 40 or 50 dead bodies.'
A. You expect me to answer? Is that a question? Well, it is very difficult for you to understand me. I was terribly afraid. I saw this machine, I saw an excavator, I wasn't sure it was an excavator, and I saw dead bodies, but they were on a pile. At that moment, I panicked and I became sick from that panic and from the fear, and I'm still suffering form the stress that I experienced at that moment …
Q. Witness H, you can distinguish between an excavator and a tractor, can you not?
A. Well, let me tell you, sir, at that moment, I cannot tell you exactly, When I saw the machine, it was a tractor or an excavator. I spent perhaps one minute or two observing those bodies. And immediately after that, I started running away. People were in a panic, they didn't know where to go. There were rumours about slaughters being committed at various places. So people panicked, and we no longer knew where to go.[84]

This transcript demonstrates how legal story-telling fails to provide victim-witnesses with the essential conditions for the achievement of restorative justice, that is, the '… opportunity, if they want it, to describe in their own words what happened and to communicate with each other'.[85] The curative effect of participation may be limited if victims are encouraged to adopt the language and structure of legal narrative. This potential problem may be compounded by the fact that victims are entitled (in some circumstances requested) to appoint a lawyer. The appointment of a legal representative is aimed to protect victims' rights.[86] Lawyers are probably best placed to protect victims' rights to reparations.

[84] Above n 58 at 1688–89 and 1705–6.
[85] M Wright describes these pre-conditions as essential for restorative justice as quoted in Donat-Cattin, above n 13 at 258, n 16.
[86] Donat-Cattin, above n 27 at 881.

However, the translation of a victim's story into a legal form may do little to provide a victim with therapeutic relief. This difficulty is compounded in the case of crimes of a collective nature, where a victim's individual interests may be represented collectively with the result that his or her individual truth and pain may become hidden.

7. RESPONDING TO PARTICIPATION

The response of the ad hoc War Crimes Tribunal to the testimony of victim-witnesses was often inadequate in the *Krstić Case*. Whether or not victim-witnesses would have fared better if the Tribunal had been able to award compensation is open to conjecture. The provisions on victim reparation in the ICC will overcome some of the problems that the Tribunals experienced in this respect.[87] More disconcerting is the response of the Judges to victim-witness testimony in the *Krstić Case*.

The ICTY makes no express provision for victim participation. In the *Krstić Case* the Judges provided victim-witnesses with an opportunity to comment freely at the end of their testimony. It is unclear why this Bench provided for informal victim participation at this point. Was it an acknowledgement that victim-witnesses have far more to tell than the legal process allows them? Were they attempting to demonstrate their respect for victim-witnesses? Worryingly in the light of developments at Rome, it was here that the process appeared to be most damaging to the victim-witnesses' consciousness.[88]

As well as being located in the past, victim-witnesses' testimonies at the ICTY were constrained by formal rules of evidence, procedure and courtroom convention. In contrast, the final remarks of the victim-witnesses tended to deal with their current troubles as survivors. Although the Judges attempted to respond sympathetically to their comments, all too often they gave the impression of not having heard anything that the victim-witnesses had tried to tell them. The Judges thereby, albeit unintentionally, denied the victim-witnesses' pain. Sometimes the Judges used these parts of the proceedings to convey a message of hope, reconciliation and forgiveness that crossed ethnic divides. In our earlier article we argued that these remarks were inappropriate because they failed to recognise that victim-witnesses may not be ready to forgive their perpetrators and because these comments assumed that healing is only a matter for interpersonal conduct.[89]

The following exchange between Witness DD and Judge Rodrigues illustrates the unsatisfactory nature of one such exchange.

[87] At Rome reparations were considered to contribute to reconciliation at both an individual and societal level. See Muttukumaru, above n 32 at 304. These provisions are to be welcomed although they may paradoxically limit the space that will be accorded to participating victims see above text to n 68.
[88] See above Pt 2.
[89] *Ibid.*

> THE WITNESS: [Interpretation] I wanted to say if I had known these people would betray us the way they did, those who had sworn to protect us and signed documents to that effect, I would have saved my family, my husband and my children. We could have sought shelter somewhere and at least we would have died together and our bones would be together. I would have stayed in front of our house together with my whole family and let them all kill us together if I had known that would happen.
>
> JUDGE RODRIGUES: [Interpretation] So, madam, I wish to repeat that you are an extremely brave woman. You have said that the body lives, but perhaps the soul needs to gain strength from the little hands of your son. You must continue living, at least if for no other reason than to testify about all those events that you have shared with us and to avoid, as you have said, that fools may appear again in the future. So that is very good reason to continue living. We thank you very much for coming here and we would like to wish a better life for you and for all your loved ones. So you may now leave.
>
> THE WITNESS: [Interpretation] May I say one more thing, please? May I?
>
> JUDGE RODRIGUES: [Interpretation] Yes, go ahead.
>
> THE WITNESS: [Interpretation]. I would like to appeal to you to ask Mr. Krstić, if you can, whether there is any hope for at least that little child that they snatched away from me, because I keep dreaming about him. I dream of him bringing flowers and saying 'Mother, I've come.' I hug him and say, 'Where have you been, my son?' and he says, 'I've been in Vlasenica all this time.' So I beg you, if Mr. Krstić knows anything about it, about him surviving some place …
>
> JUDGE RODRIGUES: [Interpretation] Yes, madam, I think all of us have heard your plea, and I think that all the people who are here and can do something will do it. But I repeat, you have good reasons to continue living. All the people here present and all those listening to us will do whatever is possible to do. We understand and feel for your suffering. I will ask the usher to lead you out now. Thank you once again for coming.[90]

These remarks demonstrate the impotence of the legal process. Witness DD is denied an answer to the one question that might have given her some relief. It is impossible to know from the transcript evidence whether Krstić was able or willing to answer Witness DD; that option was closed to him (and her). Judge Rodrigues' response is also instructive. In order to emphasise witness DD's reason for living he appears to adopt legal language.[91] However, the reference to testifying here does not appear to refer only to her role in the courtroom in establishing General Krstić's legal responsibility for atrocities. Instead, it seems to allude to another important task which is to ensure that future generations know about the massacre in a broader sense. Judge Rodrigues appears to be encouraging witness DD to continue to narrate her story outside the courtroom. In the context of what she has said, however, his remarks merely emphasise the limitations of the legal process to provide her with the closure she appears to seek so that she can achieve 'a selfhood released from the singular identity of the survivor'.[92]

[90] Above n 58 at 5768–69.
[91] Judge Rodrigues' comments are in translation.
[92] Wood, above n 8.

It seems likely that the issues that victim-witnesses raised at the end of their testimonies in the *Krstić Case* will be similar to those that participating victims will raise at the ICC. Since these issues are rooted in present concerns, they bring into play the tension between the need for courts to make past events the heart of the trial whilst simultaneously focusing upon a more hopeful future.[93] It seems that the resolution of this tension in the *Krstić Case* was damaging to some of the victim-witnesses. Some might argue that these difficulties will be avoided with careful judicial training. However, even though appropriate training of legal personnel is to be welcomed, it will not avoid these kinds of remarks entirely, nor can it always offer to relieve the personal agony that victims suffer. The focus upon individual healing for the benefit of the wider collective is an accepted use to which international criminal proceedings are put. As such it cannot but frame judicial responses to victim participation. Seen from this perspective, the Judges' comments in the *Krstić Case* were unfortunate yet inevitable.

In the *Krstić Case* it might have been better if the Judges had confined themselves to a formal role and thereby avoided making these sorts of damaging remarks. This may not be possible for judges once victims begin to participate at the ICC.

8. CONCLUSION

This chapter has argued that there are a number of difficulties with victim participation under the Rome Statute. First, its purposes are unclear and, in so far as they can be identified, may be contradictory. Secondly, it may be impossible to fulfil them within a legal framework for there is surely an inescapable tension between the desire to allow victims to use the ICC therapeutically and the demands of due process. Finally, the relationship between victim-witnesses and participating victims is unclear. Of particular concern is that the introduction of victim participation will not ameliorate, and may worsen,[94] the position of victim-witnesses.

Notwithstanding these comments, victim participation is to be welcomed. However, the processes that tend towards either the inevitable, or sometimes unnecessary, instrumentalisation of victim-witnesses will need to be vigilantly addressed and continuously worked upon in order that their worst effects are mitigated when victims participate. This will present the ICC and international law with an on-going and formidable challenge. At the outset, ICC personnel would be well advised to consider the lessons that the ICTY proceedings afford and to bear them in mind when they are exercising discretion in relation to victim participation.[95] Whatever the differences between the functions and operation of these two bodies, the experience of cases such as *Krstić* illuminates many of the pitfalls that the ICC must strive to avoid.

[93] See above n 16.
[94] If victim-witnesses have less quality space to testify when victims participate, see above, Pt 5.3.
[95] See above, text to n 57 ff.

PART VI

National Implementation and Political Responses

13

Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States

DAVID TURNS

1. INTRODUCTION

1.1 National Implementation of International Criminal Law

THIS CHAPTER EXAMINES the previous and current state of the implementation of international humanitarian law in selected States and the processes by which those States have implemented or are implementing the substantive offences contained in Articles 6–8 of the Rome Statute.[1] While the initial focus is on the position in the United Kingdom, a comparative analysis of the methods adopted in several other States — representing both the common law and civil law traditions — is also presented. The differences between many States, in terms not just of the methodology of implementation but of the underlying problems that the implementation process has caused to surface, are striking. For example, the United Kingdom and New Zealand have started from virtually identical positions in the ICC implementation process and arrived at markedly different results; Canada, with a similar legal system to those States, started from what might be termed an already 'liberal' position and ended up with a highly innovative solution. In all three States, the focus of implementation has been on the definitions of the ICC crimes and the extent of national jurisdiction allowed. France and Germany, on the other hand, have seen debates which, while similarly concerned to achieve effective and consistent national legislative definitions of the ICC crimes, have proceeded from entirely different fundamental concerns.

[1] This chapter is not primarily intended to deal with national implementation of procedural provisions governing States' technical co-operation with the ICC (although such procedural matters will be mentioned where they are a particularly interesting aspect of a State's implementation legislation). Procedures for the arrest and transfer of suspects to the ICC, for example, are fairly uncontroversial on the whole as they are generally analogous to internationally accepted principles of extradition law, albeit with specialised, 'fast-track' features. The majority of debates surrounding national implementation have been, and are, concerned with substantive criminal law.

At first sight it might seem a little odd that much attention is being devoted in criminal and constitutional legal circles to the implementation of the Rome Statute in the national legal systems of States. After all, the Statute itself contains no specific obligation on States to implement the Statute's provisions per se. While the Statute does contain various requirements for State co-operation with the ICC within the framework of the Statute,[2] these relate exclusively to matters of investigatory, executory and trial procedure.[3] Ironically, these have been the subject of very little controversy. Many of the States that are enthusiastic about co-operating with the ICC have already demonstrated enthusiasm in co-operation with the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and have enacted domestic laws to enable such co-operation to take place within the national legal framework.[4] Templates for co-operation with the ICC therefore already exist in a number of States. The debate over implementation has centred instead on the implications of the complementarity principle which is stated in Article 1 of the Statute and which is the basis on which it is intended the court will operate.[5]

1.2 The Principle of Complementarity

Even Article 1 does not require national implementation in express terms. However, its enshrinement of the principle of complementarity, which means that primary jurisdiction over the crimes in the ICC Statute will rest with individual States, implies a need for implementation. States must ensure that they are able to prosecute the crimes contained in Articles 6–8 of the Statute, not only theoretically — for example, by having the legal capability to assert jurisdiction to prosecute — but also in reality, by having in their national law criminal offences equivalent to those listed in the Statute. If States are unable to prosecute for lack

[2] Art 86 of the Statute imposes a general obligation on States Parties to co-operate with the ICC in investigating and prosecuting the crimes within the court's jurisdiction; further, Art 88 requires States Parties to ensure the availability of procedures in national law to enable all the necessary forms of co-operation with the court.

[3] The main forms of co-operation include general compliance with ICC requests for co-operation (Art 87); surrender of persons to the court (Art 89); provisional arrests pursuant to ICC requests (Art 92); identification or location of persons or items, taking and production of evidence, service of documents, facilitating witnesses' and experts' attendance before the ICC, temporary transfer of persons, examination of sites (eg, mass graves), execution of search and seizure orders, protection of witnesses, freezing of sequestration of property and assets (Art 93); and enforcement of sentences (Arts 103–7), fines and forfeiture orders (Art 109).

[4] In the United Kingdom this was achieved by the passing of delegated legislation under the United Nations Act 1946, s 1. The relevant instruments are SI 1996/716 (in relation to the ICTY) and SI 1996/1296 (in relation to the ICTR); see C Warbrick, 'Co-operation with the International Criminal Tribunal for Yugoslavia' (1996) 45 *ICLQ* 947.

[5] For general discussion, see M Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent With the Rome Statute of the International Criminal Court' (2001) 167 *Mil LR* 20; M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Mich JIL* 869.

of suitable offences in their domestic law, prosecutions will as a matter of course have to be deferred to the ICC, whereby the whole notion of complementarity will be rendered pointless and the *modus operandi* envisaged for the ICC will be ineffective. This is not a matter of altruism, of States conceding elements of their sovereignty for the greater good of the international community (although the latter was undoubtedly a primary aim behind the creation of the ICC). It is very much in States' national interests to have effective domestic laws for prosecuting ICC offences since otherwise, as noted above, they will be obliged to defer jurisdiction to the ICC in relation to the crimes contained in the Statute.[6]

States may not be unduly concerned about ceding law enforcement capability to a special international jurisdiction in the case of a foreign national who allegedly committed war crimes against other foreign nationals overseas; but they *will* be concerned if they have to defer to ICC jurisdiction in respect of their own nationals. There can be no greater demonstration of this underlying concern than the fact that the root of American opposition to the Statute is the profound reluctance in Washington to accept the eventuality that an international tribunal might have jurisdiction over United States servicemen, possibly at the malicious behest of one of the United States' many enemies in the community of nations.[7] The initial American solution to this fear was simply to vote against the Statute at Rome; it does not seem to have occurred to the US authorities that if they properly implement the Statute's provisions, they will have very little to fear from the Court as, in any case involving US servicemen, they will be able to demand the right to prosecute their own in accordance with Article 12(2)(b) of the Statute.[8]

1.3 'Internationalisation' and 'Nationalisation'

It is therefore clear that national implementation, not just of the procedural modalities to enable co-operation with the ICC, but especially of the substantive criminal offences in question, is of the utmost importance for the effective

[6] Under Art 17(1)(a)-(b) of the Statute, a case will be considered inadmissible before the ICC if it is being investigated or prosecuted by a State having jurisdiction based on territoriality or nationality, even if the State actually decides not to prosecute, '*unless the State is unwilling or unable genuinely to carry out the investigation or prosecution*' (my emphasis). In the latter scenario, the State will have the choice of either conceding jurisdiction to the ICC (or, if applicable, to another State) or being internationally censured for subscribing to a 'culture of impunity' in respect of persons accused of violating international humanitarian law.

[7] See D Scheffer, 'The United States and the International Criminal Court' (1999) 93 *AJIL* 12; M Newton, 'Should the United States Join the International Criminal Court?' (2002) 9 *UC Davis JIL and Pol'y* 35.

[8] The Rome Statute was signed by US President Bill Clinton on 31 Dec 2000, with the proviso that it not be transmitted to Congress for ratification; the administration of President George W Bush subsequently withdrew the US signature and indicated the US intention not to become a party to the Statute: US Department of State Press Statement, 6 May 2002, available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

functioning of the system as intended under the Rome Statute. Moreover, the operation of national implementation in this important field of international law represents the fascinating two-way process that is at the heart of the current trends in the development of international criminal law: the simultaneous 'internationalisation of national criminal law' and 'nationalisation of international criminal and humanitarian law'. Some commentators have termed this the 'globalisation of criminal justice'.[9] The ICC Statute 'internationalises' many general principles of criminal law that are recognised in national legal systems, by providing what is increasingly being perceived as a de facto codification or consolidation of those principles on an international level. Furthermore, the content of the ICC Statute is a blend of procedural international criminal law and substantive international humanitarian law. The fact that 120 States voted in favour of the Statute at the 1998 Rome Conference can be said to provide strong evidence of an emerging *opinio juris* as to the nature and ambit of genocide, crimes against humanity and war crimes in customary international law. At the same time, the process of national implementation in individual States 'nationalises' the offences in the Rome Statute by re-creating them in the national laws of States which may not previously have had analogous domestic offences, or which may have had such offences but defined them in a manner inconsistent with international law. The net result is that the creation of this international treaty is leading to a harmonisation of States' national laws on genocide, crimes against humanity and war crimes — which in turn enhances the credibility and effectiveness of the international law provisions themselves.

Naturally, in each State the constitutional relationship between international and national law may entail a different set of legal issues with a different methodology for implementing the three 'core crimes' of genocide,[10] crimes against humanity[11] and war crimes.[12] Much will depend in this context on whether a given State subscribes to a monist or a dualist interpretation of the relationship between national and international law, and whether its constitutional arrangements enable automatic effect to be given to provisions of international treaties which embody offences whose criminality derives from international law (and, if so, at what level of legal value vis-à-vis other laws in force domestically), or whether specific incorporation of those offences in the domestic legal system is required.[13] In the latter scenario, it will normally be the case that a special enactment of the national legislature is required.

[9] See O Triffterer, 'Legal and Political Implications of Domestic Ratification and Implementation Processes', in C Kreß and F Lattanzi (eds), *The Rome Statute and Domestic Legal Orders, Vol I: General Aspects and Constitutional Issues* (*Editrice il Sirente Piccola Società Cooperativa a r l*, 2000).
[10] ICC Statute, Art 6.
[11] *Ibid* Art 7.
[12] *Ibid* Art 8.
[13] See H Duffy and J Huston, 'Implementation of the ICC Statute: International Obligations and Constitutional Considerations', in Kreß and Lattanzi, above n 9.

2. THE UNITED KINGDOM

Before the passage of the International Criminal Court Act 2001 (and its associated Scottish legislation), the availability of offences in UK domestic law relevant to the ICC core crimes was less than satisfactory.[14] The implementation of international humanitarian law generally in the UK has always been characterised by what some commentators have labelled a 'generally minimalist approach', with specific legal provisions being incorporated piecemeal and in such a manner as to do the bare minimum strictly necessary in order to achieve basic compliance with the relevant requirements of international law.[15] The result has usually been that particular offences have either been incorporated with glaring lacunae in their scope and effect, or have been omitted altogether from the British statute book. An attempt to find the ICC core crimes in UK law was therefore formerly successful only in part and demonstrated amply the pressing need for comprehensive implementing legislation.

2.1 Genocide

Genocide had been made a criminal offence in the UK by the Genocide Act 1969 and was not in essence problematic,[16] although there were some uncertainties as to the legislation's precise jurisdictional scope. Usually, British criminal law statutes are punctilious to a fault in defining the exact circumstances in which courts in the UK will be able to exercise jurisdiction over the crimes in question, as a departure from the common law's 'default position' of strictly territorial jurisdiction. The normal basis for UK jurisdiction is that either the crime was committed on UK territory[17] or, if the crime was committed abroad, that the offender is a British national.[18] The Genocide Act, by contrast, was silent on the question of jurisdiction: it referred only to 'a person' (of unspecified nationality) committing genocide and mentioned no territorial requirements at all. It was probable, for a defendant to have been convicted of genocide under the 1969 legislation, that the offence would have had to have taken place on the territory of the UK, since the common law regards any extraterritorial application of

[14] See D Turns, 'Prosecuting Violations of International Humanitarian Law: The Legal Position in the United Kingdom' (1999) 4 *JACL* 1.
[15] See P Rowe and M Meyer, 'The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach' (1996) 45 *ICLQ* 476.
[16] The Genocide Act, s 1(1) defined the offence in UK law by reference to the Sch to the Act, which reproduces *verbatim* the international law definition contained in Art II of the 1948 Genocide Convention (78 UNTS 277).
[17] There are numerous judicial statements of the essentially territorial nature of the English criminal law, eg, *Cox v Army Council* (1963) AC 48.
[18] Jurisdiction based on the British nationality of the offender is almost invariably provided for by statute, eg, Offences Against the Person Act 1861, s 9 (providing for jurisdiction over offences of murder or manslaughter committed by British nationals overseas).

criminal jurisdiction as highly unusual unless the offender is a British national and nationality is stated, in the applicable statute, to be a ground for jurisdiction. A court would be very unlikely to presume that the British nationality of an offender is a sufficient basis on which to assert jurisdiction in the absence of an express statutory provision to that effect.

2.2 War Crimes

War crimes as defined by international humanitarian law are principally covered in UK law by three statutes: the Geneva Conventions Act 1957, the Geneva Conventions (Amendment) Act 1995 and the War Crimes Act 1991. Inasmuch as they imply that the Acts implement the 1949 Geneva Conventions and 1977 Additional Protocols *in toto* or create a generic species of war crimes in UK law, the titles of these Acts are misleading, to say the least. The legislation regarding the Geneva Conventions has been judicially declared to have the effect of implementing *only* the grave breaches provisions of the Conventions and Additional Protocol I.[19] As for the War Crimes Act, its effect is nothing like as general as its title suggests — all it does is to provide for UK criminal jurisdiction over persons accused of committing murder, manslaughter or (in Scots law) culpable homicide, if the acts in question occurred in Germany or German-occupied Europe between 1939 and 1945 and the offender was a British citizen or ordinarily resident in the UK on 8 March 1990 or subsequently acquired such status.

2.3 Crimes Against Humanity

As crimes against humanity did not formerly exist at all as a concept in the domestic law, all violations of international humanitarian law other than genocide and grave breaches of the 1949 and 1977 instruments could only be prosecuted in the UK if they happened to amount to a violation of UK law — irrespective of their acknowledged international criminality. It may in any given case be that an act which customary international law characterises as a war crime or a crime against humanity, and which was therefore not expressly covered by specific legislation in the UK, amounts to a common crime in the national criminal law. For example, any war crime which involves the death of the victim might amount to murder or manslaughter under the Offences Against the Person Act 1861.[20] Likewise, offences committed against the civilian population in circumstances amounting to crimes against humanity in international law might also constitute offences under section 63 of the Army Act, inasmuch as an offence under the latter

[19] *Cheney v Conn (Inspector of Taxes)* (1968) 1 All ER 779; for criticism of this decision, see Turns, above n 14, 14–16.
[20] The Army Act 1955, s 70 makes such 'civil offences' in the national criminal law offences also under British military law.

has to be directed at 'the person or property of any member of the civilian population'. However, these statutes apply only to British nationals or persons subject to British military law: they cannot be used to prosecute foreign nationals for crimes committed outside the UK.[21] This was the case in relation to both international[22] and non-international armed conflicts. In respect of the latter, since the ICTY Appeals Chamber's seminal interlocutory decision in *The Prosecutor v Tadić*,[23] British law was notably deficient until the 2001 Act: there was no jurisdiction in the UK to prosecute either war crimes committed in a non-international armed conflict or crimes against humanity (unless the crime was exceptionally serious — for example, murder, rape or similar offences — *and* the suspect was a British national), as the 1957 and 1995 Acts omit all reference to Common Article 3 of the Geneva Conventions and Additional Protocol II, respectively.[24]

2.4 The UK's International Criminal Court Act 2001

It can clearly be seen from the above summary that in the UK there previously existed insufficient domestic law to ensure the prosecution of most violations of international humanitarian law. It was thus obvious, right from the start of the ICC ratification process, that fairly comprehensive changes would be required for UK law to be brought into line with the Rome Statute, as only the offences contained in Articles 6 and 8(2)(a) already existed in the national criminal law. The vehicle for those changes naturally had to be in statutory form, as the UK's constitutional arrangements require that any treaty affecting the rights and duties of British subjects, as an exercise of the royal prerogative in foreign relations, must receive parliamentary approval in the form of special legislation;[25] such legislation both authorises UK ratification of the treaty, in the sense of signalling Parliament's consent thereto, and incorporates it into domestic law. The UK signed the Rome Statute on 30 November 1998[26] but, despite the

[21] A rare example of such a wide-ranging jurisdiction is to be found in the Criminal Justice Act 1988, s 134 of which provides for UK courts to have jurisdiction over cases of torture committed by foreign nationals against foreign nationals outside the UK territory. This implements the 1984 UN Convention Against Torture ((1984) 23 *ILM* 1027, (1985) 24 *ILM* 535) into UK law and would have been of relevance, for the purposes of the present analysis, in cases involving acts of torture as war crimes or against humanity.

[22] Unless the offences amounted to grave breaches of the 1949 and 1977 treaty instruments.

[23] *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 Oct 1995, 105 ILR 419.

[24] An attempt was made in 1997 to remedy this particular gap in the law when a Geneva Conventions (Amendment) Bill was introduced in the House of Lords with a view to making violations of Art 3 common to the Geneva Conventions criminal offences attracting universal jurisdiction in UK law. This private member's Bill was not actively supported by the Government and ran out of time during the 1997–98 parliamentary Session; it was not subsequently reintroduced. See further Turns, above n 14, 26–28.

[25] *Ibid* 3–5. See also *The Parlement Belge* (1879) 4 PD 129; *Maclaine Watson v Department of Trade and Industry* (1989) 3 All ER 523 at 544–45 (*per* Lord Oliver).

[26] *Hansard* HC Debs (30 Nov 1998), col 95.

Government's stated intention that the UK should be among the first 60 States to ratify the Statute,[27] the production of draft implementing legislation was substantially delayed.[28] Evidently the introduction of the necessary legislation was for some time not treated as a priority commensurate with the Foreign Secretary's assurances; this was probably due to the complexity of the task and the fact that it was not solely the responsibility of the Foreign & Commonwealth Office (FCO), but also required co-operation from the Home Office (because of the criminal justice aspects of the matter) and the Ministry of Defence (because of the military aspects). Nevertheless, a draft International Criminal Court Bill was finally published as a Foreign Office Consultation Document on 25 August 2000;[29] the consultation period ended on 12 October and the draft was revised with a view to its introduction to Parliament during the 2000–2001 Session.[30] In the event, the Bill's progress through the parliamentary stages was rapid enough after its introduction, in the House of Lords, on 14 December 2000.[31] It received its Second Reading in the Lords in January 2001,[32] was debated in Committee of the Whole House in February[33] and passed its Third Reading in March,[34] whereupon it went to the House of Commons. Its most notable stage in the latter was the Second Reading on 3 April 2001;[35] it received the Royal Assent on 11 May. The International Criminal Court Act 2001, which does not apply to Scotland,[36] entered into force on 1 September 2001.[37]

The Bill had four main purposes:

1. to enable the UK authorities to arrest and surrender persons wanted for trial by the ICC;
2. to enable 'other co-operation' with the ICC;

[27] *Ibid* (16 November 1998), col 418; *Ibid* (22 Nov 1999), col 361.
[28] The Government's tardiness was twice subjected to criticism by the House of Commons Foreign Affairs Select Committee in its *First Report on Foreign Policy and Human Rights* [HC 100-I (1998–99)] at para 102, and in its *First Annual Report on Human Rights* [HC 41 (1999–2000)] at para 29.
[29] The Consultation Document, including the Draft Bill and Explanatory Notes, was accessed at <http://www.fco.gov.uk/>.
[30] The International Criminal Court Bill was in fact included in the Queen's Speech of 6 Dec 2000, accessed at <http://www.fco.gov.uk/news/newstext.asp?4469>.
[31] *Hansard* HL Debs (14 Dec 2000), col 493.
[32] *Ibid* (15 Jan 2001), cols 924–41 and 955–1001.
[33] *Ibid* (8 Feb 2001), cols 1270–1329; *Ibid* (12 Feb 2001), cols 11–30.
[34] *Ibid* (20 March 2001), cols 1290–1334.
[35] *Hansard* HC Debs (3 April 2001), cols 214–79.
[36] Because Scots criminal law is different to that of England, Wales and Northern Ireland, the devolved Scottish Parliament had to consider separate ICC implementation legislation for Scotland. The International Criminal Court (Scotland) Act 2001 was passed on 13 Sept 2001: Scottish Parliament *Official Report*, vol 3, No 17, col 2527. It is much shorter than its Westminster equivalent but the implementation of the core crimes follows a generally identical pattern.
[37] International Criminal Court Act 2001 (Commencement) Order, SI 2001 No 2161, promulgated pursuant to s 82 of the Act.

3. to enable prisoners convicted by the ICC to serve any sentences in the UK; and
4. to incorporate the offences set out in the Rome Statute into UK domestic law.

To those ends, the Act as passed is arranged in six Parts, respectively dealing with introductory provisions, the arrest and delivery of persons, other forms of assistance, the enforcement of sentences and orders, offences under domestic law, and general provisions.[38] In respect of the arrest and delivery of persons and other forms of assistance, it is worth noting that the procedures in the Act are based on the 'fast-track' rendition procedures adopted in the Statutory Instruments providing for co-operation with the ICTY and ICTR,[39] rather than the traditional procedures of inter-State extradition law (currently contained in the Extradition Act 1989).

An immediately noticeable aspect of the new Act is that the creation of substantive criminal offences in domestic law, which has generally been at the very forefront of most other States' preoccupations in terms of implementing the Rome Statute, is relegated to the penultimate and shortest part of the legislation: the first 49 sections of the Act are either definitional or procedural, with the substantive law contained in the relatively short Part 5. Section 51 of the Act makes genocide, crimes against humanity and war crimes offences in UK domestic law if committed in England, Wales or Northern Ireland, or outside the UK by British nationals, residents or persons subject to British service jurisdiction.[40] The offences are defined by reference to Articles 6, 7 and 8(2) of the Rome Statute, respectively; these are annexed to the Act as Schedule 8. Section 52 refers to ancillary offences, which are subsequently defined[41] as those of aiding and abetting, inciting, attempting or conspiring, and assisting in the commission of an offence.

Section 53 of the Act provides that the offences in sections 51 and 52 are triable on indictment only and with the consent of the Attorney-General; the sentences available on conviction are life imprisonment (for offences involving wilful killing) and a maximum of 30 years' imprisonment (for any other offence). Section 54 covers offences in relation to the ICC (that is concerning the administration of justice), as provided for in Article 70 of the Rome Statute. These provisions are all then duplicated in respect of Northern Ireland.[42] Section 65 of the Act deals with the doctrine of command responsibility in terms mirroring those of Article 28 in the Rome Statute.

[38] For general discussion, see R Cryer, 'Implementation of the International Criminal Court Statute in England and Wales' (2002) 51 *ICLQ* 733.
[39] Above n 4.
[40] The service jurisdiction to which s 51 refers applies under British military law, which currently consists of the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957, together with associated instruments such as the *Queen's Regulations for the Army* (1975) and the *Manual of Military Law (Pt I)* (HMSO, Ministry of Defence, 1972).
[41] International Criminal Court Act 2001, s 55.
[42] *Ibid* ss 58–62.

2.4.1 The Methodology of Incorporation

The methodology of incorporation of criminal offences used in Part 5 of the 2001 Act is somewhat unusual for the UK, since the traditional approach — as manifested in the Geneva Conventions legislation and interpreted in *Cheney v Conn*[43] — has been only to create specific, limited offences in national law. Presumably it was felt in the Government Departments responsible for drafting the legislation that the sheer volume of substantive law in the Rome Statute would render the itemising of specific crimes and their formulation as new domestic offences too difficult and time-consuming. It is probable that the re-incorporation of genocide (which was already a criminal offence in the UK pursuant to the Genocide Act 1969)[44] was effected with a view to consolidating international crimes in UK law — an approach similar to that adopted in several of the other jurisdictions considered in this chapter — and also in order to close the 1969 Act's jurisdictional loophole by replacing the latter's open-ended jurisdictional provisions with specific territoriality and nationality requirements. The incorporation of crimes against humanity and war crimes, on the other hand — legal concepts previously either unknown or heavily circumscribed in UK law — has the effect of creating, at a stroke, new generic offences in the English criminal law and signals British recognition that these offences are firmly entrenched in customary international law. On the whole, this is undeniably a positive development, especially in that it includes '[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character' as contained in the Rome Statute.[45] In addition, at least one lesson *has* now been learnt from the *Pinochet* case, as any possibility of defendants invoking State or diplomatic immunities as a ground to prevent arrest and delivery to the ICC is expressly excluded.[46] It is noteworthy, though, that even this provision was absent from the original draft Bill and was introduced only grudgingly, under pressure — the Foreign Office viewed its introduction as 'a very substantial concession' to those who were arguing for more rigorous implementing legislation, although international lawyers were dismayed by its omission from the original draft Bill.

2.4.2 Jurisdiction

There are other substantive criticisms that can be made of the Act. From an international lawyer's perspective there is a more than reasonable case for arguing that the British legislation does not go far enough in implementing the ICC

[43] Above n 19.
[44] Sch 10 to the 2001 Act repeals the Genocide Act in its entirety.
[45] ICC Statute, Art 8(2)(e).
[46] International Criminal Court Act 2001, s 23; note that this provides that it does 'not prevent proceedings under [Part II of the Act]'. Although on the face of it the individual may still be immune from arrest and detention because of the operation of State or diplomatic immunity, this does not apply to nationals of States parties to the Rome Statute.

Statute and that the 'generally minimalist approach' has again prevailed, with disappointing results. The most noticeable lacuna in this context is the provision in section 51(2), which limits the British courts' jurisdiction over ICC offences to acts committed in the UK or by British nationals or residents outside the UK. The national jurisdiction envisaged is thus *not* the universal jurisdiction allocated by customary international law in respect of war crimes and crimes against humanity,[47] as it is instead based on considerations of the territorial location of the offence and the nationality of the offender. A conclusive statement of British Government policy on the question of universal jurisdiction was made in the House of Commons by the FCO Minister of State as follows:

> We have a long-established practice of taking universal jurisdiction only as part of international law. The problem is that the [ICC] statute does not require universal jurisdiction, so we do not think that we should go it alone and say that we will do it all if the court will not do it. … [T]he principle is that we would not stand in the way of extradition to another State … or of transfer to the ICC, but we cannot set ourselves up as a substitute court and go further than is proposed in the statute.[48]

This rationale, that the ICC Statute does not expressly *require* States to adopt universal jurisdiction over the offences in Articles 6–8, is both superficial and flawed in terms of international law, for it ignores the fact that universal jurisdiction is by definition a jurisdiction of *States*, not of international tribunals, so that the Rome Statute could not possibly provide for it.[49] It is true that the Statute's own preconditions relating to the grounds for asserting jurisdiction in any particular case are either that the crime was committed on the territory of a State Party[50] or that the accused is a national of a State Party.[51] But the whole point of the complementarity principle is to have as wide as possible a jurisdiction for States — universal jurisdiction, as authorised by customary international law — which is then backed up, as necessary, by the ICC's jurisdiction. There was also a fear lurking in the corridors of Whitehall that if the UK adopted full universal jurisdiction, this would encourage an undesirable form of reciprocity whereby other States parties might also seek to assert universal jurisdiction to the detriment of 'responsible officials' of the UK.[52] Further objections to the use of

[47] *Attorney-General of Israel v Eichmann* (1962) 36 ILR 5; K Randall, 'Universal Jurisdiction under International Law' (1988) 66 *Texas LR* 785; MC Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia JIL* 81.
[48] *Hansard* HC Debs (3 April 2001), vol 366, col 278.
[49] Note that the jurisdiction of UK courts over grave breaches of the 1949 Geneva Conventions and 1977 Additional Protocol I *is* universal, as provided for in the Geneva Conventions Act 1957 and the Geneva Conventions (Amendment) Act 1995; however, those statutes implement express requirements to have mandatory jurisdiction available pursuant to certain provisions in the relevant international treaties. There are no equivalent provisions in the ICC Statute.
[50] ICC Statute, Art 12(2)(a).
[51] *Ibid* Art 12(2)(b).
[52] This misguided argument, which was given judicial expression by Lord Goff in *Reg v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3)* (1999) 2 All ER 97 at

universal jurisdiction in UK courts were connected with the difficulties, real or perceived, in obtaining evidence and securing witnesses from outside the jurisdiction; arguably it would be difficult to justify the considerable cost to the taxpayer of mounting investigations and eventual prosecutions in cases where the offence had no connection, in terms of territoriality or nationality, to the UK.[53] It is true that such cases are enormously expensive and can be very difficult in practical terms: the fact that evidence and witnesses are situated outside the jurisdiction may contribute to a perception that universal jurisdiction is not really effective in practical terms.[54]

It is submitted that none of these considerations are sufficient to justify a state of the law whereby those who commit the most abhorrent international crimes could benefit from a lack of provision for their prosecution, which would relegate the UK to the unsavoury status of being perceived as a 'safe haven' for war criminals. Such fears have been voiced in the UK before, notably during the protracted legal proceedings in relation to the extradition of General Augusto Pinochet Ugarte to Spain for offences allegedly committed in Chile;[55] however, that case did not involve an international jurisdiction like the ICC, but competing national jurisdictions. Nevertheless, the position demonstrated with alarming force by the *Pinochet* case is that, in principle, a foreign national accused of crimes against humanity against other foreign nationals in another State will not be subject to prosecution under the law of the UK if there is no statutory criminal offence with which he could be charged.[56] Moreover, if any other States involved

128 and found some favour with the Foreign Office, where the *Pinochet* precedent was apparently viewed as a 'bottomless pit', is not much different from the American objections to the ICC, and can be dismissed in a similar fashion. As UK courts now have primary jurisdiction over ICC offences committed by UK nationals, it will always be possible for the British authorities to invoke Art 12(2)(b) and request the extradition of any UK nationals arrested abroad and accused of such offences.

[53] See the public policy arguments mentioned for the non-exercise of universal jurisdiction in national courts, in Turns, above n 14 at 12–13.

[54] Although it was not a case of universal jurisdiction per se as it was brought under the War Crimes Act 1991, *Reg v Sawoniuk* (2000) *Crim LR* 506 illustrates the practical difficulties and expense. The defendant was accused of murdering Jews in his native town of Domachevo, in what was then the Soviet Union (now the Republic of Belarus) during World War II; such were the evidential obstacles that the trial judge and jury had to spend a week on site in Belarus to see the places described and hear witnesses who were too elderly or infirm to travel to give evidence in the UK. In the event, Sawoniuk was convicted, but it was by no means certain that a successful outcome would be inevitable.

[55] *Reg v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 1)* (1998) 4 All ER 897; *Pinochet (No 3),* above n 52.

[56] In the event, it was possible to formulate charges against Pinochet (albeit for the purpose of extradition proceedings, rather than actual prosecution before a court in the UK) because there was a specific statutory offence in UK law applicable to the charges against him. In respect of ICC core crimes, s 72 of the 2001 Act provides for the disapplication of the double criminality rule of extradition so that the UK will be able to extradite foreign nationals accused of committing ICC crimes abroad to States that use universal jurisdiction. This is essentially a distillation of the principle of *aut punire, aut dedere* and, whilst admittedly it answers the 'safe haven' argument, it still falls short of true universal jurisdiction. (In s 73, the Act also specifies that ICC core crimes shall not be regarded as political offences for the purposes of extradition).

are not parties to the Rome Statute, the preconditions for the exercise of the ICC's jurisdiction in Article 12 of the Statute would not be met as the State of territoriality or nationality needs to be a party to the Statute. The whole principle of complementarity would thus be compromised and rendered ineffective. Whilst it is true that the ICC Statute in itself does not expressly require States to provide for universal jurisdiction in their national law, the crimes in Articles 6–8 of the Statute are already subject to universal jurisdiction in customary international law; by failing expressly to recognise this, the UK is lagging behind in the progressive development of international criminal law and runs the risk of being accused of subverting the spirit of the Rome Statute by complying with its letter only to the minimum extent strictly required.[57] Amnesty International insists that:

> … if the international system of justice is to be fully effective, all States parties should fill [the] gap in the Court's jurisdiction [by its limitation to territoriality or nationality] by ensuring that their own courts can exercise universal jurisdiction over such crimes wherever they are committed, without requiring any link to the State such as the nationality of the suspect or the victim.[58]

This view is consistent with modern international law and supports the contention that, if UK jurisdiction over the crimes in Articles 6–8 of the Rome Statute were to be extended to a universal basis, this would not represent the creation of new and possibly controversial grounds for extraterritorial jurisdiction, but would merely amount to a recognition of what international law already permits.[59] When using that perspective, it is difficult for an international lawyer to reach any conclusion other than that the jurisdictional provisions in section 51(2) are unnecessarily and regrettably restrictive. As a sop to those who urged the UK to provide for universal jurisdiction in respect of ICC crimes, the Act does include within its jurisdiction British nationals and other persons resident in the UK — the latter provision was not in the original draft and was added under pressure. Even so, it clearly would

[57] This criticism was a popular theme in the debates on the Bill in Parliament: see *Hansard* HL Debs (15 Jan 2001), col 976; *Ibid* (8 March 2001), cols 418–27. See also on this point, in relation to the equivalent Scottish draft legislation: Scottish Parliament Justice 2 Committee, 7th Report, 2001, Stage 1 Report on the International Criminal Court (Scotland) Bill, SP Paper 348, Session 1 (2001), Annexe C, Submission from I Scobbie, paras 14–19.

[58] Amnesty International, *International Criminal Court: Checklist for Effective Implementation* (AI Index: IOR 40/11/00, July 2000) 5.

[59] This interpretation is supported by the approach of Lord Millett, dissenting, in *Ex parte Pinochet (No 3)*, above n 52, when he held (at 177): Every State has jurisdiction under customary international law to exercise extraterritorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extraterritorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts. The jurisdiction of the criminal courts is usually statutory, but is supplemented by the common law. *Customary international law is part of the common law, and accordingly I consider that the English courts have and have always had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law* (emphasis added).

not cover the case of a foreign suspect who was not resident in the UK but was merely present in the territory on a temporary visit — limitations which again were reflected in concerns expressed in parliamentary debates on the Bill.[60]

2.4.3 Defences

The Act makes no provision at all for defences to the ICC core crimes. The presumption therefore must be that the normal defences in English criminal law will be available to charges under the Act. However, the scope of defences in English law is not always consistent with international law — a problem illustrated in *The Prosecutor v Erdemović*,[61] where duress was raised as a defence to a charge of crimes against humanity. Although a majority of the judges in the ICTY Appeals Chamber adopted the common law test (duress can never be a defence in cases of homicide but may go to mitigation of sentence only), the ICC Statute in Article 31(1)(d) follows the civil law-based approach of Judge Cassese's Dissenting Opinion, in which he suggested that duress may in any case amount to a full defence, provided certain stringent conditions were met.[62] The latter's inclusion in the Rome Statute suggests that it is the approach which a majority of States favour in respect of duress and which may therefore be evidence of *opinio juris* that this is now customary international law; on the other hand, English law still applies the doctrine that duress can never be a defence in cases of homicide.[63]

It is unfortunate that the Act does not address such inconsistencies directly, although the Solicitor-General was of the view, during the passage of the Bill, that 'existing defences under our own law, which the courts use every day, are the best defences for individuals'.[64] It therefore seems that UK courts will apply common law defences in cases of ICC crimes, which would be quite objectionable if it resulted in defendants' being disadvantaged (as would be the case if duress were pleaded, for example). On the other hand, some safeguards for defendants are apparent in the specification of the mental element ('intent and knowledge') necessary to secure a conviction,[65] consistent with the Elements of Crimes adopted by the Assembly of States Parties, and also the provision that, in interpreting and applying the same, UK courts 'shall take into account any relevant judgement or decision of the ICC … [or] any other relevant international jurisprudence'.[66]

[60] See *Hansard* HL Debs (8 March 2001), vol 623, cols 418–27. It is worth noting that, in the 3rd Stage debate on the International Criminal Court (Scotland) Bill, an amendment was proposed in favour of 'absolute', as opposed to 'partial', universal jurisdiction; however, it was defeated by 76 votes to 26: Scottish Parliament *Official Report*, 13 Sep 2001, vol 3, No 17, cols 2419–31.
[61] (1997) 111 ILR 298.
[62] *Ibid* President Cassese, Separate and Dissenting Opinion, 397.
[63] *Reg v Howe* (1987) 1 AC 417; *Reg v Gotts* (1992) 2 WLR 284.
[64] *Hansard* HC Debs, Standing Committee D, 3 May 2001.
[65] International Criminal Court Act 2001, s66(2).
[66] *Ibid* s 66(4).

2.4.4 A Minimalist Approach Again

It may be said in general terms that Part 5 of the Act follows an oddly inconsistent pattern: it is 'generally minimalist' in relation to jurisdiction and omits consideration of defences altogether, yet the substantive ICC core crimes and the doctrine of command responsibility are incorporated wholesale into national law without demur. While the creation of new generic offences of war crimes and crimes against humanity in the UK is to be welcomed, it is clear that universal jurisdiction is unfortunately still not seen as something in respect of which the UK should be keeping up with international law. The ultimate problem with the Act is that it is premised on the assumption that there will never be any prosecutions of ICC crimes in the UK courts. The whole structure of the Act, with its extremely detailed procedural provisions on arrest and transfer of suspects and its skeletal provisions regarding substantive law, which look almost as though they were added on as an afterthought, indicates that in any case where a foreign suspect is apprehended in the UK, prosecution will be deferred either to the ICC itself or to the national courts of the State of territoriality or nationality. In other words, any possible expedient *other than* prosecuting the accused in the UK will be used. As Baroness Scotland elaborated in the House of Lords:

> … [W]e remain of the view that where [an accused] has no ties with this country, surrender to the ICC or extradition to another State is the proper and most practical course. That approach is based on a realistic appraisal of what our criminal justice system, with its strong dependency on the principle of territoriality, is organised to deliver. It is also in line with the long-standing policy of this country not to take universal jurisdiction except as required by an international agreement. We do not believe that the UK should unilaterally take on the role of global prosecutor. Where a crime is committed with no clear nexus to the UK, it must be for the countries concerned to prosecute and for the ICC to step in if they fail to do so. That is precisely the reason that we are establishing the International Criminal Court.[67]

This statement is somewhat disingenuous, taking as it does the entire point about establishing an international criminal court and turning it on its head. If complementarity is the fundamental operating principle of the ICC, it is illogical to claim that the very reason for the Court's establishment is to take cases away from State jurisdictions as frequently as possible: the reverse is true. The whole point is that the Court should only intervene where States are unable or unwilling genuinely to prosecute. It is submitted that the UK's attitude leads inexorably to the position that where a State has not properly and fully implemented the core crimes with appropriate (that is, universal) jurisdiction, it can legitimately claim that it is unable genuinely to prosecute in all cases without a direct nexus and pass them on to the ICC. Such an approach defeats the object of the complementarity

[67] *Hansard* HL Debs (8 March 2001), vol 623, cols 418–19.

principle, not least because it is far more likely that the UK's obligations will be engaged by cases involving non-UK nationals who are found in the UK, as opposed to UK nationals — let alone the possibility of ICC crimes occurring on UK territory.

The inclusion in the Act of jurisdiction over persons resident in the UK, designed to mollify those who pleaded for full universal jurisdiction to be included in the Bill, is not particularly impressive; indeed, it attracted considerable derision in the House of Lords, where Lord Goodhart called it 'delightfully circular' and likened it to Gertrude Stein's line, 'Rose is a rose is a rose'[68] (a jibe at section 67(2)'s simple definition of 'United Kingdom resident' as 'a person who is resident in the United Kingdom'). As Lord Goodhart pointed out, English law recognises different tests for residence for different legal purposes (for example, taxation as opposed to divorce cases), so that the definition in section 67(2) is meaningless in practical terms. The Government's response, as stated by Baroness Scotland, was that 'residence' is a flexible concept which can — and should — be decided by the courts on a case-by-case basis, rather than being given an 'all or nothing' definition on paper; among the various criteria which the courts could look at in individual cases, Baroness Scotland suggested purchasing property or taking up employment. Although some flexibility is obviously to be welcomed, it is submitted that the Government's approach to this question smacks of legislative laziness; the abandonment of all discretion to the judiciary creates a void of uncertainty as to how residence will be determined for the purposes of ICC crimes. Given the extremely serious nature of these crimes, it is submitted that in order to trigger a prosecution in the UK, it would have made far more sense to adopt a simple requirement of physical presence within the jurisdiction at any time after the alleged commission of the offence.

Clearly — uncertainty over the use of an undefined residence test notwithstanding — the Act's provisions on jurisdiction follow a long-established British pattern. Territorial jurisdiction is obviously unexceptionable, as is nationality jurisdiction in the case of such serious crimes; as the Solicitor-General stated when the Bill was being debated in House of Commons Standing Committee D:

> We want to ensure that UK courts can always investigate allegations against a British national so that the ICC cannot have jurisdiction.[69]

A reasonable interpretation of this position might be that a British serviceman (the most likely category of person to have the opportunity to commit an ICC offence outside the UK) will be tried by a British court, thus obviating the need for ICC jurisdiction. Alternatively, it is implicit in the British Government's overall attitude that the only cases where UK law provides for jurisdiction

[68] *Ibid* col 420.
[69] *Hansard* HC Debs, Standing Committee D, 3 May 2001.

over ICC offences in UK courts — cases where the accused is a British national or resident — will simply not occur, because either no responsible British official or serviceman will ever commit any of the core crimes, or because no foreign national accused of such crimes will be admitted to the UK. This is a complacent and unrealistic attitude: it is tantamount to the British Government sticking its head in the sand, ostrich-like, in order to avoid the responsibilities that come with participation in international criminal law, whilst at the same time proudly proclaiming its compliance with the onerous duties imposed upon it.

3. DIFFERENT APPROACHES WITHIN THE COMMON LAW TRADITION: THE EXAMPLES OF NEW ZEALAND AND CANADA

Although it might be thought that the most obvious contrasts in national implementation methodologies for the Rome Statute would lie between common law and civil law States, different approaches and results are to be found even within the common law tradition. Two cases in point are New Zealand and Canada. Both have been enthusiastic about implementing the Rome Statute and proceeding to full ratification; both, being common law States, have had to adopt the same basic method as the UK — namely, the introduction of special legislation to enable ratification. Yet in terms of detail, they present interesting comparisons, both with the UK and with each other. Although the Canadian legislation is the more striking and innovative, the case of New Zealand follows on naturally from that of the UK because of the extreme similarity of their pre-ICC positions. Despite such similarities, the NZ approach to national implementation of the Rome Statute and the solutions adopted have been quite different, in several respects, to those used by the UK.

3.1 New Zealand

On the whole the approach adopted by New Zealand to national implementation of the Rome Statute has been more pragmatic than that exhibited by the UK, as well as more in line with current trends in international law; as such, it is to be welcomed and commended. Like the UK, NZ did not until recently possess generic offences of war crimes, apart from grave breaches of the Geneva Conventions and Additional Protocol I (which were recognised in the NZ criminal law by virtue of the Geneva Conventions Act 1958). Similarly, there was no discrete offence directly comparable to crimes against humanity in NZ law, although much of the conduct specified in Article 7 of the ICC Statute would have amounted to offences under the general criminal law (for example, murder). Unusually, there was also no offence of genocide in the national criminal law, NZ having signed and ratified the Genocide Convention but never apparently seen the need to incorporate it in its domestic legal system on the grounds that other general offences — for example, those found in the Crimes Act 1961 — could be used to prosecute any conduct

amounting to genocide in the unlikely eventuality that such conduct occurred in NZ. To close these gaps in the national law, the International Crimes and International Criminal Court Act 2000 entered into force on 1 October 2000, making New Zealand the 17th State to ratify the Rome Statute.

3.2 New Zealand's International Crimes and International Criminal Court Act 2000

The 2000 Act creates new generic offences of war crimes[70] (apart from grave breaches),[71] crimes against humanity[72] and genocide[73] in the national law, in exactly the same terms as those set out in Articles 6–8 of the ICC Statute and by direct reference thereto (for example, 'For the purposes of this section, a crime against humanity is an act specified in Article 7 of the Statute').[74] Given that the NZ implementing legislation entered into force 21 months before the ICC Statute itself (1 October 2000 as opposed to 1 July 2002, respectively), the NZ authorities found themselves confronted with an interesting question as to the retroactivity of the offences created in NZ law, in that it was possible to envisage a prosecution in NZ for an ICC crime committed before the Rome Statute itself actually came into force. The 2000 Act therefore makes an exception to the general rule of non-retroactivity[75] of the criminal law in the cases of genocide and crimes against humanity,[76] on the basis that these offences had long been considered criminal in international law, despite there having been no corresponding offence in NZ law — an interesting contrast with the traditional approach in the UK, whereby international law is barely considered relevant until enacted by Parliament.[77] For genocide the period of retroactivity is dated back to 28 March 1979, when NZ ratified the Genocide Convention.[78] For crimes against humanity, in the absence of a specific relevant treaty instrument, the interesting expedient was adopted of dating the retroactivity back to 1 January 1991, when the jurisdiction of the ICTY commenced.[79]

The provisions on retroactivity notwithstanding, in terms of the generalities of creating substantive offences in domestic law, the NZ legislation follows the same pattern as that of the UK. The jurisdictional provisions, however, differ in that the

[70] International Crimes and International Criminal Court Act 2000, s 11.
[71] Although grave breaches already existed in New Zealand law, s 11(2)(a) of the Act refers to them — and, like the Rome Statute itself, omits any reference to Additional Protocol I. The grave breaches already incorporated in NZ law under the Geneva Conventions Act 1958 include violations of Additional Protocol I.
[72] International Crimes and International Criminal Court Act 2000, s 10.
[73] *Ibid* s 9.
[74] *Ibid* s 10(2).
[75] The general rule is contained in the New Zealand Bill of Rights Act 1990, s 26(1).
[76] No such exception was thought necessary for war crimes because of the existing offences in the Geneva Conventions Act 1958.
[77] Cf the views expressed by Lord Millett in *Pinochet (No 3),* above n 52.
[78] International Crimes and International Criminal Court Act 2000, s 8(4)(a).
[79] *Ibid* s 8(4)(b).

New Zealand Government opted in favour of taking full universal jurisdiction in respect of these crimes. This principle of jurisdiction was deemed the most appropriate by the NZ authorities in view of the heinous nature of the crimes in question, although — as with most common law countries — the use by the NZ courts of any basis of jurisdiction other than territoriality is highly unusual and generally limited to situations expressly provided for by statutes, which normally require some link to NZ. Any such links are expressly eschewed by the 2000 Act, which affirms NZ jurisdiction:

> regardless of –
> (i) the nationality or citizenship of the person accused; or
> (ii) whether or not any act forming part of the offence occurred in New Zealand; or
> (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence. [80]

This use of what might be called 'pure' universal jurisdiction (as opposed to jurisdiction absent any link of territoriality, nationality or national interest, but where the prosecuting State has custody of the offender) is indeed unusual, not just for a common law country, but in legal systems generally.[81] It is particularly striking for an Anglo-Saxon-derived system, though, as countries following the common law tradition generally eschew the use of any form of universal jurisdiction.

The NZ legislation also departs from its British counterpart by including most of the 'general principles of criminal law' which make up Articles 20–33 of the Rome Statute; these are said to apply to domestic proceedings 'with any necessary modifications'.[82] However, alongside these provisions imported from the ICC Statute, rules and principles of NZ criminal law applicable to the relevant offence shall also apply;[83] and defendants 'may rely on any justification, excuse or defence available under the laws of New Zealand or under international law'.[84] In the event of a conflict between NZ law and the provisions of the ICC Statute, the latter will prevail.[85] An enhanced position for the Rome Statute vis-à-vis NZ domestic law is also apparent from the provisions in the NZ legislation dealing with command responsibility[86] (which was not previously covered expressly by any NZ statute)

[80] *Ibid* s 8(1)(c).
[81] See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgment of 14 Feb 2002, available at <http://www.icj-cij.org/>: Judges Higgins, Kooijmans and Buergenthal, Joint Separate Opinion, para 20.
[82] International Crimes and International Criminal Court Act 2000, s 12(1)(a).
[83] *Ibid* s 12(1)(b).
[84] *Ibid* s 12(1)(c).
[85] *Ibid* s 12(3).
[86] *Ibid* s 12(1)(a)(vi).

and defences[87] (which are generally less favourable to the defendant under NZ law than under the Rome Statute). This overall approach, of generally according primacy to the Rome Statute's — and international law's — interpretation of the ICC crimes and associated matters, seems highly appropriate and successful in view of the nature and purpose of the ICC and the law involved; indeed, it is submitted that the NZ approach can even be viewed as a model of national implementation for a common law jurisdiction.

3.3 Canada

The Canadian implementation of the Rome Statute may also be seen as in some ways a model, but for different reasons. While the Canadian Crimes Against Humanity and War Crimes Act 2000 incorporates universal jurisdiction, like the NZ legislation, it departs from the latter — and even further from its UK counterpart — in its innovative approach to the definition of crimes by incorporating in national law the eventuality of changes in the ICC core crimes at customary international law. This different emphasis in the Canadian legislation may be explained largely by the recent unhappy experience of the Canadian authorities in pursuing accused war criminals under Canadian law on the basis of their presence in Canada.

The background to this situation is that in Canada, as in the UK, the 1980s saw a resurgence of interest in the prosecution of World War II-era war criminals, following the growing suspicion that a number of alleged Nazi war criminals or Nazi collaborators were living in Canada. In 1985 the Canadian Government appointed an independent Commission of Inquiry, the Deschênes Commission, which submitted its *Report [Commission of Inquiry on War Criminals]* in 1986.[88] In order to enable the prosecution of war criminals under Canadian criminal law — which at the time lacked any such provisions — the Commission recommended, and the Government adopted, amendments to the Canadian Criminal Code so as to give Canadian courts retroactive jurisdiction over the offences in question. The conditions were that the relevant acts or omissions had to be punishable offences under Canadian law which also amounted to war crimes or crimes against humanity in international law; and that the accused was at the time, or subsequently became, a Canadian citizen (or was 'employed by Canada in a civilian or military capacity') or was a citizen of or employed by a State engaged in an armed conflict against Canada or was present in Canada; alternatively, the victim of the crime in question had to have been a citizen of Canada or any State allied to Canada in an armed conflict.[89]

[87] *Ibid* s 12(1)(a)(ix)–(xi).
[88] See Parliament of Canada, Parliamentary Research Branch, 87–3E, 'War Criminals: The Deschênes Commission' (1987), available at <http://www.parl.gc.ca/information/library/PRBpubs/>.
[89] Criminal Code (RS 1985, c C-46), ss 7(3.71)–(3.77).

The first, and as it turned out the only, case to be prosecuted under these amendments to the Criminal Code was *Reg v Finta*. Imre Finta was a Hungarian-born Canadian citizen who during World War II had been an officer in the Royal Hungarian Gendarmerie and had allegedly participated in acts of unlawful confinement, robbery, kidnapping and manslaughter[90] against Jews in the Hungarian city of Szeged in 1944 after the German occupation of Hungary. At trial, a jury acquitted Finta on all counts,[91] an outcome which was upheld by majorities of both the Ontario Court of Appeal[92] and, eventually, the Supreme Court of Canada.[93] The decision of the Supreme Court in *Finta* was long and highly complicated,[94] but its effect was to make war crimes prosecutions in Canada far more difficult than had ever been expected by placing impossibly high burdens on the prosecution, such that convictions were rendered extremely unlikely. Essentially, the Supreme Court in *Finta* required, for a conviction, strict proof of the *actus reus* and *mens rea* of (1) offences under Canadian law; *and* (2) separately, offences under international law; and (3) in respect of the latter, very high elements of criminal conduct, the precise ambit of which nevertheless remained vague — for example, the defendant had to know, 'with … calculated malevolence', that he was inflicting 'untold misery', 'immense suffering' and 'barbarous cruelty' on his victims.[95] In addition, the Supreme Court allowed Finta to rely on a peculiarly warped combination of the defences of superior orders and mistake of fact, in that he had committed his crimes because he had been led to believe, by the hate propaganda of the Arrow Cross (the Hungarian Fascist regime), that the Hungarian Jews were disloyal to Hungary and that consequently his orders to round up and deport the Jews of Szeged were lawful.[96] Finally, the lack of detailed definitions of substantive criminal offences in sections 7(3.71)–(3.77) of the Criminal Code[97] made it appear that those provisions were so vague as to be incompatible with the guarantees contained in the Canadian Charter of Rights and Freedoms.[98]

The *Finta* decision, described by Cotler as 'one of the most important cases ever decided by the Supreme Court of Canada',[99] effectively made the prosecution of war criminals in Canada at once much more difficult and much less likely.

[90] Note that the provisions cited above, n 89, did not actually create any new offences in Canadian law, but were jurisdictional only; while grave breaches of the Geneva Conventions and Additional Protocol I were specific offences in Canadian law under the Geneva Conventions Act (RS 1985, c G-3), other war crimes, crimes against humanity and acts of genocide could only be prosecuted in Canada if they amounted to generic offences under the Criminal Code — as was attempted in *Finta*.
[91] (1989) 69 OR (2d) 557.
[92] (1992) 92 DLR (4th) 1.
[93] (1994) 1 SCR 701.
[94] For discussion, see I Cotler, 'Regina v Finta' (1996) 90 *AJIL* 460; D Matas, 'Prosecution in Canada for Crimes Against Humanity' (1990) 11 *NYL Sch J Int'l and Comp L* 347.
[95] Above, n 93 at 818.
[96] *Ibid* at 847.
[97] Above n 90.
[98] Enacted by the UK Parliament as the Constitution Act, Sch B to the Canada Act 1982.
[99] Above n 94 at 461.

However, the Canadian Government's pledge, in a 1995 Department of Justice Press Release, 'to ensure that World War II war crimes and crimes against humanity, regardless of time and place, are addressed'[100] accumulated publicity and support once the creation of a permanent international criminal court had reached the forefront of the international agenda — and, moreover, it acquired the wider ambit of *future* violations of international humanitarian law with Canada's prominent role at the Rome Diplomatic Conference and accelerated drive comprehensively to implement the ICC Statute after 1998. Thus, while the Crimes Against Humanity and War Crimes Act 2000 was certainly prompted by the need to implement the ICC core crimes in domestic law and to ensure that rendition of suspects from Canada to the ICC itself or to another State Party would be possible, its format and approach were very much conditioned by the need to overcome the legacy of *Finta*. Consequently, it should be emphasised that the purpose of the Canadian legislation was not just to implement the ICC Statute, but also — and arguably more importantly, at least on a psychological level — to ensure that Canadian courts will be able to prosecute the core crimes, whenever and wherever and by whomever committed.

3.4 Canada's Crimes Against Humanity and War Crimes Act 2000

It was this approach that led the Canadians to incorporate the core crimes, but by reference to their definitions in customary and conventional international law generally, rather than by reference to the Rome Statute exclusively — although the latter is also expressly mentioned. Sections 4(3) and 6(3) of the Canadian legislation — dealing respectively with crimes committed within and outside Canada — both define crimes against humanity, genocide and war crimes as acts or omissions which:

> at the time and in the place of [their] commission, [constitute the relevant crimes] according to customary international law or conventional international law [applicable to armed conflicts][101] [or by virtue of [their] being criminal according to the general principles of law recognised by the community of nations][102]…

The phrase 'conventional international law' is defined as:

> … any convention, treaty or other international agreement
> (*a*) that is in force and to which Canada is a party; or
> (*b*) that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved.[103]

[100] *Ibid.*
[101] In the case of war crimes only.
[102] In cases of crimes against humanity and genocide only.
[103] Crimes Against Humanity and War Crimes Act (2000, c24), s 2(1).

The legislation does not attempt to define customary international law or general principles of law. The Rome Statute makes its somewhat understated appearance in sections 4(4) and 6(4), which assert that the crimes defined in Articles 6, 7 and 8(2) of the Statute:

> are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.

A similar assertion is made in section 6(5) specific to crimes against humanity, to the effect that they were criminal under either customary international law or the general principles of the law of nations before the 1945 prosecutions of the major Axis war criminals in occupied Germany and Japan (which were the first occasions on which such crimes were charged in an indictment).

In addition to the desire to reverse the effects of the *Finta* decision, the references in the Canadian Act to customary international law and general principles of law reflect the Canadian view that, on the one hand, several provisions in the Rome Statute reflect comparatively recent developments (for example, the extension of individual criminal responsibility to war crimes in non-international armed conflicts) which cannot be applied retroactively and therefore — for the sake of future prosecutions — should be expressly acknowledged as customary international law at the date of the Rome Statute. On the other hand, the provisions of the Statute (Article 8(2) in particular) do not encompass all possible violations of international humanitarian law (especially in relation to the use of prohibited weapons, for example, chemical weapons) and therefore the Act should not preclude the ability of Canadian courts to take into account and apply further emerging or developing permutations of the rules at customary international law. The latter aspect is particularly striking in that it authorises Canadian courts to apply customary international law directly, even when the law is newly emergent or developing, without further reference to domestic statutes beyond the generalities of the 2000 Act.

It is this flexibility, which represents a conspicuous departure from common law practice in respect of international law in the domestic legal system, that is especially innovative and admirable. It makes prosecutions of the core crimes comparatively easy, because of the broad and adaptable nature of the definitions of crimes, whilst at the same time preserving the right of the accused not to be faced with a retroactive application of the criminal law — thereby also meeting the requirements of the Canadian Charter of Rights and Freedoms, which the Supreme Court had believed impugned in the *Finta* case.[104] Persons accused under the 2000 Act may use any defences available under either Canadian or international law[105] — a position which is surely far safer than, for example, the

[104] Above n 98.
[105] Crimes Against Humanity and War Crimes Act 2000, s 11.

British failure to specify any applicable defences at all. Superior orders are dealt with separately in Section 14, in terms which mirror those of the ICC Statute.

3.4.1 A Wholly New Crime

Apart from its singular approach to defining the core crimes, the 2000 Act also creates a wholly new crime of 'breach of responsibility by a military commander'.[106] This was again necessary because the Charter of Rights and Freedoms, as interpreted by the Supreme Court in *Reg v Vaillancourt*,[107] does not allow for serious crimes the kind of constructive or vicarious liability involved in cases of 'pure' command responsibility — as, for instance, where a commander does not participate in atrocities and may not even know, but should have known, that his troops are committing them. In *Vaillancourt*, the Supreme Court held that in cases of very serious crimes which carry a serious stigma, nothing short of subjective intent to commit the crime is required. While this would pose no problem in cases where a commander actually ordered or in some other way was a party to a criminal act — he could then simply be charged with a war crime, crime against humanity or act of genocide as appropriate — such classic command responsibility cases as *In re Yamashita*,[108] for example, would fail the *Vaillancourt* test. The solution in the 2000 Act is that the commander is not charged with the stigmatised core crime, but with the new crime which accurately reflects what the commander actually did: breach of command responsibility. The requirements in sections 5(1) and 7(1), which are in line with those in Article 28 of the ICC Statute, are that (1) the commander 'fails to exercise control properly over a person under their effective command and control or authority and control' with the result that that person commits an offence under sections 4 or 6; (2) the commander either knows or is criminally negligent in not knowing that the person is about to commit or is committing an offence; and (3) the commander fails to take, as soon as practicable, all necessary and reasonable measures either to submit the investigation of the offence to the appropriate authorities or to prevent or repress the offence or further offences. Sections 5(2) and 7(2) extends the same liability to superiors with effective authority and control, who are not military commanders as such. The definition of 'military commanders' for offences within Canada includes police commanders with comparable authority and control.[109]

3.4.2 Jurisdiction

Sections 4–7 of the 2000 Act cover the same crimes but with different jurisdiction, sections 4 and 5 being concerned with crimes occurring within Canada, sections 6

[106] *Ibid* ss 5 (within Canada) and 7 (outside Canada).
[107] (1987) 2 SCR 636.
[108] (1946) 327 US 1.
[109] Crimes Against Humanity and War Crimes Act 2000, s 5(4).

and 7 with those occurring elsewhere. The extraterritorial jurisdiction asserted over the latter is laid down in section 8 of the Act by reference to the same criteria as those listed in the Criminal Code pre-*Finta*.[110] These are worthy of brief comment because of their all-inclusive nature: they include nationality and (very unusually for a common law system) passive personality jurisdiction; what might be described as a form of 'partial' universal jurisdiction is also included in the requirement of an accused's simple presence on Canadian territory. Particularly unusual is the inclusion of jurisdiction on the basis of the accused's affiliation with a State engaged in an armed conflict against Canada or the victim's affiliation with a State allied to Canada in an armed conflict. While these provisions clearly cast the Canadian jurisdictional net about as wide as is likely to be possible, it is unclear why the Act does not simply identify universality as the basis of jurisdiction, since that is clearly the intended ambit of the legislation. Nevertheless, on the whole, it is submitted that the provisions of the new Canadian legislation indeed go a long way to laying the ghost of *Finta* to rest.

4. COMPARATIVE EXPERIENCES IN THE CIVIL LAW TRADITION: THE EXAMPLES OF BELGIUM, FRANCE AND GERMANY

As with the common law tradition, so with that of the civil law: countries using the same basic legal system, with the same fundamental conception of the relationship between international law and the domestic legal order, have adopted some quite different approaches to the problems posed by national implementation of the ICC Statute. For comparative and illustrative purposes, the civil law countries to be surveyed in this section include one which already had comprehensive national legislation in place covering the ICC core crimes and where the need for detailed national implementation of the ICC Statute was correspondingly less acutely felt (Belgium), as well as one where it was felt that the entire relevant body of national law needed overhauling, with the result that a completely new penal code had to be promulgated *ab initio* (Germany). A third case, that of France, discloses special problems that are largely *sui generis* and have accordingly led to a somewhat idiosyncratic approach to national implementation.

4.1 Belgium

Until the International Court of Justice's recent unenthusiastic treatment of a Belgian-issued arrest warrant for the former Congolese foreign minister forced the initiation of a political reappraisal,[111] Belgium was generally perceived as being at the forefront of the enforcement of international criminal and

[110] Above n 89 and accompanying text.
[111] *Arrest Warrant Case,* above n 81, in which the ICJ held that the issue and international circulation of the arrest warrant by Belgium constituted a violation of the immunity of a former foreign minister

humanitarian law. Under a law passed in 1993 and amended in 1999 to expand its scope further,[112] Belgian courts have full universal jurisdiction over genocide, crimes against humanity and '*infractions graves*' ('grave breaches') of the Geneva Conventions and both Additional Protocols.[113] In short, the Belgian jurisdiction under this law extends to most serious violations of international humanitarian law, whether committed in peacetime or in time of armed conflict, and irrespective of the nature of the armed conflict.

In considering the most appropriate method for Belgium to ratify the Rome Statute, the availability of comprehensive substantive national law on the subject-matter led to a decision not to bother with further detailed legislation at that stage, but merely to pass a general act of ratification in the Belgian Parliament. This was introduced on 2 March 2000 in the Senate;[114] following adoption there on the same day, it was transmitted to the Chamber of Representatives,[115] who referred it directly to its *Commission des relations extérieures* (Commission of External Relations). It consisted of only two articles: the first was purely procedural, referring to the article of the Belgian Constitution under which the law was being proposed. Article 2 of the *projet de loi* then stated simply: '*Le Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998, sortira son plein et entier effet*'. In this form it was debated by the Commission, which presented its report thereon to the Chamber on 31 March 2000.[116] The Commission voted unanimously to adopt the law as proposed;[117] the absence of any amendments is not surprising in view of the insubstantial nature of the text. It was then adopted in plenary session and transmitted for Royal Assent on 27 April 2000,[118] which it

(and hence a violation of Congolese rights), and required the cancellation of the warrant; as a result, the Belgian Government began rethinking the application of the law under which the arrest warrant was issued. See D Turns, 'Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium): The International Court of Justice's Failure to Take a Stand on Universal Jurisdiction' (2002) 3 *Melbourne JIL* 383 at 399. For recent developments in Belgian law, see nn 131–134 below, and accompanying text.

[112] *Loi relative à la répression des violations graves du droit international humanitaire*, reprinted at 38 *ILM* 921. The original law of 16 July 1993 covered only grave breaches of the Geneva Conventions and the Additional Protocols; the supplementary legislation of 10 Feb 1999 included crimes against humanity and genocide within the scope of the earlier law. Belgium ratified the Genocide Convention on 5 Sept 1951, the four Geneva Conventions on 3 Sept 1952, and the two Additional Protocols on 7 Nov 1986.

[113] Violations of Additional Protocol II are expressly included as *'infractions graves'*, notwithstanding the absence of any provisions concerning either protected persons as such or individual criminal responsibility from the Protocol itself. In its original 1993 enactment, the Belgian law thus preceded the ICTY Appeals Chamber's 1995 decision in the *Tadić* case (above n 23), in which individual criminal responsibility was for the first time extended to violations of international humanitarian law committed in non-international armed conflicts.

[114] *Doc Sénat* 2-329/1 (1999–2000). All documents of the Belgian legislature cited herein are available at <http://www.senate.be/> and <http://www.lachambre.be/>.

[115] *Doc Chambre* 50 0492/001 (1999–2000).

[116] *Doc Chambre* 50 0492/002 (1999–2000).

[117] *Doc Chambre* 50 0492/002 (1999–2000) 5.

[118] *Doc Chambre* 50 0492/003 (1999–2000).

received on 25 May, following which Belgium formally ratified the Rome Statute on 28 June 2000.

It then became necessary for the Belgian authorities to consider the extent to which the definitions of crimes in the 1993/1999 law diverged from those contained in the ICC Statute. There was no problem with regard to genocide as Article 1§*1er* of the Belgian law and Article 6 of the Statute both use the same definition, taken from Article II of the Genocide Convention. As for crimes against humanity, the new Article 1§2 of the Belgian law uses the same language as Article 7 of the Statute, with the exceptions of the enforced disappearance of persons,[119] the crime of apartheid[120] and '[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health';[121] technical amendments to the Belgian law were necessary in order to bring its provisions on the precise acts characterised as crimes against humanity into line with the Rome Statute. With regard to war crimes, there were differences between Article 1§3 of the Belgian legislation and Article 8 of the Statute, most notably, in that the 1993 law did not differentiate at all between violations committed in international and non-international armed conflicts, whereas the ICC Statute expressly preserves that traditional dichotomy of international humanitarian law; the Belgian law also refers only to grave breaches of the Geneva Conventions and Additional Protocols, while the corresponding provisions of the Rome Statute, in particular Article 8(2)(b), are much broader in scope as they incorporate a wide range of violations of customary international law in international armed conflicts (mostly derived from the 1907 Hague Regulations). The reference in the Belgian law to Additional Protocol II is a further divergence from the course adopted in Rome.

As a result of these differences being identified, it became necessary to pass a new law modifying the 1993/1999 law by incorporating into Belgian law all the crimes contained in Articles 6–8 of the ICC Statute. The required *projet de loi* was introduced in the Senate on 18 July 2002[122] and, having passed without dissent in that forum,[123] was transmitted to the Chamber of Representatives on 30 January 2003;[124] at the time of completing this chapter it had not yet been further debated. Articles 2§1 and 2§1*bis* of the Belgian *projet de loi* reproduce the exact text from the French version of the ICC Statute (omitting the details of Article 7(2)–(3)) and are thus uncontroversial. Article 2§1*ter*, however, preserves the original Belgian law's inclusion of war crimes committed in both international and non-international armed conflicts — the latter again incorporated by reference to Additional Protocol II, which is not in the ICC Statute. A further curiosity of the provisions on war crimes is that not only is the order of individual prohibitions

[119] ICC Statute, Art 7(1)(i).
[120] *Ibid* Art 7(1)(j).
[121] *Ibid* Art 7(1)(k).
[122] *Doc Sénat* 2-1256/1 (2002–2003).
[123] *Sénat de Belgique, Annales n°* 2–265.
[124] *Doc Chambre* 50 2265/001 (2002–2003).

different, but the wording also is not always identical to that in the Rome version (for example, the repeated use, in the Belgian draft, of '*lancer*' instead of '*diriger*' for the launching of attacks — the latter verb being a much more accurate translation of the equivalent English phrase '[I]ntentionally directing'. Indeed, the wording in the Belgian draft is often much more elaborate than the equivalent provisions of the Rome Statute and, in several instances, goes in substantive terms well beyond the latter: for example, where Article 8(2)(b)(x) of the Statute forbids medical or scientific experiments on persons of an adverse party, Articles 2§1*ter* 9° and 10° of the Belgian draft are far more elaborate, the former prohibiting acts and omissions not legally justified which would compromise the health of protected persons, and the latter prohibiting mutilations, medical and scientific experiments and removal of tissue or organs for transplants, unless (in the latter case) it is for the purpose of blood transfusions or skin grafts made voluntarily, with consent and for therapeutic ends. Article 2§3 of the Belgian draft includes within the legislation's scope violations of the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict.[125] The inclusion of this instrument in the *projet de loi* is particularly surprising in view of the fact that not only is the Protocol not yet in force (not having received the 20 ratifications required by its Article 43), but Belgium itself has not ratified it although it is a signatory. It appears that this kind of all-inclusive approach in the current *projet de loi* is motivated purely by a desire to implement contemporary international humanitarian and criminal law as comprehensively as possible — which can only be a good thing. It remains to be seen, however, whether the legislation will in fact be passed in its present form, in view of the fact that it considerably exceeds the requirements of the Rome Statute. On the other hand, the aim of the legislation as suggested by its title is the wholesale modification of the 1993/1999 law,[126] so it should perhaps be regarded as more analogous to the German creation of an entire new code dealing with international crimes,[127] rather than a *de minimis* exercise in simply implementing the Rome Statute.

Belgium's legislation on the repression of grave violations of international humanitarian law has been widely cited as a model of national implementation of the criminal aspects of that law. Nevertheless, its enforcement has been distinctly controversial. Apart from a successful prosecution of some atrocities which took place in Rwanda during the 1994 genocide, which resulted in the conviction of four Rwandan nuns who were resident in Belgium,[128] the law has not been

[125] 38 *ILM* 769.

[126] Art 4 of the *projet de loi* rules out immunity as a defence, except '*dans les limites établies par le droit international*'; Art 5 affirms universal jurisdiction, including in cases where the accused is not in Belgium (with the safeguard, to prevent the proliferation of 'international justice' cases in the Belgian courts, that in cases with no link of any kind to Belgium, the consent of the *Procureur Fédéral* is required.

[127] See s 4(c) below on Germany.

[128] See BBC Online News Report, 8 June 2001; *Cour de Cassation, Arrêt n°JC02194_1 du 9 janvier 2002*, available at <http://www.cass.be/juris/jucf.htm>.

successfully enforced. A high-profile case against Ariel Sharon, currently the Prime Minister of Israel, for his involvement in the massacre at the Sabra and Shatila refugee camps outside Beirut in 1982 (when he was Israel's Defence Minister), entered a state of legal limbo after the ICJ's ruling in the *Arrest Warrant Case*.[129] As a direct result of the ICJ's Judgment in this case, the proceedings in the Belgian courts against the former Congolese foreign minister (pursuant to which the disputed arrest warrant had been issued) were thrown out by the Brussels *Cour d'appel* in April 2002 for lack of jurisdiction on the basis that the accused were not physically present in Belgium; a similar fate befell the case against Sharon and other former Israeli military officers in June 2002.[130] However, on 12 February 2003, the highest court in Belgium, the *Cour de Cassation*, overturned that decision in the Sharon case and held that the presence of the accused on Belgian territory was not necessary for prosecutions to be initiated.[131] Although the case against Sharon himself could not proceed as long as he is a Head of Government because of his immunity *ratione personae*, the joined case against several other former Israeli officers who were implicated in the Sabra and Shatila massacre was permitted to proceed.

However, following acute political pressure on the Belgian Government — primarily from the US and Israel — the Belgian law was revised twice within the space of three months. First, in April 2003, the law was amended to require the consent of the *Procureur Fédéral* (the public prosecutor) for any prosecution of an alleged crime with no link to Belgium. Consent would be withheld if it would be possible to refer the case to either the ICC or the State of territoriality of the crime, or nationality or custody of the offender, as long as such State had an impartial and independent judicial system and a law providing for the punishment of the offence in question.[132] American unhappiness with a group of cases opened against the former President George Bush and various of his military and civilian officials (including the current US Secretary of State, Colin Powell) concerning the 1991 Gulf War, combined with continuing Israeli resentment over the cases concerning the Sabra and Shatila massacre, resulted in a final crippling amendment

[129] Above, n 81.

[130] See Turns, above n 111 at 399.

[131] *Cour de Cassation, Arrêt n° JC032C1_1 du 12 février 2003*, available at <http://www.cass be/juris/jucf.htm>. This decision was contemporaneous with the passage of a new law through the Belgian legislature, specifying that the correct interpretation of the jurisdictional provisions in the 1993 law is that the location of the accused, in particular the fact that he is not on Belgian territory, is irrelevant: *Doc Sénat* 2-1255/1 (2001–2002). A decision on the *projet de loi* by the *Conseil d'Etat* (*Avis 34 153/VR, Doc Sénat* 2-1255/2 (2002–2003)) confirmed the legality of the proposed legislation by reference to the *travaux préparatoires* of the original 1993 legislation, which it held clearly indicated the legislature's intention to use universal jurisdiction without reference to custody or presence on the national territory. The *projet de loi* was adopted by a majority in the *Commission de la Justice* (*Doc Sénat* 2–1255/4 (2002–2003)) on 28 Jan 2003.

[132] *Loi du 23 avril 2003 modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire at l'article 144*ter *du Code judiciaire, Moniteur Belge, n° 167*, 24846, 24851-24852.

to the law in July 2003. Faced with the possibility that US Government officials visiting Belgium to attend NATO meetings, for example, might be arrested and charged, the Belgian Government finally agreed to amend the law so that it can only be used if either the offender or the victim was a Belgian national or permanent resident at the time of the alleged offence; in the latter case, the person in question must have been resident in Belgium for at least three years. The revision also guarantees respect for the immunity of any foreign officials visiting Belgium.[133] The remaining cases pending under the original law, estimated to be 29 in number, are now expected to be dismissed in an impending general review of all such cases.[134]

It should be borne in mind that the objections to the enforcement of the Belgian law have been essentially procedural in nature, in that they have related to its assertion of unrestricted universal jurisdiction and to its refusal to respect the immunities of incumbent government ministers; they have not been directed at the substantive humanitarian law content of its provisions. Unfortunately, political interference has sabotaged the operation of the Belgian law as originally conceived by its drafters. It will now operate, if at all, within a drastically circumscribed remit. As such, it has largely been deprived of its impact, which was initially so bold and striking. As the highest-profile cases are now certain to be removed from the Belgian courts' docket, the usefulness of such cases as testimony to the wisdom and practicability of adopting the principle of complementarity as the operational basis of the ICC Statute will be virtually nil. Indeed, it is arguable that the saga of the Belgian law and its eventual *dénouement* testifies, rather, to the imperative need for a functioning and truly international criminal tribunal.

4.2 France

The case of France in the context of national implementation of the Rome Statute presents a unique set of circumstances which is simultaneously frustrating and fascinating in equal measure. Although France was the 17th State to ratify the Statute of the ICC, thereby earning an enviable place among the Court's supporters, the ratification has not to date resulted in any substantive amendments to the national law (other than the constitutional amendments necessary to enable ratification to take place and the procedural provisions necessary to facilitate French co-operation with the ICC). National implementation would not by any means necessarily be a big issue in France, were it not for the fact that French national law presents certain notable differences from the Rome Statute's definitions of genocide and crimes against humanity, and contains no discrete or generic definition at all of war crimes.

These remarkable lacunae are *sui generis* and almost entirely the legacy of France's defeat by Germany in 1940 and the country's consequent partition

[133] *Doc. Chambre* 51 0103/005 (2003); *Doc. Sénat* 3-136/5 (2003).
[134] Expatica News, 11 Sept 2001, available at <http://www.expatica.com/belgium>.

into two distinct zones: the north, which was under direct German military administration as occupied territory; and the south, which retained a semblance of separate legal personality as the so-called 'French State', with its capital at Vichy under the notionally independent collaborationist government of Marshal Philippe Pétain. In both entities, substantial sectors of the French population collaborated to a greater or a lesser extent with the German and/or Vichy authorities; equally, in both entities there were highly active armed resistance movements. The principles and rules of French national law governing what are now the ICC core crimes have been conditioned almost exclusively by the French experience of defeat, occupation and collaboration during the 1940–44 period and the French courts' need, in the course of some very confused jurisprudence, to pursue judicially those accused of having committed crimes whilst on the one hand protecting the hallowed status of the Resistance as not just fighters for French freedom, but ideological opponents of National Socialism and Fascism; and, on the other, not opening the potential floodgates to prosecutions of French citizens (as opposed to Germans or other foreigners) for crimes committed either during the 1940–44 period (that is, collaborators, Vichy officials) or subsequently (for example, French soldiers accused of having committed crimes in Algeria during that country's protracted and exceedingly brutal war for independence from France in the 1950s).

It can be seen, therefore, that the ICC core crimes have uncomfortable subtexts in France for historical reasons: a dilemma which is reflected in current French statutory law and its interpretations by the courts — most notably in the prosecutions of Klaus Barbie in the 1980s and Paul Touvier in the 1990s. These skeletons in the French national closet continue to have unfortunate contemporary effects, which in the case of French acceptance of the ICC have been both dramatic and highly undesirable: to date, France is one of only two States parties to the Rome Statute (the other being Colombia) to have made a declaration under Article 124 of the Statute, refusing to accept the jurisdiction of the ICC for seven years in cases of alleged war crimes committed on its territory or by its nationals.

4.2.1 Deceptively Easily Solved: Constitutional Law Aspects

Before considering these problems of substantive criminal law in detail, however, it is necessary to consider the procedural matter of the ratification process itself, which in France was the subject of a judicial opinion which resulted in a revision of the national Constitution. Perhaps fortunately in the circumstances, the question of the modalities of French ratification of any eventual treaty creating a permanent international criminal court had been raised as far back as 1995, when the French Government received the International Law Commission's 1993 draft proposals for the institution[135] and referred them to the *Conseil d'Etat* for consideration of

[135] See Yearbook ILC 1993, vol II (Pt Two).

any constitutional complications that might result from French adherence to such an instrument.[136] The resulting decision[137] identified five substantive causes for concern: (1) the criminal responsibility to which the draft statute would subject the President of the Republic and members of the French government and legislature; (2) the interaction of the proposed court's investigative powers with French national sovereignty in the event of an investigation being pursued on French territory; (3) the fact that the proposed court would be able to try persons already tried in national courts for the same crime, which violated the fundamental principle of *non bis in idem*; (4) the absence from the ILC's draft of any provisions concerning a statute of limitations (*prescription*) in respect of the crimes within the proposed court's jurisdiction; and (5) the granting of pardons, which the ILC reserved for the proposed court but which under the French Constitution is the prerogative of the President of the Republic — this would be problematic in the cases of convicted prisoners serving their sentences in France. After the French vote in favour of the Rome Statute in 1998, the same question — no longer *in abstracto* — was referred by the President of the Republic and the Prime Minister to the *Conseil Constitutionnel*, in accordance with Article 54 of the Constitution, in order to determine whether French ratification of the Rome Statute needed to be '*précédée d'une révision de la Constitution*'.[138]

On 22 January 1999, the *Conseil Constitutionnel* answered the question in the affirmative, on the premise that, while there was no general constitutional obstacle to French adherence to the ICC Statute in principle, to the extent that certain individual provisions in the Statute might '*[mettre] en cause les droits et libertés constitutionnellement garantis ou [porter] atteinte aux conditions d'exercice de la souveraineté nationale*', a revision of the Constitution would be necessary before France would be able to ratify the Rome Statute.[139] The issues raised by the *Conseil Constitutionnel* in its decision were very similar to, though less extensive than, those already raised by the *Conseil d'Etat* three years previously. They were as follows:

(1) the immunities of the President of the Republic, members of the government and of the legislature, respectively under Articles 68, 68–1 and 26 of the Constitution, were in direct conflict with the principle contained in Article 27(2) of the ICC Statute, namely that any official position held by an accused person cannot serve as grounds for excluding criminal responsibility;

[136] See A Buchet, '*L'intégration en France de la convention portant statut de la cour pénale internationale: histoire brève et inachevée d'une mutation attendue*', in Kreß and Lattanzi, above n 9, 66–69.
[137] *Conseil d'Etat, Décision n° 358-597 du 29 février 1996,* available at <http://www.conseil-etat.fr/ce/rappor/index_ra_cg03_05.shtml>.
[138] Buchet, above n 136, 76.
[139] *Conseil Constitutionnel, Décision n° 98-408 DC du 22 janvier 1999, Journal Officiel de la République Française (JO) du 24 janvier 1999,* 1317: '*Article premier — L'autorisation de ratifier le traité portant statut de la Cour pénale internationale exige une révision de la Constitution*'.

(2) the exercise of the Court's powers to proceed with a case under Article 17 of the Statute, where State authorities are unwilling or unable genuinely to prosecute an ICC core crime in the national courts, could fail to distinguish such cases of inability or unwillingness to prosecute from cases where a valid French law provides for either an amnesty or a statute of limitations for the crime(s) in question, in which case there would be an infringement of national sovereignty; and
(3) the Prosecutor's power, under Article 99(4) of the ICC Statute, to undertake certain investigative measures on the territory of a State Party without the participation or even the presence of the national judicial authorities would amount to an infringement of national sovereignty.

Once it had been decreed that the Constitution would have to be revised before France would be able to ratify the Rome Statute, a debate immediately began as to the best method of accomplishing the desired revisions. The two basic options considered by French law-makers were the adoption of either separate special laws specifically addressing each of the three grounds of unconstitutionality found by the *Conseil Constitutionnel*, or of '*une réponse unique et globale, qui permettra de les couvrir tous*'.[140] The difficulty with the first option was that, with the exception of the question of immunities, the *Conseil Constitutionnel* had not identified any specific articles of the Constitution that would be infringed: rather, the decision otherwise had merely pointed to ill-defined '*principes à valeur constitutionnelle*' which by their very nature were not codified and therefore not susceptible to specific amendment as such. Accordingly, the second of the two options was rapidly preferred, leading to the government's 'cure-all' response of a single new article to be inserted into the Constitution, consisting of one sentence:

> *La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998.*[141]

As Buchet has noted, the very general and discreet formula chosen — the word '*peut*' ('may') and the reference only to the conditions envisaged in the ICC Statute, without providing any details — had the dual benefit of respecting the constitutional logic of the ratification process in French law and of being sufficiently flexible to encompass all the difficulties mentioned in the decision of 22 January 1999.[142] In respect of the ratification process, the constitutional amendment contained in Article 53–2 did not of itself imply ratification or make it inevitable; it simply made it constitutionally possible, hence the permissive

[140] Buchet, above n 136 at 80. See also *Assemblé Nationale: Rapport N° 1501, fait au nom de la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République*, 38–39.
[141] Art 53–2 of the Constitution, proposed in *Projet de loi constitutionnelle n° 1462* see Buchet, 81.
[142] *Ibid.*

phrase '*La République* peut *reconnaître*' ('The Republic *may* recognise') rather than more imperative language like '*La République reconnaît*' ('The Republic recognises' or 'The Republic shall recognise').[143] Ratification in France was thereby confirmed as a two-stage process, the second stage of which is entirely at the discretion of the President of the Republic once the legislature has made any necessary preliminary constitutional amendments. Likewise, the reference to '*la juridiction de la Cour*' ('the jurisdiction of the Court') was sufficiently non-specific to encompass all constitutional problems arising in relation to any aspects of the Court's operation, in respect of which problems a generalised exception to French constitutional norms was thus made. On the other hand, the formula's reference to the Rome Statute as 'the treaty signed on 18 July 1998' apparently indicates that future amendments to the Statute agreed by the Assembly of States Parties (including, presumably, the eventually agreed definition of aggression) will not a priori be in conformity with the Constitution and will thus necessitate further constitutional amendments before France will agree to be bound by them.[144]

As an amendment to the Constitution, *Projet de loi constitutionnelle n° 1462* had to be considered by both houses of the French legislature, sitting together as a *Congrès*. The National Assembly's Commission of Constitutional Laws, Legislation and General Administration of the Republic having adopted the draft text without amendment,[145] it was duly accepted by the *Congrès* and promulgated accordingly on 8 July 1999 as *Loi constitutionnelle n° 99-568*,[146] whereby the mandated formula was inserted into the Constitution as its new Article 53–2. While this law made French ratification of the Rome Statute possible, however, it did not actually authorise it. For that, another law was necessary, as the French Constitution allocates the power to ratify a treaty to the President of the Republic, but only upon authorisation by the *Parlement*.[147] This authorisation was duly forthcoming on 30 March 2000 in *Loi n° 2000-282*,[148] again expressed with remarkable concision in a single article:

> *Est autorisée la ratification de la convention portant statut de la Cour pénale internationale, signée à Rome le 18 juillet 1999, et dont le texte est annexé à la présente loi.*

With all the formalities thus completed, the French instrument of ratification was duly signed by President Jacques Chirac on 5 June 2000 and deposited with the Secretary-General of the United Nations in New York four days later.[149] This stage

[143] *Rapport N° 1501*, 39–40.
[144] *Ibid* 39.
[145] *Ibid* 42.
[146] *JO n° 157 du 9 juillet 1999*, 10175.
[147] French Republic, Constitution of 4 Oct 1958, Art 52.
[148] *JO n° 77 du 31 mars 2000,* 4950.
[149] Buchet, above n 136 at 83. A law has since been passed to enable French co-operation with the ICC by inserting a new Art 627 into the *Code de procédure pénale: Loi n° 2002-268 du 26 février 2002, JO n° 49 du 27 février 2002,* 3684.

of the French ratification process is very similar to the procedure adopted in Belgium and was in itself quite uncontroversial.[150] As Buchet comments:

> *les enjeux [des débats sur la ratification] se situaient véritablement au stade de la réforme constitutionnelle, la suite des événements apparaît sans grand intérêt.*[151]

The constitutional reform, though, was only half the story — and at the time of writing in March 2003, the other half has no end in sight.

4.2.2 A Continuing Controversy: Criminal Law Aspects

Of the three ICC core crimes, the French problem in terms of national implementation is most acute in the case of war crimes: French law knows no such category of offences. Although a special law specifically mentioning war crimes was passed in the wake of the Liberation in 1944,[152] it was aimed solely at 'enemy nationals or their non-French agents', whose prosecution had a low priority in France after the war by comparison with the massive purge ('*l'épuration*') of those French citizens who had collaborated with the Germans or worked for the despised Vichy regime. In accordance with the normal rules of French law, the statute of limitations for war crimes expired after 20 years, in 1964; to date, no specific enactment on the subject has replaced it.

Although acts amounting to war crimes (that is, violations of the laws and customs of war) do exist in contemporary French law, they are considered to be only general or common crimes; as a recent commentary has put it, the situation is characterised by:

> *une absence de spécificité des crimes de guerre dans le code pénal français, la dispersion des définitions de ces infractions, et la disparité de leur mode de répression.*[153]

Three principal instruments of French law do authorise the punishment of acts amounting to war crimes: the *Code pénal*, the *Code de justice militaire* and the *Règlement de discipline générale dans les armées*. For example, crimes of homicide, torture and rape — all of which are war crimes if committed in a situation of armed conflict — are covered by the *Code pénal*,[154] as indeed is the case in the criminal laws of all States. However, there is no reference, even in the instruments concerned more specifically with military discipline, to war crimes as such. To the extent that a French court would be able to punish war crimes, it would only be

[150] See above nn 114–18 and accompanying text.
[151] See Buchet, above n 136 at 82.
[152] *Ordonnance du 28 août 1944, relative à la répression des crimes de guerre, JO n° 780 du 30 août 1944.*
[153] *Fédération Internationale des Ligues des Droits de l'Homme (FIDH), Rapport hors série n° 312 (Septembre 2001): Rapport de position n° 6, Cour pénale internationale: La loi française d'adaptation — enjeux et taboux*, 26.
[154] Respectively, in Arts 221–1 to 221–5-1; 222–1 to 222–6-1; 222–23 to 222–26.

able to do so in cases of isolated offences; the Rome Statute, on the other hand, aims at the punishment of such crimes 'particularly when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.

The absence of any specific definitions of war crimes as a generic category of offences with special characteristics in French law, coupled with a certain fear of malicious prosecutions given France's prominent involvement in international peacekeeping operations,[155] combined to lead the French Government to make clear its intention to enter, with its instrument of ratification, a declaration under Article 124 of the Statute, whereby for seven years France will not accept the jurisdiction of the ICC in respect of war crimes committed on its territory or by its nationals. The French Ministries of Defence and Foreign Affairs presented this unique recourse to Article 124 as purely '*transitoire*', in order to enable France to gauge if the guarantees for the protection of States contained in the Rome Statute will be effective and to provide time to find solutions to any problems[156] — the latter not apparently including the lack of a comprehensive French law on war crimes, since neither ministry mentioned it.

The French use of Article 124, which in fact was included in the Rome Statute on French insistence with precisely this use in mind,[157] was severely criticised in the parliamentary proceedings related to the ratification law. The National Assembly's Commission of Foreign Affairs, referring to the arguments of many non-governmental organisations and eminent jurists, characterised the effects of the resort to Article 124 as '*néfastes et pervers*' in that other countries might be encouraged to follow France's example by refusing to accept the jurisdiction of the ICC in relation to war crimes; it was also noted that French interests would not necessarily be protected in practical terms, since French soldiers could still be the object of war crimes charges in other States applying universal jurisdiction.[158] The Commission's Rapporteur, Pierre Brana, therefore officially recommended that the French Government reconsider its position on the use of Article 124[159] — a position which was equally adopted by the Commission as a whole in adopting the *projet de loi*.[160]

Brana's Report also noted the unsatisfactory nature of the provision for prosecuting war crimes in French law and the inconsistencies of such provision with the terms of Article 8 of the ICC Statute: in particular, the lack of any French law concerning violations of humanitarian law occurring in non-international armed conflicts, and the fact that Additional Protocol I has only comparatively

[155] See *Assemblé Nationale: Rapport N° 2141, fait au nom de la Commission des affaires étrangères*, 25–26.
[156] *Ibid* 26.
[157] See S Bourgon, 'Jurisdiction *ratione temporis*' in A Cassese, P Gaeta and JRWD Jones, *The Rome Statute of the International Criminal Court: A Commentary (Vol I)* (OUP, Oxford, 2002) 543 at 554–56.
[158] *Rapport N° 2141*, 26–29.
[159] *Ibid* 29.
[160] *Assemblée Nationale: Commission des affaires étrangères, Compte rendu n° 23, 8 février 2000,* available at <http://www.assemblee-nationale.com/cr-café/99-00/c990023.asp>.

recently been ratified by France,[161] on 11 April 2001. The Senate's Commission of Foreign Affairs, Defence and the Armed Forces was however much less critical of the Government's stance on Article 124: the Report submitted by Senator André Dulait even sympathised to a considerable extent with the argument that there would be '*un risque particulier de détournement de la Cour à des fins autres que judiciaires*', in that French troops would be vulnerable to malicious complaints of war crimes because Article 8 would permit the prosecution of isolated acts (unlike Article 7, which requires crimes against humanity to be 'part of a widespread or systematic attack', or Article 6 for genocide, which implies a pattern of attacks '*commis massivement selon un plan préétabli*').[162]

The political wisdom of the French Government's position was, nevertheless, questioned and it was suggested that it might have done better to wait for the ICC to 'malfunction' in the manner feared and then react thereto, rather than prejudging the ineffectiveness of the Court's safeguards in the event of abuses and withdrawing from the war crimes jurisdiction in advance.[163] In this context the *déclaration interprétative* made by France in its instrument of ratification of the Rome Statute dated 5 June 2000[164] strikes an odd note as it includes a series of interpretations of various specific aspects of Article 8 of the Rome Statute — the very article to which France is withholding its consent for up to seven years and in respect of which its domestic law is so inadequate as to make any prosecutions for war crimes in the French courts a fantasy for at least the short-term future.

If French domestic law on war crimes is profoundly unsatisfactory, then its provisions on genocide and crimes against humanity (which do exist as discrete offences in French law) are at least troubling in that they seem to be almost wilfully inconsistent with accepted international law definitions of those offences as reflected in Articles 6 and 7 of the ICC Statute. The definition of genocide in French law[165] is different from the international law definition in two respects: first, it requires acts amounting to genocide to be committed '*en exécution d'un plan concerté*' ('in carrying out a common plan') to destroy a group, where Article 6 of the ICC Statute — which is taken from Article II of the 1948 Genocide Convention — merely requires the acts to be committed 'with intent' to destroy a group.

Secondly, the definition of the group itself in French law is different in that, in addition to the international law criteria of nationality, ethnicity, race and religion, it includes a general class of group '*déterminé à partir de tout autre critère arbitraire*' ('determined according to any other arbitrary criteria'). The requirement of a common plan — language which goes back to the indictments of the

[161] *Rapport N° 2141,* 23–24. Note that the Rapporteur's reference to Additional Protocol I as being expressly included in Art 8 is incorrect: not only is it not included (the only treaty instruments referred to in Art 8 are the 1949 Geneva Conventions), but its inclusion was firmly opposed at the Rome Diplomatic Conference by France, among other States, precisely because France had not ratified it.
[162] *Sénat, session ordinaire de 1999–2000: Rapport N° 259, fait au nom de la commission des Affaires étrangères, de la défense et des forces armées*, 23–24.
[163] *Ibid* 26.
[164] Reproduced in the FIDH Report, above n 153, Annex 5.
[165] *Code pénal*, Art 211–1.

International Military Tribunal at Nuremberg (1945–46) — introduces a worryingly objective element to the *mens rea* of the crime of genocide in that some wider plan or conspiracy extending beyond the subjective intention of the individual perpetrator is needed to obtain a conviction. In a type of case where international jurisprudence has clearly demonstrated how difficult it can be to obtain a conviction,[166] is such an additional element of the crime really necessary or desirable? As the FIDH has noted, it is '*trop restrictive et conduit à de sérieuses difficultés de preuve*'.[167]

As for the broader criteria for the definition of a group for the purposes of genocide, a similar problem was encountered in the context of the Pinochet proceedings in Spain: the criteria used in the Spanish courts to base a charge of genocide against Pinochet, essentially for the persecution of his political opponents in Chile, was very dubious from an international law perspective (indeed, the charge was quietly dropped from the extradition request which led to the proceedings in the UK).[168] Although having a broader definition of the target group of genocide is in itself perhaps not necessarily a bad thing, the formulation adopted does have the disadvantage of being inherently uncertain as well as subjective, and international jurisprudence does not support it in principle.[169] A final point about genocide is that the form of the offence which consists of direct and public incitement to commit genocide is unknown to French law — possibly because of a typical civil law-common law misunderstanding of incitement as being a form of mere complicity in the crime, as opposed to a crime in itself.[170] The omission appears all the more illogical in light of the criminalisation of incitement to racial discrimination, hatred or violence.[171]

While the French enactment of genocide in the *Code pénal* at least bears some resemblance to the international instruments which are the original source of the criminalisation, French law relating to crimes against humanity is in a terrible mess. The downright bizarre formulation of crimes against humanity in the *Code pénal* — where they are referred to as '*other* crimes against humanity' apart from genocide — is essentially the result of legislative and judicial history, as this category of crimes was not imported properly into French law after World War II, but rather, so to speak, entered by the back door. In 1964, as the statute of limitations on crimes committed during the German occupation of France was about to expire, a law was hastily passed declaring crimes against humanity to be by their nature '*imprescriptible*', that is, not subject to any statute of limitations.[172] This law did

[166] *The Prosecutor v Jelisić*, ICTY Trial Chamber I, Judgement (14 Dec 1999) Case No IT–95–10–T, available at <http://www.un org/icty/brcko/trialc1/judgement/index.htm>.
[167] FIDH Report, above n 153 at 21.
[168] See D Turns, 'Pinochet's fallout: jurisdiction and immunity for criminal violations of international law' (2000) 20 *LS* 566 at 569–70.
[169] See *The Prosecutor v Akayesu*, ICTR Trial Chamber, Judgment (2 Sept 1998) Case No ICTR–96–4–T, para 511 (available at <http://www.ictr.org/>).
[170] FIDH Report, above n 153, 22–23.
[171] Cf the general provisions of the *Code pénal*, Art 121–7.
[172] *Loi n° 64-1326 du 26 décembre 1964, JO (Lois et Décrets)* (1964), 17788.

not itself attempt to define crimes against humanity but simply referred to the definitions contained in the Charter of the International Military Tribunal at Nuremberg[173] and the resolution passed by the United Nations General Assembly on 13 February 1946.[174] Thus, in the *Barbie* and *Touvier* cases, the French courts had only a very imperfect definition at their disposal; the idiosyncratic format adopted in the present *Code pénal* is due to a combination of the lack of any previous clear statutory provisions and the often confusing statements of law made by the French courts in those two cases.[175]

4.2.3 The Barbie and Touvier Cases

In *Barbie*,[176] the fundamental legal controversy concerned the difference between crimes against humanity and war crimes in the French domestic legal order. When the final criminal indictment was drawn up against Barbie, the Lyon *juge d'instruction* took the view that only acts committed against Jewish civilians on racial or religious grounds in furtherance of the 'Final Solution' constituted crimes against humanity for which Barbie could be prosecuted in 1983; various other victims of Nazi oppression, notably former members of the Resistance, appealed against that decision. They lost in the Lyon *Cour d'appel* but then won on appeal, thanks to a frankly strange interpretation of the applicable law by the judges of the *Cour de Cassation*. The highest court in France held that, whereas war crimes (whose prosecution was time-barred under French law) were directly connected to a state of hostilities between two or more States, crimes against humanity (whose prosecution was not time-barred because of the 1964 law) consisted of inhumane acts and persecution committed: (1) in a systematic manner; (2) on behalf of a hegemonic State practising an ideology of supremacy; (3) against not only the victims, but also the opponents, of that policy.[177]

In the context of Barbie's case, the third condition was all-important, as the court accepted — with conspicuously circular reasoning — that because the crimes committed against the French Resistance had been presented by the Nazis as politically justified on ideological grounds, the French Resistance had been fighting in opposition to the Nazi ideology as such (and not merely for the liberation of France from German occupation). They could therefore be victims of crimes against humanity — a conclusion which flatly contradicted the traditional international law view of the Resistance as legitimate combatants, that

[173] IMT Charter annexed to the 1945 London Agreement, Art 6(c). The London Agreement and Charter are reprinted at 39 *AJIL* Supp 258.
[174] General Assembly Res 3 (I) (1946).
[175] For a useful overview, see L Sadat Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again' (1994) 32 *Colum J Transnat'l L* 289.
[176] *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v Barbie* (1983–88) 78 ILR 124. Klaus Barbie was the Chief of the Gestapo in Lyon (1942–44) and was implicated in murders, torture, arbitrary arrests and detentions during that time.
[177] *Ibid* 136–40.

is, not civilians, the latter being the only possible victims of crimes against humanity.[178]

The second element of crimes against humanity as identified in *Barbie* was to prove crucial to the decision in *Touvier*.[179] Here the defendant was not a German, but a Frenchman; he had been a high-ranking officer in the *Milice* (a French paramilitary organisation operated by the Vichy regime) and the single charge confirmed against him by the *juge d'instruction* was that he ordered the execution of seven Jews in June 1944 as a reprisal for the assassination of the Vichy Minister for Propaganda. The Paris *Cour d'appel* caused an uproar by holding that this was not a crime against humanity, because the Vichy 'French State' on behalf of which Touvier had acted,[180] despite the anti-Semitic measures which it had promulgated, had merely been pragmatic in its co-operation with the Germans in this respect; persecution of the Jews by the Vichy regime had not been motivated by a policy of ideological supremacy. The *Cour de Cassation* reversed the decision of the *Cour d'appel*, but only on the very narrow ground that Touvier's evidence disclosed that the decision to carry out the reprisal against the Jews had been taken by his superior in the *Milice* following consultation with the local German Gestapo chief; it was thus possible to say that the executions had been carried out at the instigation, and in the interests, of Nazi Germany and therefore where part of a policy of ideological supremacy, thereby constituting crimes against humanity.

Although the 'right' decision was eventually reached by the *Cour de Cassation* in *Touvier*, the reasoning could not unreasonably be described as warped and, as Sadat Wexler comments with some understatement, it 'leaves one strangely dissatisfied' because the French judges appear to have misinterpreted not only the letter, but also the spirit, of the law which they were called upon to apply.[181] It is particularly unfortunate that jurisprudence inducing such unease should, perhaps inevitably, have left its mark on the provisions of the *Code pénal* regarding crimes against humanity, which were adopted in 1992 to reflect the results of the *Barbie* and *Touvier* cases. There are two provisions in the *Code pénal* dealing with crimes against humanity: first, Article 212–1 lists a number of the acts enumerated in Article 7 of the ICC Statute[182] and identifies the target group as a civilian population, but requires the acts to be '*massive et systématique*' and '*inspirées par des motifs politiques, philosophiques, raciaux ou religieux et organisées en exécution*

[178] Every formulation of crimes against humanity adopted since 1945 has stressed that such crimes can only be committed against a civilian population. For cases on the combatant status of the French Resistance see eg, *Compagnie d'Assurance La Nationale v Veuve Cabanel* (1946) 13 AD 228; *X v Compagnie d'Assurance Z* (1945) 13 AD 229.

[179] (1992) 100 ILR 338.

[180] Touvier's evidence, which was not contested, was that he had ordered the execution entirely on his own initiative and without any reference at all to the German authorities: see *ibid* at 355–56.

[181] Above n 175 at 353.

[182] But not all of them: in particular, murder, extermination, imprisonment, sexual crimes, apartheid and persecution are not listed in Art 212–1. The omission of these acts — especially the first four — is surprising and ought to be remedied in a re-drafted provision.

d'un plan concerté'. Then, Article 212–2 refers to a special sub-category of crimes against humanity:

> *commis en temps de guerre en exécution d'un plan concerté contre ceux qui combattent le système idéologique au nom duquel sont perpétrés des crimes contre l'humanité.*

This latter formulation in particular was a direct result of the decision in Barbie, but its inclusion is fundamentally inappropriate in terms of the harmonisation of French law with the provisions of the ICC Statute, since the latter covers only crimes committed against civilians and does not require any nexus to an armed conflict.[183] As for the elements identified in Article 212–1, the expression '*massive et systématique*' used to describe the pattern of criminality is cumulative, whereas the phrase adopted in Article 7 of the Rome Statute is alternative ('widespread or systematic') and clearly more desirable from a prosecutorial point of view. It is submitted that in any event the phrase is unnecessary in the French law in view of the inclusion of the requirement of a common plan.[184] Finally, the discriminatory motivations identified in the French law are also present in the ICC Statute, but only for the specific crime against humanity of persecution (which itself is not included in the French law), not as a general requirement for all acts characterised as crimes against humanity. Having to prove such motivations in respect of each of the other variants of crimes against humanity would, again, impose a heavy burden on the prosecution.

4.2.4 Jurisdiction

The only other matter to be considered here is the question of jurisdiction. In two decisions in the late 1990s, the *Cour de Cassation* rendered contradictory decisions on whether universal jurisdiction exists in France for serious international crimes.[185] In fact, as Stern notes,[186] there is clear provision in the *Code de procédure pénale* for universal jurisdiction to be applied by the French courts either in cases to which French law is applicable in accordance with Articles 113–6 to 113–12 of the *Code pénal*,[187] or in cases where French jurisdiction is authorised by

[183] The FIDH Report, above n 153, comments (at 24) that the acts described in Art 212–2 are more characteristic of war crimes than crimes against humanity.
[184] Cf Art 211–1 on genocide, above n 165 and accompanying text. In the context of crimes against humanity, the requirement seems more restrictive in French law than in the ICC Statute, with its 'widespread or systematic' formulation: see FIDH Report, 24. Note also that it is at variance with the *Barbie* decision, which required a State policy of ideological supremacy rather than merely a common plan.
[185] See B Stern, 'In re Javor; In re Munyeshyaka' (1999) 93 *AJIL* 525; R Maison, *'Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes'* (1995) 6 *EJIL* 260.
[186] *Ibid* Stern, 528–29.
[187] These establish French extraterritorial jurisdiction for crimes committed outside France by (Art 113–6) or against (Art 113–7) French nationals or contrary to the fundamental interests of the State (Art 113–10), aboard non-French-registered aircraft in certain circumstances (Art 113–11) and outside the French territorial sea when permitted by international treaties (Art 113–12).

international treaty.[188] It is notable that the latter cases do not include any of the treaties of international humanitarian law, with the exception of the 1984 United Nations Convention Against Torture;[189] however, some French commentators have suggested that Article 689 contemplates the use of self-executing treaty provisions as direct sources of French jurisdiction, and that the grave breaches provisions of the Geneva Conventions are such, an argument with which the *Cour de Cassation* disagreed.[190] Moreover, Article 689–1 requires that a person accused of a crime over which French courts have extraterritorial jurisdiction must be present on French territory in order for a prosecution to take place.[191] At present, therefore, the position is that France does have what might be termed a qualified form of universal jurisdiction, but such jurisdiction does not extend to cover such ICC core crimes as exist in French law; doubtless, this is a situation that will only be remedied when France undertakes a proper enactment of war crimes and brings its substantive law fully into line with the provisions of Rome Statute.

4.3 Germany

The Federal Republic of Germany (FRG) — even prior to reunification with the former German Democratic Republic (GDR) — has long been one of the strongest supporters of an effective system for the enforcement of international criminal justice. The experience of Nazi tyranny within Germany under the Third Reich (1933–45), coupled with the Allied occupation of Germany after the unconditional surrender and an acute awareness of international criminality (the latter enhanced, of course, by the great Nuremberg Trial and subsequent trials of Nazi war criminals in various military courts of the Allied Control Council for Germany until 1949, with more trials in Federal German courts thereafter)all combined to make the FRG strongly committed to the repression of international crimes, both through domestic mechanisms and, eventually, through an effective international penal machinery.[192] In this context, the FRG took care to implement certain international criminal offences as a complement to the domestic penal

[188] *Code de procédure pénale*, Art 689.
[189] The treaties cited are those prohibiting torture (Art 689–2), various forms of terrorism (Art 689–3), unauthorised transfer, appropriation etc of nuclear material (Art 689–4), unlawful acts against the safety of maritime navigation (Art 689–5), hijacking and other unlawful acts against the safety of civil aviation (Art 689–6) and civil airports (Art 689–7), corruption in the European Union (Art 689–8), terrorist bombings (Art 689–9) and the financing of terrorism (Art 689–10).
[190] Eg, see Stern, above n 185 at 529.
[191] Cf the debate generated in the *Arrest Warrant Case*, above n 81, and the subsequent reactions of the Belgian authorities, above n 130 and accompanying text, as to whether custody of the accused is an essential prerequisite of universal jurisdiction. The French judge in the ICJ, President Guillaume, certainly thought so: see above n 81, President Guillaume, Separate Opinion, para 9.
[192] The GDR, on the other hand, never accepted any sense of special historical responsibility in relation to Nazi crimes or showed any interest in developing or participating in an international criminal justice system.

code (*Strafgesetzbuch – StGB*), was generally at the forefront of efforts to create a workable international criminal law system, and was a likely candidate for early ratification of the Rome Statute.

This having been said, it is interesting that the pre-ratification state of German law on the substantive aspects of the Rome Statute was not much different from that of the UK, inasmuch as a piecemeal approach to national implementation had been adopted and the result was inevitably somewhat patchy. The difference between Germany and the UK post-ratification, however, has been in the rigour of the German approach to harmonising substantive domestic law with the contents of the ICC Statute. Indeed, the Germans have even gone beyond what was strictly required by the Statute in their attempt to achieve a serious and effective implementation: rather than simply annexing the ICC core crimes to a general piece of implementing legislation, they have elaborated a wholly new and separate international criminal code (*Völkerstrafgesetzbuch – VStGB*),[193] which in some respects goes further than the ICC Statute, especially in terms of the definition of specific sub-crimes within each broad category of core crimes. A stronger contrast with the approach of the UK is hard to imagine; indeed, a fairer comparison with the German approach might be that adopted by Canada.

The German process of ratifying the ICC Statute has involved four separate legislative projects: the basic act of ratification, a constitutional amendment, and two implementing laws — one dealing with matters of criminal procedure to enable Germany to co-operate with the ICC to the fullest extent envisaged by the Rome Statute,[194] the other consolidating substantive criminal law by incorporating already existing offences from Germany's earlier international obligations under humanitarian law treaties and creating new offences to reflect those contained in Articles 7 and 8 of the ICC Statute.[195] Germany signed the Statute on 10 December 1998 and within twelve months a draft bill of ratification and constitutional amendment were adopted by the German Government and introduced in the *Bundestag*.[196] The bill of ratification, required under Article 59 of the *Grundgesetz* (the Basic Law, or constitution), enabled Germany to ratify the Statute on 11 December 2000,[197] making it the twenty-fourth State to

[193] *Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches*, available at <http://www.bmj.bund.de/images/11222.pdf>. The final version of the new code entered into force on 30 June 2002: *Bundesgesetzblatt (BGBl)* 2002, I, 2254. See A Zimmermann, 'Main Features of the new German Code of Crimes against International Law (Völkerstrafgesetzbuch)', in M Neuner (ed), *National Legislation Incorporating International Crimes — Domestic Approaches to International Criminal Law* (Berliner Wissenschaftsverlag, Berlin, 2003) 137; H Satzger, 'German Criminal Law and the Rome Statute — A Critical Analysis of the New German Code of Crimes against International Law' (2002) 2 *Int Crim LR* 261.

[194] See P Wilkitzki, 'The German law on co-operation with the ICC' (2002) 2 *Int Crim LR* 195.

[195] See S Wirth, 'International Criminal Law in Germany — Case Law and Legislation' (2002), at 6, available at <http://www.iuscrim.mpg.de/forsch/onlinepub/Ottawa.pdf>.

[196] F Jarasch and C Kreß, 'The Rome Statute and the German Legal Order', in Kreß and Lattanzi (eds), above n 9, 91.

[197] *BGBl* 2000, II, 1393.

do so.[198] Because of the complementarity principle, it was also necessary to amend the *Grundgesetz* itself, Article 16(2) of which prohibited the extradition of German nationals to stand trial outside Germany.[199] An innovative approach was adopted with the effect of reforming and consolidating German practice as to extradition, whereby the general prohibition of such rendition (*Auslieferung*) was preserved, but the *Bundestag* is nevertheless empowered to make exceptional provision for the rendition of German nationals, both to international tribunals and member States of the European Union.[200]

Nevertheless, it is clear from German commentators[201] that the whole intention of the German Government (like the British Government) was always to ensure that the national law was sufficiently watertight to enable the prosecution of offenders in Germany and thereby avoid the situation of having to surrender jurisdiction over their own nationals to the ICC.[202] As has already been noted, however, the methodology adopted in Germany was radically different from that of the UK. The problem was essentially identical: prior to the adoption of the *VStGB* the only ICC core crime which could be prosecuted under pre-existing German law was genocide, under §220a of the Penal Code (*Strafgesetzbuch – StGB*) which had been in place since 1955, when the FRG ratified the Genocide Convention.[203] It was accordingly decided, in the context of the post-ICC reform of the German criminal law relating to international crimes, that there was no need to enact a new provision as such concerning the offence of genocide: as a matter of German law the offence would simply be moved from §220a of the *StGB* to the new specialist code of international crimes. It is worth noting that the wording of the new *VStGB* provision[204] makes it unequivocally clear that genocide can be committed against just one person, as long as the required *dolus specialis* is present.[205]

[198] A Zimmermann, 'Implementing the Statute of the International Criminal Court: The German Example', in A Cassese and LC Vohrah (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer, Dordrecht, 2002) 943.

[199] As to whether the former wording of Art 16(2) implied international tribunals — whether permanent or ad hoc — or was restricted in scope to national tribunals of States other than Germany, in which case a constitutional amendment was technically not necessary, see Zimmerman, *ibid* 944 at n 4.

[200] *BGBl* 2000, I, 1633.

[201] Eg, Zimmermann, above n 198, 944–45.

[202] Cf the new provision (§153f) inserted into the Code of Criminal Procedure (*Strafprozeßordnung – StPO*), concerning the public prosecutor's discretion not to proceed with the prosecution of a crime committed outside Germany if the accused is not present in Germany and his presence is not anticipated: this discretion will not apply if the accused is a German national, unless the crime is being prosecuted by an international court or by a State with territorial or passive personality jurisdiction.

[203] Zimmermann, above n 198, 946–47.

[204] Genocide (*Völkermord*) is now to be found in the *VStGB*, §6.

[205] *VStGB*, §6(1)1 specifies that genocide can be committed, inter alia, by someone who kills *'ein Mitglied der Gruppe'* ('a/one member of the group'); the wording in Art II of the Genocide Convention and Article 6 of the ICC Statute both refer to killing 'members' of the group. This problem has long been the subject of disagreement among commentators, although the Elements of Crimes (EOC) drafted by the Preparatory Commission for the ICC (PrepCom) now confirm that one person alone

Neither crimes against humanity nor war crimes were punishable as such under the *StGB* — not even grave breaches of the Geneva Conventions.[206] Instead, as Germany had jurisdiction over, but no definitions of, crimes against humanity and war crimes, they could only be punished if they amounted to offences under the ordinary criminal law (murder, manslaughter etc).[207] This was a direct consequence of the Allied occupation of Germany after 1945: Nazi war criminals were punished by the military courts of the occupation authorities in each Zone of Germany and, after 1949, by the civilian courts in the FRG. As a result of the (at least partial) restoration of the exercise of sovereignty in the three western Zones of Germany, ACCG Law No 10 was deemed no longer applicable in the FRG.[208] For the purposes of implementing the ICC Statute into German law, therefore, it was necessary to create completely new offences of crimes against humanity (*Verbrechen gegen die Menschlichkeit*)[209] and war crimes (*Kriegsverbrechen*).[210]

4.3.1 Definitions of Crimes

The definitions of crimes against humanity in the *VStGB* departs in several respects from the definitions in Article 7 of the ICC Statute, in regard to both the *chapeau* and certain specific offences. In the *chapeau* the *VStGB* does not define the phrase 'widespread or systematic attack directed against any civilian population' as closely as Article 7(2)(a) of the Statute, which specifies that such attack must also be 'pursuant to or in furtherance of a State or organisational policy to commit such attack'.[211] Zimmermann is dubious about Article 7(2)(a), considering it to be inconsistent with customary international law,[212] but it is submitted that his analysis is flawed in that the passages he quotes from

may be a victim of genocide: see C Byron and D Turns, 'The Preparatory Commission for the International Criminal Court' (2001) 50 *ICLQ* 420 at 422; A Cassese, 'Genocide', in Cassese, Gaeta and Jones, above n 157, 335 at 340–47.

[206] In this respect, the position in Germany was even more deficient than in the UK: see Zimmermann, above n 198, 950–51.

[207] In such cases a convoluted procedure was necessary, whereby the courts had to ascertain whether the act(s) in question amounted to a violation of international humanitarian law solely for the purposes of founding German jurisdiction, before proceeding to 'subsume' the same facts under the relevant provisions of the StGB to see if they in fact amounted to murder, manslaughter or any other offence under German law: see Wirth, above n 195 at 4. Thus, in one case, a Bosnian Serb was convicted of aiding and abetting murder under the StGB, rather than the equivalent war crime of wilful killing: see CJM Safferling, 'Public Prosecutor v Djajić' (1998) 92 *AJIL* 528.

[208] Zimmermann, above n 198, 947.

[209] *VStGB*, §7.

[210] *Ibid* §§8–12.

[211] The German Government, in its explanations accompanying the submission of the draft *VStGB* to the *Bundestag*, noted that 'The individual offences [in Art 1§7] … only become crimes against humanity, and thus crimes against international law if they are committed as part of a "widespread or systematic attack against a civilian population", and thus are in a functional connection [*sic*] with such an attack': Government Draft Code (*Entwurf*) of Crimes Against International Law (Federal Ministry of Justice, 2001), 42, available at <http://www.iuscrim.mpg.de/forsch/legaltext/VStGBengl.pdf>.

[212] Above n 198, 948–49.

the *Tadić*,[213] *Rutaganda*[214] and *Akayesu*[215] judgments refer to a different aspect of the *chapeau* — namely, whether the acts in question have to be widespread *and* systematic, or widespread *or* systematic. This is not the same point as the question of whether there needs to be 'a State or organisational policy', which has been treated in a somewhat confusing manner in recent jurisprudence, both international and national. In *Tadić*, the ICTY Trial Chamber stated that crimes against humanity 'are not isolated, random acts of individuals, but rather result from a deliberate attempt to target a civilian population',[216] but that this no longer needed to be in the form of a State policy to commit such acts. In *The Prosecutor v Nikolić*, it was stated that the acts did not need to part of a State policy as such, but could not be the work of isolated individuals acting alone.[217]

On the other hand, national decisions in Canada[218] and France[219] have strongly emphasised the requirement of a State policy, rather than acts of private individuals who bear a hatred against a particular group or the public or society at large. In *The Prosecutor v Kupreskić*, the ICTY concluded its discussion of this difficult and controversial issue with the tentative suggestion that, in cases where there the perpetrators of crimes against humanity have no official status and do not act on behalf of any governmental authority:

> some sort of explicit or implicit approval or endorsement by State or governmental authorities is required, or else … the offence [must] be clearly encouraged by a general governmental policy or … clearly fit within such a policy.[220]

It is therefore submitted that the drafters of the *VStGB* were perhaps excessively cautious on this point, although admittedly the contradictions in many of the cases do not inspire great confidence.

Similarly, as far as the enactment of individual crimes against humanity in the *VStGB* is concerned, the main points of interest arise in instances where the German law departs to a greater or lesser extent from the wording in the Rome Statute. In relation to Article 7(1)(g) of the Statute (sexual violence), the German wording[221] uses the term '*sexuelle Nötigung*' (sexual coercion) instead of sexual slavery (which would be '*sexuelle Sklaverei*'); this was taken from the equivalent offence in the regular penal code[222] and was considered, as a 'basic concept', to

[213] ICTY Trial Chamber, Opinion and Judgment (7 May 1997) Case No IT–94–1, 112 ILR 1.
[214] ICTR Trial Chamber, Judgment and Sentence (6 Dec 1999) Case No ICTR–96–3, available at <http://www.ictr.org/>.
[215] ICTR Trial Chamber, Judgment (2 Sept 1998) Case No ICTR–96–4–T, available at <http://www.ictr.org/>.
[216] Above, n 213, 219–220.
[217] *Rule 61 Decision*, 20 Oct 1995, 108 ILR 21.
[218] *Finta*, above n 93.
[219] *Barbie*, above n 176, and *Touvier*, above n 179.
[220] ICTY Trial Chamber, Judgment (14 Jan 2000) Case No IT–95–16–T, para 555, available at <http://www.un org/icty/kupreskic/trialc2/judgement/index.htm>.
[221] *VStGB*, §7(1)6.
[222] *StGB*, §177.

cover sexual slavery and any other form of sexual violence of comparable gravity in the terms of the Statute.[223] Because the crime of enforced disappearance of persons (Articles 7(1)(i) and 7(2)(i) of the Statute) did not previously exist in German law and was thought to be too uncertain in terms of the basis of individual criminal responsibility,[224] the equivalent provision in German law distinguishes between two alternative methods of committing the offence: deprivation of freedom coupled with a subsequent refusal to supply information about the person concerned,[225] and refusal to supply information about a person previously detained or abducted.[226] For similar reasons of lack of certainty in the ICC wording, the German offence equivalent to committing 'other inhumane acts of a similar character' (Article 7(1)(k) of the Statute) refers specifically to 'severe physical or mental harm, in particular of the type referred to in §226 of the *StGB*'.[227] In relation to persecution as a crime against humanity, in light of recent jurisprudence from the ICTY,[228] the *VStGB* in Article 1§7(1)10 dispenses with the ICC Statute's retention of the requirement that acts of persecution be 'in connection with … any crime within the jurisdiction of the Court' and instead merely refers to persecution on any of the grounds mentioned in Article 7(1)(h) of the Statute, that is, treating persecution as a crime against humanity in its own right.

Finally, the treatment of apartheid — a crime which did not previously exist in German law — in the new *VStGB* departs somewhat from the approach of the Rome Statute, again because of a perceived lack of certainty in the Statute. Article 7(2)(h) of the Statute explains that apartheid is constituted, as a separate crime against humanity, by:

> inhumane acts of a character similar to those referred to in paragraph 1 [that is, murder, extermination, enslavement etc], committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group[s] … with the intention of maintaining that regime.

In German law, by contrast, the acts constituting apartheid are treated as an aggravating factor if the intent defined in Article 7(2)(h) of the Rome Statute is present in relation to any other crime against humanity.[229]

In respect of the implementation of war crimes in Germany, the new provisions of the *VStGB* are equally distinctive in three main respects. First, the German Government decided to implement not only the provisions of the ICC Statute,

[223] *Entwurf*, above n 211, 46.
[224] *Ibid*. For details of the PrepCom's rather elaborate EOC regarding enforced disappearance, see Byron and Turns, above n 205 at 423–24.
[225] *VStGB*, §7(1)7(a).
[226] *Ibid* §7(1)7(b).
[227] *Ibid* §7(1)8; see *Entwurf*, above n 211, 47–48.
[228] *Kupreskić*, above n 220, para 580.
[229] *VStGB*, §7(5); see *Entwurf*, above n 211, 49–50.

but also those of earlier humanitarian treaties which Germany had ratified but not previously implemented, namely, the Geneva Conventions and Additional Protocol I. The rationale behind this was that, since the latter instruments reflect customary international law and provide for a broader scope of application than the ICC Statute in terms of criminalisation, it was seen as desirable to make the equivalent provisions of the *VStGB* as all-embracing as possible.[230] Secondly, an attempt was made — consistent with German military doctrine — to incorporate, as far as possible, provisions harmonising the rules applicable in international and non-international armed conflicts.[231] Since it is the German belief that most customary rules of humanitarian law are applicable in all armed conflicts,[232] and the provisions of the *VStGB* on war crimes generally reflect customary international law even where the latter is broader than the specific prohibitions contained in the ICC Statute, it is unsurprising that this is particularly so in respect of non-international armed conflicts. Thirdly, war crimes in the *VStGB* are divided into different sections covering acts committed against persons,[233] property and other rights,[234] humanitarian operations and emblems,[235] and those involving prohibited methods[236] and means[237] of conducting hostilities.

The *chapeau* of each of these separate sections specifies that its general scope applies to acts committed '*im Zusammenhang mit einem internationalen oder nichtinternationalen bewaffneten Konflikt*' ('in connection with an international or non-international armed conflict'), although in a few instances[238] it was unavoidable that certain offences are unique to international armed conflicts, in which cases the text specifies that the relevant provisions are limited to such conflicts. No distinction is made per se between grave breaches and other war crimes as it was not considered relevant for the purposes of national law.[239] In general, where the provisions of the *VStGB* go beyond the equivalent provisions

[230] See Zimmermann, above n 198, 1951–52; *Entwurf*, 51, which states: 'The penal regulations of the [*VStGB*] only exceed the scope of the ICC Statute in accordance with the consolidated status of the international customary law [sic] as it has become manifest in the international practice and accompanying *opinio juris*'.
[231] Zimmermann, above n 198, 952.
[232] See *Humanitäres Völkerrecht in bewaffneten Konflikten — Handbuch, Zentrale Dienstvorschrift* 15/2 (Federal Ministry of Defence 1992), §211; *Entwurf*, 52 ('… the majority of war crime elements today apply to all kinds of armed conflicts'). This is the German conception of fundamental general principles of humanitarian law, such as the proportionality rule, as well as many specific rules, such as the prohibitions of biological and chemical weapons; see D Turns, 'At the "Vanishing Point" of International Humanitarian Law: Methods and Means of Warfare in Non-international Armed Conflicts' (2003) 45 GYIL 1 at 25–27.
[233] *VStGB*, §8.
[234] *Ibid* §9.
[235] *Ibid* §10.
[236] *Ibid* §11.
[237] *Ibid* §12.
[238] Eg, transfer by an occupying power of its civilian population into occupied territory: see *ibid* §8(3)2.
[239] *Entwurf*, at 53.

of the ICC Statute, the basis is always that the former represent accepted customary international law and it was seen as preferable to provide as broad a protection as possible. However, the *Entwurf* provides very little in the way of evidence for its assertions to that effect in most such cases, and inevitably the argument is more convincing in some instances than in others. On the other hand, what the *VStGB* loses in cogency it often makes up for in clarity: the simplified wording employed by the German drafters in some instances is more straightforward and comprehensible than that used in the ICC Statute or Additional Protocol I.

In addition, the structure of the German law is logical and well thought out, and also contains some eminently sensible provisions which conveniently fill loopholes in international humanitarian law. For example, Article 1§8(6) defines a concept of 'protected persons' in both international armed conflicts (using the accepted wording from the Geneva Conventions and Additional Protocol I) and non-international ones. As Additional Protocol II does not contain a concept of protected persons in the sense that it exists in international conflicts, the *VStGB* extends such protection in non-international conflicts to the wounded, sick and shipwrecked, as well as — more innovatively — persons not taking an active part in hostilities and under the control of the hostile party (which in international conflicts would cover prisoners of war and civilians). Also protected (in all conflicts) are combatants who are no longer participating in hostilities and have laid down their arms or are otherwise defenceless, but have not yet been taken under the control of the opposing forces.[240] Likewise, the improper use of recognised distinctive emblems is prohibited in all armed conflicts, however they are characterised.[241]

In some other respects, however, the new German code creates a basis of criminal liability narrower than that permitted in international law. For example, directing attacks against a civilian population is only a war crime under the *VStGB* if the civilian population is deliberately targeted as such; attacking a target in negligent disregard for whether the attack could harm civilians, or recklessly as to whether civilians might be in the vicinity and suffer harm, does not satisfy the *mens rea* requirement for the offence under German law.[242] This is unfortunate, as it is inconsistent with the prohibition of indiscriminate attacks and the rule of proportionality, both of which are incontrovertibly part of customary international law. Although it covers grave breaches of Article 57 of Additional Protocol I, the German provision does not criminalise violations thereof which, while not amounting to grave breaches, would nevertheless be war crimes incurring individual criminal responsibility in international law.[243]

[240] *VStGB*, §8(6)3. This is explained by reference to the fact that such persons are not otherwise covered by protected status until they have actually been taken into custody by the opposing forces: *Entwurf*, 66–67.
[241] *VStGB*, §10(2).
[242] *Ibid* §11(1)1; see *Entwurf*, 71–72.
[243] See APV Rogers, *Law on the Battlefield* (Manchester University Press, Manchester, 1996), ch 3.

4.3.2 Jurisdiction

Finally, on the question of the German exercise of jurisdiction over the ICC crimes, the *VStGB* represents a considerable advance — at least in theory — on the jurisdictional rules which previously operated in Germany. Formerly, German law allowed universal jurisdiction only in respect of genocide and certain other international crimes in respect of which Germany was under a treaty obligation to prosecute[244] — specifically, in relation to ICC core crimes, grave breaches of the Geneva Conventions and Additional Protocol I, and torture.[245] An alternative foundation for German jurisdiction was provided in cases where the accused was in German custody and the State with primary enforcement jurisdiction (that is, the State of territoriality or active nationality) showed no interest in prosecuting or seeking extradition, under the principle of so-called 'vicarious jurisdiction' ('*stellvertretende Strafrechtspflege*').[246] Even then, in both these cases, the German courts required a so-called 'legitimising link' ('*legitimierender Anknüpfungspunkt*'), whereby the accused was somehow connected to Germany, for example, by residence,[247] before they would actually exercise jurisdiction.

The result of all this was a form of universal jurisdiction (in name only) which was so circumscribed as barely to conform to the definition of true universal jurisdiction under customary international law, whereby no link of any kind is required between the offence and the State asserting jurisdiction. The new code regarding international crimes departs significantly from that position by providing that it shall apply to all criminal offences designated therein, 'even when the offence was committed abroad and bears no relation to Germany'.[248] No 'legitimising link' of any kind is required by the new law, although, as the links thus far required have been insisted upon by the courts in interpreting the jurisdictional provisions of German law, it is not inconceivable that they might be required again, despite the apparent espousal of 'pure' universal jurisdiction in the applicable code. However, in its most recent decision on this point, in 2001, the *Bundesgerichtshof* 'seems to lean toward no longer requiring such jurisdictional link'.[249] Even the presence (or anticipated presence) of the offender on German territory is not an essential prerequisite for a prosecution of a *VStGB* crime, under the new §153f(1) of the *StPO*.[250] Overall, then, the jurisdictional provision of the *VStGB* is somewhat broader than was the case before in that it stipulates a notionally unqualified universal jurisdiction for German courts over serious international crimes.

[244] *StGB*, §6.
[245] See Wirth, above n 195, 3.
[246] *StGB*, §7(2).
[247] Wirth, above n 195 at 5.
[248] *VStGB*, §1.
[249] Zimmermann, above n 193, 153 n 56.
[250] See above, n 202.

5. CONCLUSIONS

This chapter has surveyed mainly the substantive criminal law aspects of national implementation of the ICC Statute in six States — three representing the common law tradition (including the UK), three the civil law tradition. The examples of these States were chosen purely for their illustration of the kinds of problems that States Parties have been encountering to the Rome Statute in the process of giving effect to the complementarity principle; they stand for the implementation processes in dozens of other States.[251] They run the gamut from the UK, with its strictly minimalist approach, doing the bare minimum essential to comply with the requirements of the Statute, to the extremely comprehensive incorporation of international criminal law in Germany. In Belgium, the implementation is proceeding with a law which in several substantive respects actually goes further than what the Statute requires. Canada and NZ both break new ground in different ways compared to the traditional approach favoured by common law countries: the former in its willingness to let its law evolve as customary international law definitions of the various crimes evolve, the latter in its exceptional use of retroactive universal jurisdiction. France is something of an anomaly in this company, in that its implementation process is stalled on the difficulties it has encountered in the definition of war crimes.

The specific issues raised from one country to the next have generally been quite similar: the ambit of extraterritorial jurisdiction to take over the crimes, the definition of the crimes themselves. The solutions adopted vary from the idealistic to the plainly expedient. Although they are rarely perfect, they do illustrate the twin, symbiotic processes of the nationalisation of international law and the internationalisation of criminal law. The best opportunity since the immediate post-1945 period now exists to attain a largely uniform and efficient system for the enforcement of international criminal law, not so much through the ICC itself as through the revisions of national law which its creation has prompted. In time, the greatest irony — and the greatest benefit — of the ICC may turn out to be that those revisions in national law have rendered the Court's use largely unnecessary.

[251] As at 14 Sept 2003, there were 92 States Parties to the Rome Statute — see <http://www.iccnow.-org/>.

14

Political and Legal Responses to the ICC

DOMINIC MCGOLDRICK

1. INTRODUCTION

1.1 Political and Legal Responses to the ICC

THIS CHAPTER ADDRESSES political and legal responses to the ICC.[1] The responses of states, International Governmental Organisations (IGO's) and Non-Governmental Organisations (NGO's) to the idea of the ICC makes for a fascinating case-study. It has been a project which has attracted worldwide political interest. The chapter is principally concerned with the political response in terms of support or opposition. However, it also includes reference to how those political responses have been translated into constitutional amendments, national legislation, statements by international organisations and policy instruments. While the division is necessarily a broad brush one, Part 2 considers responses which have generally been supportive of the ICC. Parts 3–4 considers responses which have generally been in opposition to the ICC, even if, in some cases, they have been supportive of its establishment as a matter of principle. It is helpful to consider the political responses in terms of broad regional and geographical groupings, with the proviso that membership of these groupings overlaps significantly.

1.2 Voting on the Statute

One hundred and twenty states voted in favour of the Statute. The vote was not recorded so there is no official listing. Three members of the Security Council, the UK, France, and Russia, voted in favour. Two members of the SC, the US and China, voted against. Twenty-one states abstained. The Statute was immediately open for signature and remained open for signature until 31 December 2000. The Statute entered into force on the first day of the month after the 60th day following the date of the deposit of the sixtieth instrument of ratification or accession.[2] The

[1] See also D Robinson, 'The Rome Statute and Its Impact on National Law', in A Cassese, P Gaeta and RWD Jones (eds), *The Rome Statute for an International Criminal Court* (OUP, Oxford, 2002) at 1849.
[2] Art 126.

speed of signature and ratification of the Statute has been phenomenal in historical terms and much faster than predicted. As of November 2003 there were 139 signatories and 92 states parties.[3] It therefore appears that the Statute is more widely accepted now than at the end of the Rome Conference. Indeed, a number of states that abstained in the final vote have subsequently ratified the Statute.[4]

Seven states voted against. They were either known or thought to be the US, China, Libya, Iraq, Israel, Qatar and Yemen. Twenty one abstained. The 'magnificent seven' are a mixed but important group. They include the world's superpower, or 'hyperpower',[5] the US, and the world's most populous state, China. Both are permanent members of the Security Council. The US position is dealt with at length in Part 3 because it has taken the position of the leading opponent of the ICC. It has expended massive diplomatic capital in opposing the ICC. This has mystified many states who regard the likelihood of US prosecutions as almost entirely theoretical. Some of the US's strategies have also put the Security Council's credibility and legitimacy on the line.

There is a strong argument that the ICC is going to need the support of the US, even if it remains a non-party, if it is going to be able to function effectively. Only the US and Libya have been actively opposing the ICC. However, the US is not alone. There are other major states which are opposed or which have grave reservations. These include India, the world's largest democracy; Israel, the US's strongest ally in the Middle East; Pakistan, a key ally in the war against terrorism; and Turkey, a close military ally of the US. The position of some of the other opponents of the ICC are considered in Part 4.

1.3 Legal Issues

For states the same legal issues tended to be problematic. Issues have included immunities for heads of state or other state officials, members of Parliament, members of the Government, prohibitions on life imprisonment, prohibitions on the surrender or extradition of nationals to the Court, guarantees of jury trials, and the transferability of judicial competencies.[6] Where constitutional changes have had to be considered or undertaken this has increased the public knowledge of the ICC. For example, the amendment to the Irish Constitution required for ICC ratification was approved by 64.2 per cent, with a positive vote in all 41 constituencies. For many states complex legislation was needed to regulate assistance and co-operation with the ICC. Legislation has covered, for example, the questioning

[3] For signature and ratification status see <www.iccnow.org/rome/html/ratify.html>
[4] The Board of Editors, in Cassese *et al* n 1 above, 1439 at 1913.
[5] The expression used by French President Jacques Chirac in a speech on 4 Nov 1999, see R Graham, 'Chirac Attacks American Attitudes', *Financial Times*, 5 Nov 1999, p 10.
[6] See C Kreb and F Lattanzi (eds), *The Rome Statute and Domestic Legal Orders — General Aspects and Constitutional Issues*, vol 1 (Nomos/ Il Sirente, Baden-Baden, 2002); B Suhr and H Duffy, 'The Debate on Constitutional Compatibility with the ICC', *ICC Monitor*, June 2000.

of suspects, enforcement of prison sentences, to sanction the offences to the administration of justice, and to give effect to the privileges and immunities of the ICC and its members. Penal codes and codes of criminal procedure have been amended or modified. In some case mirror legislation has been introduced to ensure that under the complementarity principle the ICC will not exercise its jurisdiction.[7] These legislative activities have also given public attention to the ICC. National and international human rights organisations have supported states in their consideration of the implementation of the Statute.[8]

2. POLITICAL SUPPORT FOR THE ICC

2.1 Regional and Geographical Responses

At the Rome Conference a 'Like-Minded Group' of 67 states formed a broad political coalition in support of an independent and effective court. The position of particular states is noted where they have been the scene of conflict situations in the past or the present. Political support for the ICC has been expressed in international and regional institutions and meetings around the world.[9] These include the Africa-Europe Summit, the Rio Group, European Union,[10] African Union (formerly OAU),[11] the Southern African Development Community, the Organization of American States,[12] the Non-Aligned Movement, the Commonwealth States,[13] the Council of Europe, the Caribbean Community (CARICOM), the Economic Community of West African States, the Parliamentary Assembly of the Francophonie, the Commonwealth, the Inter-Parliamentary Union,[14] African, Caribbean and Pacific States.[15] Not surprisingly there was support from the UN General Assembly,[16] the UN Human Rights Commission and the High Commissioner for Human Rights.[17] Many regional conferences on implementation

[7] See Turns in this volume.

[8] See eg, Lawyers Committee for Human Rights, *Final Report — Conference on Implementation of the Rome Statute in Senegal (23–26 October 2001)* <www.lchr.org>

[9] See <http://www.iccnow.org/docuemnts/statements/intergovbodies2002.html>

[10] The EU engaged in diplomatic approaches to more than 60 countries to encourage support for the ICC. See the EU's common positions 2001/443/CFSP of 11 June 2001, OJ L 155/19 and 2003/444/CFSP of 16 June 2003, OJ L 150/67.

[11] See Resolution on 'Ratification of the ICC Statute by OAU Member States'; African Commission on Human Rights, May 2002.

[12] See Resolution of General Assembly of OAS of 4 June 2002.

[13] See the Statement of Commonwealth Secretary-General of 12 April 2002; 'Coolum Communique', March 2002, <www.chogm2002.org>

[14] See Resolution at its 107th Conference, para 4 (Marrakech, 2002).

[15] See the Resolutions of the Joint Assembly of ACP-EU on the ICC, March 2002.

[16] See eg, statements during the 58th session of GA, Sept–Oct 2003, <http://www.iicnow.org/documents/statements/governments2003.html>; GA Resolution 58/79.

[17] The Former UN High Commissioner for Human Rights, Mary Robinson, was a strong supporter of the ICC. See M Robinson, 'Human Rights in the Shadow of 11 Sept', 5th Commonwealth Lecture, Commonwealth Institute, 6 June 2002, http://www.ichrp/org/ac/excerpts/97.pdf; also published in (2003) 20(2) *New Perspectives Quarterly*.

have been held and there has been worldwide support from NGO's, with a number of national ICC coalition movements being established.[18]

2.2 European Union Member States [15 states]

Every EU state, except France, was in the Like-Minded Group. All EU member states were signatories and undertook to ratify by the end of 2000, although this timetable was not observed.[19] In 1999, Italy became the first EU member to ratify. Greece was the last EU member to ratify in 2002. The UK was a strong supporter of the ICC with ratification of the Statute being part of its 'ethical foreign policy'.[20] It was a leading member of the Like-Minded Group. In December 1997, the UK defected from the position of the other SC members and backed a 'Singapore compromise' to limit SC authority over the ICC. It played a leading part in the Rome diplomatic conference. The UK published a draft Bill on the ICC for consultation.[21] The International Criminal Court Act was passed in 2001.[22] This covered England, Wales and Northern Ireland. Scotland fully supported the UK governments' policy and the Scottish Parliament passed separate legislation.[23] Another indication of political support is that the UK has volunteered to house prisoners convicted by the ICC.[24]

In June 2000 France became the first member of the SC to ratify. It ratified after a constitutional amendment. It has exercised the opt-out for war crimes.[25] It is the only EU member state to do so and one of only two states parties that have exercised this option.[26] On ratification it made a number of interpretative declarations.[27] One concerned nuclear weapons. It stated that:

> *(2) Les dispositions de l'article 8 du Statut, en particulier celles* du paragraphe (2 p), concernent exclusivement les armements, classiques et ne sauraient ni réglementer ni interdire l'emploi éventuel de l'arme nucléaire ni porter préjudice aux autres règles du droit international applicables à d'autres armes, nécessaires à l'exercice par la France de son droit naturel de légitime défense, à moins que l'arme nucléaire où ces autres armes ne assent l'objet dans l'avenir d'une interdiction générale et ne soient nscrites

[18] Eg, in EL Salvador.
[19] See EP Debates International Criminal Court, EP News Release, 20 Dec 1999. An EP Resolution of 6 May 1999 invited the Council and the Commission to establish the goal of the entry into force of the Court's jurisdiction by 31 Dec 2000, as a priority of the EU's foreign policy, including the negotiation process with all the applicant countries to the EU.
[20] See 'Human Rights Into A New Century', Speech by UK Foreign Secretary, Robin Cook, London, 17 July 1997, para 7 <http://fco.gov>
[21] See <www.fco.gov.uk >
[22] See Turns in this volume.
[23] International Criminal Court (Scotland) Act 2001.
[24] See the debate on the ICC in the House of Commons, 14 Jan 2003, cols 211WH–231WH.
[25] See R Denys, 'CPI: Non A L'Article 124', *Le Monde*, 24 Feb 2000; Turns in this volume.
[26] The other was Columbia. It is reported that Burundi is considering making an Art 124 declaration.
[27] Assemblée Nationale, Document, N° 2141, 15 Feb 2000, Annexe 3. These concerned, inter alia, the right of self-defence, nuclear weapons, armed conflict, military objects, military advantage.

dans une annexe, au Statut, par voie d'amendement adopté selon les dispositions des articles 121 et 123.

The Declaration that the Statute's war crimes provisions (not crimes against humanity or genocide provisions) do not apply to nuclear weapons is intended to reflect what happened during the negotiations in relation to nuclear weapons.[28] However, it is too broadly worded. It is clear that the use of a nuclear weapon could be a war crime.[29] The Declaration has been criticised on this point for appearing to be a reservation, which is prohibited by the Statute.[30] After ratification, France adopted complementary legislation, particularly establishing that war crimes have no Statute of limitations and including in the Penal Code crimes such as forced pregnancy and enforced sterilisation.

In Denmark the main issue of concern appeared to be the immunity of the Queen. In Finland, Portugal and Spain no amendment of their respective Constitutions was considered necessary. In Germany an amendment was passed to Article 16 (extradition of nationals) of the Basic Law. Three new legislative acts were passed.[31] In Ireland among the issues of concern was the compliance with ECHR with respect to the questioning of witnesses. An amendment to the Irish Constitution was required before ICC ratification was approved. A comprehensive Bill on the ICC was introduced to the Irish Parliament in 2003. Spain introduced into its national law the concept of crimes against humanity.

The ICC is considered to be one of the best results of the EU's Common Foreign and Security Policy. The EU adopted a legally binding common position to defend the letter and spirit of the ICC and to afford the ICC strong political and practical support.[32] Under the EU's Action plan on the ICC ratification and implementation should be brought up as a human rights issue in the negotiation of EU agreements. The European Commission and the European Parliament are strong supporters of the ICC.[33] The European Commission funded an ICC ratification campaign and, along with the French Ministry of Justice, it sponsored the International Criminal Bar Association.[34] The EU would like the US to join the ICC.[35] It is arguable

[28] See Cassese *et al*, n 1 above, 79–80, 396–97.
[29] See ICJ Advisory Opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports (1996).
[30] See the Memorandum of the Lawyers' Committee on Nuclear Policy, <http://www.lcnp.org/global/french.htm>
[31] See <www.iuscrim.mpg.de/forsch/online_pub.html>; Turns in this volume.
[32] 2001/443/CFSP, 11 June 2001. The Danish EU Presidency proposed a decision linking the EU war crimes unit with immigration authorities and mandating prosecution of war crimes, OJ C 223 (19 Sept 2003). See also Council Decision of 13 June 2002 setting up a network of national contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, OJ L 167 (26 June 2002).
[33] See <http://www.europarl.eu.int> EP's Resolution of 4 July 2002 criticising the US for undermining the ICC's authority, P5_TA(2002)0449.
[34] See www.europa.eu.int/comm/europeaid/projects/eidhr. The EU budget for 2002 contained seven projects on fighting impunity, promoting international justice, the international penal tribunals and the ICC.
[35] On the US position see Pts III and V below.

that member states of the EU and the Council of Europe are more supportive of the ICC because they have been used to a greater degree of judicial control in sensitive areas.[36]

2.3 EU Applicant States (10 invited states, plus Turkey)

The Associated Countries, Malta, Cyprus, EFTA countries, and members of EEA shared the objectives of the EU's common position.[37] Turkey did not. It has not signed the Rome Statute.[38] The European Commission has indicated that this should be a factor to hinder Turkey's accession to the EU.[39]

2.4 NATO (19 member states and 7 invited states)

All of NATO except US, Turkey and the Czech Republic have ratified. The Czech Republic has signed. Poland, the most pro-US state in Europe, is a party. All the states invited to join NATO in November 2002[40] — Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovenia and Slovakia — are parties. A number of the NATO applicant states also want membership of the EU. The EU's strong support for, and the US's strong opposition against the ICC, has placed the applicant states in a difficult political position.[41] They want to strengthen America's international involvement, not put a brake on it. All except Slovenia are considered to be more pro-US than are France or Germany.[42] There have been suggestions that the US Congress will insist that the new NATO members sign Article 98 agreements[43] with the US before it approves their membership. Romania was one of the first states to sign such an agreement.

2.5 Council of Europe

The Council of Europe has supported the ICC initiative and called upon its members to ratify the Statute.[44] Forty-Two of the 45 members have signed the Statute — the exceptions are Armenia, Azerbaijan and Turkey and 38 have ratified.

[36] The US has not accepted the jurisdiction of the Inter-American Court of Human Rights.
[37] See above n 32.
[38] Turkey had supported the inclusion of terrorism as a crime within the ICC's jurisdiction.
[39] See 2002 Regular Report on Turkey's Progress Towards Accession', European Commission, (8 Nov 2000) <http://europa/eu/int/comm/enlargement/report_11_00pdf.en/tu_en.pdf>.
[40] Albania and Macedonia were deemed not to be ready.
[41] 'Choose your Club', *The Economist*, 24 Aug 2002; Cf C Krauthammer, 'Our Real Friends in Europe: To Find Them Start at the Iron Curtain and Go East', 7(47) *The Weekly Standard*, 26 Aug 2002.
[42] See Speech by Secretary of State Rumsfeld at Mashall Center's 10th Anniversary, 12 June 2003. <www.iccnow.org>
[43] See Pt 3.9 below.
[44] See Recommendations 1408 (1999) and 1581 (2002) and Resolutions 1300 (2002) and 1336 (2003) of the Parliamentary Assembly; Declarations on the ICC, Committee of Ministers, 10 Oct 2001 and 18 April 2002.

Bosnia and Serbia have ratified. Switzerland supports the ICC and has ratified the Statute.[45] The Council of Europe has compiled a report on ratification and implementation for member states and for some non-member states.[46]

2.6 Organisation for Security and Co-operation in Europe (OSCE)

The FRY (Serbia) ratified the Statute in September 2001, ten weeks after handing former President Miloševic over to the ICTY. In July 2003, the Serbian parliament approved war crimes legislation enabling local prosecution of war crimes. Albania and Georgia have ratified the Statute. Afghanistan has also ratified. Provisions in its draft Constitution of November 2003 allow for implementation of the Statute in local law.

2.7 Russian Federation

The Russian Federation voted in favour of the Statute and has signed it. It is being examined by the relevant domestic departments. Priority is being given to changes in legislation that would be necessary to conform with the Statute. Proposals to ratify will be sent to the Duma (Parliament) in due course.[47] There has been no strong political movement in support. Neither the President nor the Parliament have made a public statement of support, but there have been some supportive statements in the Duma. An important political factor is that Russia is keen on integration with what it perceives as the civilised world represented by European institutions.[48] A major political obstacle is the situation in Chechyna.

2.8 Canada

Canada was strongly supportive of the ICC and ratified the Statute in 2000. It provided the Chair of the Preparatory Commitee and of the PrepCom, Phillipe Kirsch, who was subsequently elected as a judge on the ICC and then to be its President. It is notable that Canada does not share the US's view of the ICC.[49] Referring to a number of institutions, including the ICC, the Prime Minister of Canada stated that, 'These institutions do not threaten American security; rather they enhance it, and exemplify and uphold the fundamental values that underpin

[45] In July 2002 the Holy See made a symbolic contribution to ICC Trust Fund.
[46] <http://www.coe.int> This also contains the 'Report by The Venice Commission on Constitutional Issues Raised by Ratification of the Rome Statue'.
[47] In Feb 2003 discussions were held in the Duma at the Regional Parliamentary Conference for the Commonwealth of Independent States.
[48] See 'Russian Upper House Member Slams US Stance on Rome Statute of ICC', BBC Monitoring Former Soviet Union, 6 May 2002.
[49] The Canadian Prime Minister stated that there have to be globally accepted rules of justice; an international justice rather than 'jus Americana'.

American democracy and liberty'.[50] Canada has adopted a new approach to foreign affairs, which he calls a 'human security agenda' and which focuses on the rights of individuals above national sovereignty.[51] Canadian NGO's have worked with 80 countries from 5 regions to help establish the ICC.[52]

2.9 South America

There has been strong support. Argentina, Bolivia, Brazil, Ecuador, Paraguay, Peru, Uruguay and Venezuela are all parties. States that have made the transition from dictatorship to democracy, such as Argentina and Uruguay, see the ICC as an insurance policy against retrenchment. Brazil's ratification was accompanied by a provision that a life-term imprisonment sentence could not be carried out in Brazilian territory.[53]

Columbia ratified the Statute in 2002 in the midst of continuing conflict with the hope was that it might act as a brake on the excesses of armed groups. Possible crimes include forced displacement, use of bombs made from propane cylinders, attacks on municipalities, and the recruitment of children under the age of 15. Colombia receives extensive military and financial support from the US. Columbia has also exercised the opt-out for war crimes under Article 124.[54] One of its arguments was that it could be helpful in the context of a peace agreement. A local peace agreement would probably be part of any peace agreement. The decision on Article 124 caused domestic political controversy.

The position of Chile is of interest given the worldwide prominence generated by the Pinochet proceedings. Although those proceedings generated some domestic opposition to the ICC, in 2003 a constitutional amendment was submitted to the Chilean Congress to allow for ratification. In 2003 the Executive Branch in Mexico asked the legislature to give maximum priority to the proposed constitutional amendment that would allow for ratification of the Statute.

2.10 Central America

Here the position has been more mixed. Costa Rica, Honduras and Panama are parties. Guatemala, El Salvador and Nicaragua have not ratified. Trinidad and Tobago has ratified and it continues to propose that drug trafficking and terrorism be included within the ICC's jurisdiction.[55]

[50] 'Real Human Security', *The Washington Times*, 29 Aug 2000.
[51] See 'A Dialogue on Foreign Policy: Report to Canadians', <http://www.foreign-policy- dialogue.ca/en/final_report/index.html#human>
[52] See *ICC: Manual for the Ratification and Implementation of the Rome Statute* (Rights and Democracy/ International Centre for Criminal Law Reform, Vancouver, 2000); <www.icclr.law.ubc.ca> <www.dfait-maeci.gc.ca/foreign_policy/icc/PDF/eng-man.pdf>
[53] Brazil ratified after two years of national discussions.
[54] Columbia made a number of other declarations on Arts 17(3), 61, 67, and 87.
[55] See General Asssembly, Sixth Committee, (November 2001), <un.org/ga/56>

2.11 Arab States

Although the Arab League has been supportive of the ICC, this is the weakest region in terms of representation,[56] 13 Arab states have signed but only Jordan has ratified.[57] Among the states expected to ratify in due course are Morocco, Algeria, Egypt, Yemen, the UAE, Kuwait and Syria. Kuwait has established a national committee to look at the issue. Lebanon is reluctant to ratify because of fears that government officials could be prosecuted. The crime of aggression is stated by Arab states to be a major issue for them, partly on the assumption that Israeli actions in the West Bank and Gaza might be caught. It has also been suggested that most Arab states are reluctant to ratify because the US and Israel are opposed.

2.12 Africa

As of November 2003, 22 African countries have ratified. Senegal was the first state to ratify the Statute. The others are Benin, Botswana, Central African Republic, Democratic Republic of Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Lesotho, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Sierra Leone, South Africa, Tanzania, Uganda and Zambia. Countries in Southern Africa and Francophone Africa expressed their support for early ratification of the ICC. The Southern African Development Community prepared a model Bill of Ratification for all its 14 members. South Africa revised its criminal code. Kenya is at an advanced stage of ratification.

The first cases for the ICC could come from the Democratic Republic of Congo, Uganda or Cambodia. All have ratified.[58] The Prosecutor has stated that the alleged war crimes in the Democratic Republic of Congo's north-eastern region of Ituri was the most urgent situation which he was going to follow closely and, if necessary, seek authorisation from a pre-trial Chamber to start an investigation.[59]

2.13 Asia

The pace of involvement has been very slow. This is despite the fact that some of the worst atrocities have taken place in this region of the world. The situation is exacerbated by the fact that unlike Europe and the Americas, the Asian region has no judicial system over and above the national system. Asia is the only continent where governments have not been able to produce a comprehensive human rights

[56] In Feb 2002, it held a regional symposium on impact of ratifying Rome Statute on Arab Countries.
[57] Jordan also provided the First President of the Assembly of States Parties. See also the Sana'a Declaration on Democracy, Human Rights and the Role of the ICC, Jan 2004, <www.npwj.org>
[58] See E Kennes and S Vandeginste, 'Be Warned: ICC Will End Immunity In Congo', *The East African* (Nairobi), 1 July 2002.
[59] See 'Communications Received by the Office of the Prosecutor of the ICC', 16 July 2003, <www.icc-cpi.int> See also SC Resolutions 1484 (2003), 1493 (2003) and 1501 (2003).

declaration and the institutions to uphold it, such as a Commission or a Court. Out of 86 signatories at the Rome Conference, only three were from Asia — Korea, Japan and The Philippines.[60] South Korea, a major democracy in the region, has ratified, as has New Zealand. Japan supported the establishment of the ICC. It did not have national legislation corresponding to the 1949 Geneva Conventions and has not ratified either of the 1977 Protocols. After meticulous study on the necessity for enabling legislation, it has now adopted two domestic laws and is expected to ratify in due course.[61] The process of ratification is also underway in The Phillippines. However, The Philippines Cabinet has expressed concern that ratification would hamper domestic law enforcement efforts and that their security forces could be brought before the ICC for measures taken against Muslim separatist and communist insurgencies.[62]

Indonesia deplored the fact that it had been necessary to resort to voting, and abstained on the ground that it was in favour of the universal character of the court. Malaysia abstained too, though it supported the expeditious establishment of a truly independent international criminal court. Neither Indonesia nor Malaysia have signed. Singapore abstained on three grounds. First, the Statute contained provisions in whose drafting only a small group of countries were involved. Secondly, the Statute excluded misuse of chemical and biological weapons from the purview of the court's jurisdiction. Thirdly, the Statute had excluded the death penalty.[63] In Central Asia, Kyrgyzstan and Tajikistan signed the treaty but only the latter has ratified.

In South Asia, Afghanistan voted in favour and has ratified. It felt that if such a court existed 20 years ago, it would not have been a victim of several aggressions. Bangladesh, which was unable to make Pakistani officials criminally responsible for genocide and mass rapes perpetrated on its citizens during its liberation struggle. It has signed but not ratified.[64] Pakistan voted in favour. However, it made it clear that it considered that it was essential to permit reservations to the Statute with a view to ensuring that states were not initially deterred from becoming parties to it and that states which were already parties did not later withdraw. It has not signed the Statute. Sri Lanka, whose chief concern is the containment of the Tamil Tigers, abstained on the ground that the crime of terrorism had not been included in the Statute. It has not signed the Statute.

As of November 2003, just 12 countries from Asian geographical region, out of more than 92 world-wide, have ratified — Afghanistan, Australia, Cambodia, East

[60] As of mid-Nov 2002 there were 11 Asian nations that had ratified in terms of the UN country groupings (which is not solely geographical) eg, it includes Cyprus, Jordan and the Republic of Korea.
[61] As part of its general diplomatic campaign, an EU delegation visited Japan in Dec 2002 to discuss ratification and implementation of ICC Statute.
[62] CH Conde, 'Philippines: International Court Questioned', *New York Times*, 6 Sept 2002, p 10; 'Loren Urges Senate To OK ICC Statute', *Manila Bulletin*, 17 Oct 2003.
[63] See A Ho, 'Singapore Should Stay Out Of War-Crimes Court For Now', *The Korea Herald/Straits Times*, 9 July 2002.
[64] See MH Rahman, 'ICC', *The Daily Star* (Bangladesh), 22 Sept 2002.

Timor,[65] Fiji, Marshall Islands, Mongolia, Nauru, New Zealand, Republic of Korea (South Korea) Samoa and Tajikistan. The Association of 10 South-east Asian Nations (ASEAN) had so far failed to coordinate on the issue of the ICC. There had been some hope that Thailand would lead by example but it has not ratified. Its Ministry of Defence has grave reservations.[66] In November 2002, it was reported that Indonesia will not ratify the Statute until after it has reformed its judicial system.[67] The EU–ASEAN Ministerial Summit in January 2003 acknowledged the establishment of the ICC as a positive development.

2.14 Australia

It is important to remember that for Australia its regional context is different from the European one. For Australia, the Tokyo Tribunal for Far East was as important as Nuremberg.[68] It has also been strongly affected by the conflicts in Vietnam and Cambodia and, most recently, in East Timor. Its major neighbours, China, Indonesia, Japan, Malaysia and The Philippines, have not ratified.

Australia has been a leading supporter of the ICC. It was the Chair of 'Like-Minded Group' after Canada. There was an 18 month parliamentary investigation on the ICC by the Joint Standing Committee on Treaties. It supported ratification of the Statute.[69] There was a vigorous public debate on ratification.[70] The Australian Prime Minister, John Howard, accepted that arguments of the US against the ICC were powerful.[71] One issue raised was the number of criticisms of Australia's human rights record, in particular its treatment of its aboriginal population. The criticisms were made by UN human rights committees (treaty organs), some of whose members were from non-democratic states. There was also concern that the Statutes' genocide provisions on 'forcibly transferring children of the group to another group' (Article 6(e)) could be interpreted to cover the past treatment of Aborigines. There was a doubt for some time towards the end of the political process as the Australian Cabinet divided on the issue. In the end it did ratify.[72] It proved significant that the Australian Defence Force was supportive on the basis that Australian forces abided by the Geneva Conventions. The ICC was

[65] See Statement of East Timor Workshop on the ICC, June 2002. Under Art 1 of the Agreement, 'For the purposes of this agreement, "persons" are current or former government officials, employees (including contractors), or military personnel or nationals of one party'.
[66] A National Committee has studied the issue and published its first report.
[67] 'IR defers signing ICC Statute', *Jakarta Post*, 30 Nov 2002.
[68] See McGoldrick, *Legality and Legitimacy*, in this volume, Pt 3.2.
[69] See <www.aph.gov.au/house/committee/jsct/Reports/report45/Report%2045.pdf> The Committee received over 250 submissions.
[70] See the warning of former Chief Justice Gibbs as cited in I Spry, 'Grave Risks In Signing Our Sovereignty Away To International Court', *Courier Mail*, (26 April 2002); submissions to the JSCT, above n 69.
[71] On the US-Australia relationship see G Sheridan, 'Allegiance to the US Deserves Priority in Foreign Policy', *The Australian*, 20 June 2002.
[72] See J Slater, 'Australians Will Rue The Day Canberra Ratified The ICC', *The Australian*, 30 June 2003.

not, therefore, a threat to them. There was also a timely intervention in support by Sir Ninian Stephens, a judge of Australian nationality on the ICTY.

Australian ratification was on condition that Australians cannot be tried by the ICC without a warrant from the Australian government. Also that offences of genocide, crimes against humanity and war crimes under ICC Statute be interpreted and applied in a way that accords with the way that they are implemented in Australian law. The declaration is highly nuanced and purports to be consistent with the Statute.[73] In August 2002, it was reported that Australia had agreed in principle to an Article 98 agreement with the US.

3. POLITICAL OPPOSITION TO THE ICC — THE UNITED STATES

3.1 The US Position Up To The Rome Conference

The US strongly supported the establishment of the ad hoc tribunals on the Former Yugoslavia and on Rwanda. It has also supported them financially and diplomatically and provided civilian personnel, military assistance and intelligence information. It had been a strong proponent of the idea of an ICC.[74] The International Law Commission's draft text was refined through a series of Preparatory Conferences in which the United States played an active role. A position of US Ambassador at Large for War Crimes was created in 1997.[75] Even after the adoption of the Statute, the US has supported internationalised courts for Sierra Leone and Cambodia.

On a philosophical level the ICC represents an ethical choice. It purports to signify the same values of global justice, human rights, the rule of law that the US is committed to.[76] The US played a major role in the negotiations of the Rome Statute and subsequently in the ICC PrepCom until it stopped participating in May 2002. Going into the Rome Conference in the summer of 1998, both the US Congress and the Clinton Administration indicated that they were in favour of an ICC if the right protections were built into its Statute. There was an element of 'tribunal fatigue',[77] and the US saw, 'the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more

[73] Professor Tim McCormack has stated that the Australian Declaration was consistent with the Statute, cited in L Wright, 'We Will Join The ICC Under Our Terms, Says Howard', *The Canberra Times*, 21 June 2002.

[74] See eg, the US speech to the General Assembly in 1997.

[75] Held successively by D Scheffer and PR Prosper.

[76] 'In a world that should be growing ever more democratic, ever more susceptible to the rule of law, the paramount democracy simply cannot exempt itself', 'Engage and Prosper', *The Economist*, 5 Aug 2000. Cf 'Properly understood, therefore, our lack of support for the ICC reflects our commitment to the rule of law, not our opposition to it', Statement of Nicholas Rostow, General Counsel, US Mission to the UN, during the 58th session of GA, Sept–Oct 2003, <http://www.iicnow.org/documents/statements/governments2003.html>.

[77] See D Scheffer, 'International Judicial Intervention', (Spring 1996) 102 *Foreign Policy*, March 1996, 34 (on tribunal fatigue; ad hoc tribunals as a useful policy tool).

cost-efficient in its operation'.[78] During this time, the establishment of a permanent ICC began to receive near unanimous support in the UN. The only countries who were willing to go on record as opposing the establishment of an ICC were the few states that the United States had labelled 'persistent human rights violators' or 'terrorist supporting states', for example, Libya and Iraq.

The US's concerns were evident in Rome. US officials stated that if negotiations on ICC PrepCom texts did not reach a favourable result it would be compelled to reconsider US military participation in certain contingencies.[79] It challenged other states by posing this question: 'If it came to the point of choosing between ICC jurisdiction over US personnel or the US's contribution to peacekeeping, which would you choose'? In terms of the greater good, the choice would be for the latter. However, knowledge of the existence of ICTY did not inhibit the US from acting in Kosovo in 1999. Indeed, the ICTY was potentially a greater risk than the ICC given that the ICTY can and has asserted primacy of jurisdiction.[80]

The aim at the Rome conference was to adopt the Statute by concensus but the US felt compelled to request a vote. It then voted against its adoption. It is arguable that it was a major foreign policy failure for the US that the form in which the ICC emerged was unacceptable to it.[81] The US position does present a difficult foreign policy choice.[82] The attacks on the US in September 2001 have also had an impact on the ICC debate. The US fears that its military personnel could be tried for taking part in the anti-terrorism campaign following 11 September attacks. Although the following sections concentrate on US opposition to the ICC, there has been strong support from US NGOs including the Lawyers Committee for Human Rights,[83] Human Rights Watch, the New York Bar, and the American Bar Association.[84]

[78] D Scheffer, address to US Senate Foreign Relations Committee, 23 July 23, 1998 <http://foreign.senate.gov>.

[79] 'It is a very inhibiting risk to put on the table every time you decide whether or not to intervene', Testimony of the House of Representatives Hearing on 26 July 2000, (Scheffer).

[80] See Art 9(2) ICTY Statute. For a critical view urging caution before joining see M Kirkland, 'On Law: A Court For All Ceasars', *United Press International*, 21 July 2003, <www.iicnow.org>

[81] See SM Walt, 'Two Cheers for Clinton's Foreign Policy' (2000) 79 *Foreign Affairs* (March/ April, 2000) 63; HT King and TC Theofrastous 'From Nuremberg to Rome: A Step Backwards for US Foreign Policy' (1999) 31 *Case Western Reserve JIL* 47; N Lyman 'Excursions of Grandeur', (2003) *Foreign Policy* 109.

[82] See A Frye (Project Director), *Towards An International Criminal Court? Three Options Presented as Presidential Speeches* (Council on Foreign Relations, NY, 2000); SB Sewall and C Kaysen (eds), *The US and the ICC* (Lanham, Md: Rowman and Littlefield, 2000); JJ Angat, *A Pragmatic and Philosophical Justification for the ICC: A Response to US Objections*, and *id A Final Rebuttal for the ICC* (Centre for Global Security Studies, June 1999); BD Schaefer, *The ICC: Threatening US Soveregnty and Security* (Heritage Foundation, Washington, July 1998), <www.heritage.org>; A Danner, 'The US and the ICC' (2002) 32(2) *Vanderbilt Lawyer* (ICC bears a more than passing resemblance to the US own Supreme Court at its birth); *US's Issue Brief on ICC*, <http://fpc.state.gov/c7497.htm>; *US Policy Regarding the ICC*, Report for Congress, 3 Sept 2002 (CRS RL31495, Library of Congress); TC Sorenson, 'The Foreign Policy Emergency; America In The World' (Nov 2003) *The American Prospect.*

[83] See Lawyers Committee for Human Rights (US) *The International Criminal Court: the Case for US Support* (New York: ICC Briefing Series, v 2, no 2, 1998).

[84] See 89 *ABAJ* (2003) 12.

3.2 The US Position on the Statute

The US had significant problems with the Statute.[85] First, it wanted a SC controlled ICC.[86] Its reasoning was that as the world's superpower it was expected to intervene to maintain or restore international peace and security and to halt humanitarian catastrophes all over the world. Its fulfilment of that expectation would leave US personnel uniquely vulnerable to the potential jurisdiction of the ICC. There was an explicit fear that an independent prosecutor might single out US military personnel and officials. The Prosecutor could be overwhelmed and subjected to frivolous and politically motivated complaints by those who sought to turn that office into the equivalent of a human rights ombudsman.[87] The Prosecutor was not sufficiently accountable to anyone. This would prove to be problematic if, as was inevitable, the Prosecutor became engaged in politicised second-guessing of a state's ability or willingness to investigate its own personnel:

> Our concern is once you have a totally independent international court that is not under the jurisdiction, supervision or is in any way influenced, obligated or accountable to a supervisory institution like the U.N. Security Council, then the potential for allegations to be made against our soldiers could be frivolous in nature … You could have charges brought before The Hague and this, I think, would be very destructive to our international participation. It would be intolerable as far as our people our concerned.[88]
>
> … President Bush, shares these 'fundamental concerns,' which the Bush Administration has often summarized as the potential for 'politicized prosecutions.' This phrase is not meant as a commentary on the caliber of the individuals designated to serve on the Court — and indeed, those that have been named are deservedly well regarded. Rather, it is the Court's lack of ready accountability to governments legitimately empowered to represent the people's interests to which we object.[89]

The risks for US personnel are clearly much greater than for any other state. Of the 191 Member States of the UN, the US has a military presence in 110 of them. Some 200,000 American troops are regularly stationed overseas. At one point in 2003,

[85] See D Scheffer, 'Developments in International Criminal Law: The United States and the International Criminal Court' (1999) 93 *AJIL* 12; *id* 'America's Stake in Peace, Security and Justice' (Sept–Oct 1998) *American Society of International Law Newsletter* 1; R Wedgwood, 'Fiddling in Rome: America and the International Criminal Court' (1998) 77(6) *Foreign Affairs* 20; *id* 'The Irresolution of Rome' (2001) 64 *Law and Contemporary Problems* 193; JF Murphy, ' The Quivering Gulliver: US Views on a Permanent International Criminal Court' (Spring, 2000) 34 *International Lawyer* 45 (American Bar Association, New York).

[86] So did up to 18 other states including China and Russia.

[87] P Grier, 'Disorder in the Court', *Air Force Magazine*, 9 Oct 2002, gives as an example of a politically motivated charge the Croatian complaint to the ICTY Prosecutor that former President Clinton had approved a Croatian military operation called Operation Storm, for which the Croatian General Gotovina had been indicted. See also AP Rubin, 'The ICC: Possibilities for Prosecutorial Abuse' (2001) 64 *Law & CP* 153; AM Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the ICC' (2003) 97 *AJIL* 510.

[88] Cohen, US Defence Secretary, 12 June 2000.

[89] LP Bloomfield, Jr, Assistant Secretary for Political-Military Affairs, 'The US Government and the International Criminal Court', <http://www.state.gov/t/pm/rls/rm/24137.htm>

there were 400,000 US troops stationed overseas. The US has also stressed the vulnerability of top civilian leaders such as the President, the Defence Secretary or the Secretary of State to a politically fabricated international legal action.[90] The US feared that its forces or officials might be indicted for acts such as the bombing of Serbia or missile strikes against Afghanistan and Sudan. It was concerned at the possibility of prosecution for mistakes in combat, for example, the attack on Afghanistan wedding party in July 2002 or the bombing of the Chinese Embassy in Belgrade during 1999.[91] The National Security Strategy (2002) of the US declared that, 'The US will never subject its citizens to the newly created ICC — whose jurisdiction does not extend to the Americans'.[92]

Secondly, the US wanted States to be able to look at how the ICC operated and so assess its effectiveness. It accepted need for automatic jurisdiction over genocide but it wanted to facilitate US participation by allowing a ten year opt-out for crimes against humanity and war crimes. At the end of ten years, states would have three options: (a) accept jurisdiction over all the core crimes (b) cease to be a party (c) seek an amendment to the treaty extending its opt out protection. The only provision agreed was the seven year opt-out for war crimes in Article 124. The US regarded this as even more perverse. A state could become a party, then opt-out. Meanwhile a non-state party could deploy its peacekeepers to that same state and they would be vulnerable to the ICC's jurisdiction.

Thirdly, if the amendment procedures deal with new or amended crimes, then states parties can avoid the jurisdiction over the amended provisions. Again the US regarded it as perverse that a non-state party could not do so. Fourthly, the US was not happy with the references to the crimes of terrorism and drug trafficking in the resolution annexed to the Final Act. Though it had an open mind, it thought that ICC jurisdiction could hamper national and transnational efforts. It considered that the real problems were investigations, police and customs enforcement, and intelligence, rather than prosecutions. Fifthly, the US was opposed to the provision in Article 120 that no reservations could be made to the Statute. Its concern here was that domestic constitutional requirements and national judicial procedures might require a reasonable opportunity for reservations that did not defeat the object and purpose of the Treaty.[93]

The US regarded the ICC's jurisdictional provisions as too broad in one respect and too narrow in another respect. Under Article 12 a state could simply stay a

[90] See B Becker, 'On World Court, US Focus Shifts to Shielding Officials', *New York Times*, 7 Sept 2002. Attempts have been made to extend the jurisdiction of foreign courts. A Belgium judge has attempted to claim jurisdiction over Henry Kissinger. French and Spanish prosecutors have attempted to sunpoena Henry Kissinger for questioning about the disappearances of dissidents in Chile in 1973. A purported action in the UK courts also failed. On alleged torturers living in the US see S Coliver, 'Even Without ICC, US Can Still Prosecute Human Rights Offenders', *Legal Times* (US), 13 May 2002.

[91] See M Cherif Bassiouni, 'Court Is No Threat To Us', *Chicago Tribune*, 14 July 2002.

[92] See 'The National Security Strategy of the United States', (Sept 2002), <www.whitehouse.gov/nsc/nss>

[93] Some other States took the same view.

non-party and remain outside of the reach of ICC in relation to any internal conflict. It considered this to be too narrow. Meanwhile, the US, as a non-party but a participant in a peacekeeping force in a state party's territory, could be subject to ICC jurisdiction. It considered this to be too broad. The inequity of this latter factor was accentuated by inability of a non-state party to opt-out of war crimes jurisdiction for seven years.[94]

Ruth Wedgwood has illustrated a number of practical US concerns that needed to be addressed.[95] There would need to be an 'assurance that in our targeting decisions we are never required to share sensitive information' and 'No military action should be challenged unless it was manifestly unlawful'. For example, 'The suppression of an integrated air defence system by disabling an electrical grid would be protected as an appropriate instance of a commander's judgment'. A non-state party also needed to be immune from the effects of jurisdictional change by way of amendments under Article 121. It also needed to be clear that Article 12(3) of the Statute could not be used opportunistically.[96]

3.3 Responses to US Objections to the Statute

In response to the US objections it must be noted that the Statute does not put obligations on the non-state party.[97] Rather it provides for jurisdiction over their nationals. It does not do so on the basis that the crimes are of universal jurisdiction on the basis of customary international law (although legally that would have been arguable).[98] Rather it provides for the exercise of jurisdiction based on the two most fundamental and widely accepted bases of jurisdiction, namely territory and nationality. Indeed, the US itself regularly exercises jurisdiction over non-nationals on the basis of treaties providing for universal jurisdiction, even when the state party of nationality is not a party to the relevant treaty.[99] Similarly, other states exercise jurisdiction over US nationals on the same basis. It is true that US forces would be vulnerable to ICC jurisdiction in a way that they are not vulnerable to national state jurisdiction at the moment because of the protection given them by Status of Forces Agreements. However, the Statute is based on the principle of complementarity. Given this, the reality is that there is no credible chance of the ICC

[94] Art 124 Statute.
[95] See above n 85.
[96] See also Cameron in this volume.
[97] See M Leigh, 'The US and the Statute of Rome' 95 *AJIL* (2001) 124. See also P Kirsch (the chairman of the diplomatic conference and subsequently elected as an ICC judge), *American Society of International Law Newsletter*, Nov–Dec 1998, 1.
[98] See the discussions of universal jurisdiction by McGoldrick (*Legitimacy*), Cameron and Turns in this volume; DB Rivkin and LA Casey, 'Crimes Outside The World's Jurisdiction', *New York Times*, 22 July 2003; KC Randall, (1985) 'Universal Jurisdiction Under International Law' 66 *Texas Law Review* 785; L Reydams, *Universal Jurisdiction* (OUP, Oxford, 2003).
[99] Cf Although established by the SC, the ICTY is based on territorial jurisdiction and thus the activities of the US services in Kosovo came within its jurisdiction.

prosecuting American service people unless the ICC (both Chamber and Appeal) was satisfied that the US was unable or unwilling to prosecute the offenders.

Although the US's preferences did not prevail, its strong influence is clearly reflected in the Statute. Referral by the SC, sometimes referred to by the US as 'Track One', is the most potent new weapon. Its use creates binding obligations on all UN member states to comply with orders for evidence or the surrender of indicted persons. If there was a failure to co-operate, the SC could use all of the sanctions open to it: economic and diplomatic sanctions, freezing of assets, and the use of force. Given that all of the permanent members must concur then such follow-up enforcement could be a credible threat. This is the track that could be used for a future Yugoslavia or Rwanda. It is especially important as regards situation like Former Yugoslavia where a state is falling apart and new states are being created and recognised as it bypasses questions of succession. The ICC will be at its most powerful when its acts under Track One, that is, via the SC. Here the US veto will protect the US. The SC was also given the power to suspend investigations or prosecutions for renewable 12 month periods.[100] In 2002 and 2003 this power was controversially used in the context of UN peacekeeping operations at the request of the US. The US threatened to veto the peacekeeping operations if its request was refused.[101]

'Track Two' is then used to describe referral by a State party or the prosecutor. The US wanted protection from Track Two. It is given some in the principle of complementarity, rather than that of primacy as is the case with the ICTY and ICTR.[102] Notwithstanding this protection, the US would not agree. It wanted a right of veto over ICC jurisdiction over US personnel and officials. Its principal objection appears to be that the Treaty gives the ICC a form of jurisdiction over non-states parties.[103] The Statute requires that the state of territorial jurisdiction or of nationality jurisdiction be a party or have consented separately. The US preference was that both these states to have to be parties.[104] At a minimum it wanted the consent of the state of nationality to be required.[105] That would have given it the veto it wanted for US personnel and officials. It took the view that the consent of the state of nationality can only be by passed by the SC. It argued that most atrocities are committed in internal conflicts between warring factions of the same nationality. Therefore, the State having nationality and territorial jurisdiction would be the same. If it refused then the ICC could only get jurisdiction via a SC referral.

[100] Art 16 Statute.
[101] See Pt 3.8 below; Sarooshi in this volume.
[102] See Art 12 of the Statute; Cameron in this volume.
[103] J Paust, 'The Reach of ICC Jurisdiction Over Non-Signatory Nationals', (2001) 33(1) *Vanderbilt J Transnational Law* 1; G Palmisano, 'The ICC and Third States', in F Lattanzi and WA Schabas (eds), *Essays on the Rome Statute of the ICC* vol I, (Il Sirente, Fagnano Ripa, 2001) 393.
[104] The conference overwhelmingly passed a motion to take no action on the US proposal. See the discussion in American Bar Association, *Task Force On An International Criminal Court* (ABA, New York, 1995).
[105] The UK view was that the territorial state must always give its consent. Acceptance of this view would have severely restricted the possibility of the ICC dealing with internal conflicts.

However, a peacekeeping force operating in that state could be subject to ICC jurisdiction on the basis of territorial jurisdiction. The US thought this was perverse and would inhibit peacekeeping operations.

If the alleged crimes did fall within the Statute's restrictive definition, referral would have to be by the state party where the crimes occurred (state of territorial jurisdiction) or the state party whose national is the alleged criminal (state of nationality), presuming the SC route is blocked. The prosecutor would notify the US and other states. The US would have six months to inform the Prosecutor of any US investigation or prosecution. The Prosecutor would be required to defer to any US investigation and to respect a US decision not to prosecute unless there was evidence that the investigation or prosecution were not genuine. The US could ensure priority to American courts by enacting US legislation assuring that US courts will have jurisdiction to try any American accused of violating the law of nations as laid down in the ICC Statute. This would guarantee American defendants all their constitutional rights in every possible case and exclude any prosecution by the international court.[106] The Bush Administration promised to do this in May 2002 but has not yet done so.[107]

A number of other protections and safeguards sought by the US are reflected in the Statute. There are high thresholds of seriousness for war crimes and crimes against humanity.[108] For example, under Article 8 of the Statute there is only jurisdiction over 'serious' war crimes that represent a 'policy or plan'. The United States army is well-trained, well-equipped and disciplined. It would be surprising if war crimes were to be frequently committed on a large scale by the American army in military operations. It is most unlikely that the few cases of mistakes, errors of judgment or lack of discipline would be tried by the ICC and these could, in any case, be dealt with by US military courts martial. Thus, it is argued that random acts of US personnel involved in a foreign peacekeeping operation would not be subject to the Court's jurisdiction. Neither would major one-time incidents such as the downing of the aircraft of a foreign state.

Article 15 of the Court's Statute guards against spurious complaints by the ICC prosecutor by requiring the approval of a three-judge pre-trial Chamber before the prosecution can launch an investigation. The decision of the Chamber is subject to interlocutory appeal to the Appeals Chamber. Additional protection against arbitrary actions are the powers of removal of judges, on a two-thirds majority of states parties, and of removal of the Prosecutor, by a simple majority of states parties. The US was particularly concerned at the concentration of powers

[106] On where US law does not cover ICC offences see D Cassel, 'Empowering US Courts To Hear Crimes Within The Jurisdiction of the International Court', (2001) 35 *New England Law Review* 421; D Scheffer, 'International Court Would Help in Fight Against Terrorism', *St.Louis Post-Dispatch*, 7 Feb 2002 (US should amend federal and military law to ensure that US courts can prosecute the full range of crimes in the ICC's jurisdiction. This would be the first line of defence against politically motivated prosecutions).

[107] See Scheffer, n 123 below.

[108] See Rowe and McCormack in this volume.

in a single individual. States which supported the independent prosecutor partly did so on the basis of the experience of Richard Goldstone and Carla Del Ponte at the ad hoc tribunals. States have welcomed the election by the Assembly of States Parties of Luis Moreno Ocampo of Argentina as the ICC Prosecutor. He is a distinguished and highly respected Argentinean prosecutor. The judges at the ICTY and ICTR have also been highly regarded and respected for the integrity of their work.[109] Many states considered that the US fears were highly improbable. For Germany:

> The allegation of possible frivolous and politically motivated prosecution thus presupposes not only serious misconduct on the part of the Prosecutor, but connivance and active participation in such misconduct by a number of judges of the court. This is so unlikely an occurrence that it seems safe to say for all practical purposes politically motivated prosecution will be prevented by the in-built safeguards of the Rome Statute.[110]

Nearly all of America's NATO allies were willing to take the infinitesimal risk the ICC involves. The Bush administration in the US was not.

The Statute provides for extensive fair trial and due process protections. There is no jury trial at the ICC but the same is true for more than three quarters of the states of the world and for US courts martial. There were requirements that the Statute be supplemented by the detailed texts on the RPE and EC.[111] Signing the Statute on the last day possible allowed the US to participate fully at the ICC PrepCom. Its strategy was to take a full part in those negotiations. It joined in the consensus on both texts, which was achieved by June 2000. The RPE were adopted by the Assembly of States Parties (ASP) by consensus and without change in 2002. The RPE are effectively legislative instruments. That has kept power over them in the hands of states. The EC were drafted by states at the PrepCom. They were similarly adopted by consensus and without change by the ASP in 2002. They may not be technically binding on the judges but it would be remarkable if they departed from them to any significant degree.

The then UK Foreign Secretary, Robin Cook, regarded the US concerns about the ICC as 'misplaced'.[112] He added that,

> Nobody denies that the court would be stronger if the United States became part of it, and I'm confident that over a period of time, when it is seen that the court behaves properly, judicially, not subject to the abuse that is feared by some in the United States,

[109] There was an early blemish at ICTR with charges of corruption and mismanagement.
[110] German Government Paper on the EU Conclusions, 24 Oct 2002. See Danner, n 87 above.
[111] See ICC–ASP/1/3 (2002). R Lee (ed), *The International Criminal Court — Elements of Crimes and Rules of Procedure and Evidence* (Transnational, Ardsley, New York, 2001); K Roth, 'Endorse the ICC' in Frye, n 82 above at 19–36.
[112] UK Foreign Secretary, 25 Aug 2000, Press Association Newsfile, <http://groups.yahoo.com/group/icc-info/message/685>

> that the voices in the United States saying that they should take part will become stronger … The International Criminal Court will act only where national courts have failed to offer a remedy. Therefore I think the concern about US servicemen is misplaced … There is a strong judicial system in the United States, it can take action itself if there were to be breaches of international humanitarian law by US servicemen … in those circumstances the International Criminal Court does not apply … We in Britain would not be exposing our servicemen to vexatious prosecution. We have signed up to the International Criminal Court because we are confident there is no risk of that.[113]

Effectively, the US and the UK have had to agree to disagree on the ICC. The subsequent UK Foreign Secretary, Jack Straw, expressed the view there was no need for the US to be excessively hostile to the ICC.

3.4 US Policy Subsequent to the Rome Conference

The US faced the problem that the ICC appeared relatively certain to go ahead, leaving it in relative isolation. It had articulated its own interests but failed to convince many of its allies of the strength of them. Its general strategy was to seek to correct what it described as the fundamental 'flaws' in the Statute,[114] possibly by seeking its amendment before it ever enters into force,[115] reserving the right to actively oppose the Treaty,[116] maintaining a preference for ad hoc mechanisms in the interim, vague suggestions that it would re-evaluate its troop commitments in Europe, and more explicit suggestions that it could impact on its contribution to international peacekeeping. The US launched an extensive diplomatic campaign to support its position.

In August 2002, Ambassador Scheffer put the US case in this way:

> Our fundamental concern has been articulated to other governments and narrowed to one point, which is the exposure of American service members and government officials to surrender to this court during that period of time that we are a non-party to the treaty. That's the only issue on the table now. We don't believe it's justifiable to subject our service members to the jurisdiction of this court while we are a non-party to the treaty. And it is only realistic to assume that for a number of years, at least, we will be a non-party. We have to act responsibly to address that reality, that we will be a non-party for a number of years to this court. So all we're trying to do at this point in these negotiations is to ensure that if there is an attempt to request the surrender of an American service member or government official to the International Criminal Court while we are a non-party to the court, that we have the right to either consent or object and thus

[113] *Id.*
[114] See R Wedgwood, 'Improve the Criminal Court' in Frye, n 82 above at 53–71.
[115] There is a precedent here in the UN Convention on the Law of the Sea. Adopted in 1982 it did not enter into force until 1994 and even then only after amendment was agreed to Part XI. The precedent is not likely to be followed because the major western powers were united over the LOSC.
[116] Active opposition of the US could be highly damaging to the ICC's credibility and effectiveness.

> prevent that actual surrender to the court. If that can be resolved — and I think there's reason to resolve it, because I think that will strike the right balance at this moment in time, at this time in history, between our obligations for international peace and security and involvement in humanitarian missions and the pursuit of international justice — then we'll be in a position to be able to cooperate with the court even as a non-party. And there's great advantage to be gained from that for this court. … the supporters of this court should be looking for ways to strengthen the capability of this court to effectively operate, and one way is to ensure the cooperation of the United States with this court. That cooperation can be obtained if we can resolve this one issue regarding our exposure as a non-party.[117]

3.5 The US Proposals for a Rule of Procedure and Evidence on Article 98 and on the Relationship Agreement

Between the March and June 2000 sessions, the US government actively engaged with governments around the world to seek agreement on an exemption for US nationals. In demarches and through informal channels, the US delegation made clear its commitment to securing an exemption, which would require negotiation of text for the relationship agreement or an agreement with similar effect. At the PrepCom the US also devised a subtle strategy of addressing the issue of 'surrender' rather than the overall jurisdiction of the Court over non-state parties.[118] Texts were informally proposed at the March 2000 PrepCom and then formally at the June 2000 PrepCom.[119] The June 2000 proposals focused only on the first part of the informal proposal circulated in March, but extended the scope to cover any 'international obligations' applicable to the surrender of the person.[120] The US proposed the insertion of a provision into the UN/ICC Relationship Agreement and the adoption of a Rule of Procedure relating to Article 98 of the Statute. Article 98(2) of the Statute provides that:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of the consent for the surrender.

The US argued that its proposal was consistent with the Statute and that Article 98 was not limited to agreements between states. It was described by US representatives as a 'procedural fix' that would allow the US to be a good neighbour of the

[117] State Department Briefing, 2 Aug 2000. <www.state.gov>
[118] See F Harhoff and P Mochochko, 'International Cooperation and Judicial Assistance', in Lee, *The ICC — RPE and EC*, above n 111, 637 at 664–9.
[119] See PCNICC/2000/WGRPE(9)/DP.4 (US proposal). See 'US Urges Governments to Support Immunity Proposal', (June 2000) 16 *International Enforcement Law Reporter* 771.
[120] PCNICC/2000/WGRPE(9)DP.4 (13 June 2000).

ICC, while not a party for the foreseeable future. The Proposed Text in UN/ICC Relationship Agreement read:

> The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a U.N. Member State, and such directing State has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the U.N. Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply.

The Proposed Text of Rule of Procedure and Evidence on Article 98 of the Rome Treaty read:

> The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with its obligations under the relevant international agreement.

The fundamental US objective was described as being, 'to prevent, unless certain conditions are met, the surrender to or acceptance by the ICC for trial of nationals of non-party States who are acting under governmental direction and whose actions are acknowledged as such by the non-party state'.[121] The US argued that the proposals would distinguish between responsible states and rogue states. It was consistent with Article 98 of the Statute and did not constitute an amendment or a modification. It addressed the fundamental US concerns. The result would be a stronger ICC that benefited from a relationship with the US. It would give the US time to evaluate the treaty regime and the ICC's operation before making a final decision about its participation.

The US also introduced a proposal that would have required the approval of both the State of nationality of the accused and the State upon whose territory the crime was committed in order to proceed with investigations and prosecutions of crimes added by amendment to the Rome Statute.[122] Such a provision would be contrary to Article 12 of the Statute, which requires the permission of only one of the two categories of States — territory or nationality. There was a reference in an original US proposal at the Rome Conference to exempting 'acts within the overall direction of a UN Member State'. This proposal for an exemption for official acts was debated during the Rome Conference and firmly

[121] See letter from Madleine Albright urging support for US Immunity Proposal, sent to Foreign Ministers in some 60 countries, June 2000.
[122] PCNICC/2000/WGRPE/13/DP.1 (Proposal submitted by the United States of America concerning rules of procedure and evidence relating to Part 13 of the Statute (Final Clauses)-Rule for Article 121).

rejected.[123] It would have been a massive retreat because many atrocities have been officially sanctioned. This proposal was, of course, a much narrower one than that seeking nationality exemption. It would have required states to either acknowledge that atrocities were committed as state policy or to launch a serious criminal investigation into the incident if they desire to immunise their officials from the ICC. The United States first made this proposal in the last few days of the Rome Diplomatic Conference but it could not persuade other states. It has been suggested that, 'If this had been the United States' opening position, many believe the proposal would have been adopted by the Diplomatic Conference. But as it became increasingly obvious that the United States was not going to sign the Rome Treaty, the willingness to compromise began to evaporate'.[124]

In a public debate in the PrepCom, 39 of 45 delegations (87%) which took the floor objected to the proposed rule, raising concerns about its compatibility with Article 98 with the Rome Statute. Delegates worked to develop text for a rule which would accurately reflect the Statute. The result was Rule 195(2):

> The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.

The European Union and the Like-Minded Group of States insisted on the inclusion of a proviso in the report on the PrepCom's proceedings, which indicated how what became Rule 195(2)] should be interpreted. It reads as follows:

> It is generally understood that Rule [195 (2)] should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or State.

The aim of this was to ensure that while the ICC was obliged to respect agreements within Article 98, it was not itself compelled to enter into any agreement which limited its own jurisdiction. The texts adopted appear to be consistent with this interpretation.

It is clear that states did not accept the US proposals. The proposed text would have prevented the Court from exercising jurisdiction beyond the surrender stage except where the state of the accused's nationality or the Security Council gave

[123] See A/CONF.183/C.1/L.90. This would have required the consent of a national state that has not ratified the treaty in cases involving 'acts of officials or agents of a state in the course of official duties acknowledged by the state as such'. 'The negotiating objective never was to protect American mercenaries or any other citizen engaged in unofficial action (we would have used 'state of nationality' rather than 'sending state'…), DJ Scheffer, 'Original Intent at the Global Criminal Court' *Wall St. Journal Europe*, 20 Sept 2002.

[124] M Scharf, 'The Politics Behind the US Opposition to the ICC' (1999) 5 *New England International and Comparative Law Annual* Pt V.

its consent. The proposal would have given a veto to the state of nationality of the accused or to the permanent members of the Security Council. This re-introduced the probability of selective justice. Proposals to this effect were inconsistent with the Statute and had been rejected in Rome. Their adoption would effectively have amended the Statute but not in accordance with the amendment procedures in Article 121. The proposed text of the Rule to Article 98 also went beyond the international agreements envisaged in Article 98 of the Statute. Article 98(2) of the Statute provides an exemption from a request for surrender where an agreement exists between the 'requested State' and the 'sending State', and the surrender would be inconsistent with such an agreement. The text being proposed by the United States would have expanded this rule to encompass any 'relevant international agreement', including agreements not only between States but also between the ICC and other entities, such as the United Nations. There is no evidence that this was the intention of Article 98 of the Statute. Article 98 was included in the Statute, with the strong support of the US, to allow certain international agreements between States, such as extradition or Status of Forces Agreements, to take priority over surrender requests from the ICC.

The US's position that the consent of the state of nationality should be a separate and additional jurisdictional requirement is difficult to sustain legally. As discussed above, territoriality and nationality are generally accepted as bases for the exercise of criminal jurisdiction.[125] As Scharf has noted:

> … there is nothing unusual about the conferral of jurisdiction over nationals of non-State parties through the mechanism of treaty law. The United States is party to a dozen anti-terrorism treaties that provide universal jurisdiction over these crimes, and empower States parties to investigate and prosecute perpetrators of any nationality found within their territory. The United States has exercised jurisdiction over foreigners on the basis of such treaties, without the consent of their state of nationality and even where the State of nationality was not party to the treaty. For example, in *United States v. Yunis*, the United States indicted, apprehended and prosecuted a Lebanese national for hijacking a Jordanian Airliner from Beirut, where two of the passengers were US citizens. The US asserted jurisdiction on the basis of the Hague Hijacking Convention, a treaty which provides universal jurisdiction over hijackers, despite the fact that Lebanon was not a party to the treaty and did not consent to Yunis's prosecution in the United States. The *Yunis* precedent was reaffirmed just last year in *United States v. Ali Rezaq*, where the United States apprehended and prosecuted a Palestinian for hijacking an Egyptian airliner.
>
> In light of this precedent, the United States' position that international law prohibits the ICC from exercising jurisdiction over the nationals of non-State parties is not just unfounded, it also has the potential of negatively effecting existing US law enforcement authority with respect to terrorists and war criminals.[126]

[125] See R Jennings and A Watts (eds), *Oppenheim's International Law*, 9th edn (Longman, Harlow, 1992) 456–66; *Restatement (Third) of Foreign Relations Law of the United States*, Sections 404 and 423 (American Law Institute, St Paul, Minn, 1987).

[126] Scharf, n 124 above, Pt IV (notes omitted). See also MP Scharf, 'The ICC's Jurisdiction Over The Nationals of Non-Party States: A Critique of the US Position' (2001) 64 *Law & CP* 67.

The only legal difference in the ICC context is that the territorial state is delegating its power to an international institution rather than exercising it itself. In one sense there is a close analogy with what was done at the Nuremberg IMT:[127]

> The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.[128]

This issue of whether the ICC is properly viewed as a delegation of state powers is considered below.[129]

3.6 US Government Departments and the ICC

Within the US government, the ICC was opposed by two of the three major departments, namely Justice and Defence.[130] The different psychologies of these institutions is important. The Justice Department's resistance stemmed from a belief that the establishment of an ICC would undermine the Department's existing international law enforcement efforts including its controversial authority unilaterally to apprehend international criminals abroad.[131] The Defense Department's opposition reflected concern that an international criminal court might attempt to prosecute US military commanders for internationally controversial actions such as the 1989 invasion of Panama or the 1986 bombing of Tripoli, both of which were the subject of widespread international condemnation.[132] The State Department was the least opposed. It saw some advantages in the ICC and was conscious of the diplomatic damage an anti-ICC position would bring with it.[133] It has been suggested that its attitude reflected a residual mistrust of international tribunals left over from the International Court of Justice's adverse ruling against the US in the *Nicaragua* case in 1986, a lack of faith in international institutions and doubts about their legitimacy. Its position can be located in the US's general mistrust of foreign institutions, international law and multilateralism.[134]

[127] See McGoldrick, above n 68, Pt 3.1.
[128] IMT Judgment, p 218.
[129] See Pt 4 below.
[130] M Scharf, above n 124, Pt.II.
[131] *Id.*
[132] See WK Lietzau, 'International Criminal Law After Rome: Concerns From a US Military Perspective' (2001) 64 *Law & CP* 119.
[133] It is an open secret that there was serious dissention within the US Delegation on this question, *id.*
[134] See D Rumsfeld on 6 May 2002 (Defence Department). C Rice, 'Promoting the National Interest' (2000) 79 *Foreign Affairs* 45 (multilateral agreements and institutions should not be ends in themselves). See also Pt 5.3 below.

3.7 The US's 'Unsigning' of the Statute

There was no foreseeable prospect of the US ratifying the Statute. The US President can sign on his own authority but the consent of the Senate is needed for ratification.[135] In any event, the new Bush administration was much more strongly opposed to the ICC than the Clinton administration had been.[136] Neither of the major US domestic political parties supported the ICC. However, as the US had signed the Statute in order to preserve its negotiating rights on the RPE and EC, it was arguably under a customary international law obligation not to actively oppose the ICC. Article 18 of the Vienna Convention on the Law of Treaties (1969) imposes an obligation on signatories to a treaty 'to refrain from acts which would defeat the object and purpose of a treaty' until 'it shall have made its intention clear not to become a party to the treaty'. The US has signed but not ratified the VCLT. It was clearly the US's intention not to ratify the Statute.

On 6 May 2002, in an unprecedented move, the US sought to 'unsign' the Rome Statute. According to the US Restatement, 'Signature (of a treaty) is deemed to represent political approval and at least a moral obligation to seek ratification'.[137] The US State Department advised that a state can legally unsign a treaty.[138] The UN treaty section stated that there was no precedent for unsigning a treaty.[139] There was strong political criticism of the US action from states, international organisations and NGO's.[140] There was particular concern at any precedent it might set, for example, for human rights treaties or the Chemical Weapons Convention. However, the idea that other countries could unsign treaties that are important for human rights or in the battle against terrorism is not very convincing. If they have only signed they are not legally bound anyway.[141] If they have ratified they can only denounce if possible under the terms of the treaty or customary international law.

There is no specific legal procedure for unsigning. Nothing physically happens to the original signature but the US should no longer appear in the list of signatories. However, 'unsigning' signified and symbolised the US's rejection of the ICC.[142]

[135] See P McNerney, 'The ICC: Issues For Consideration by the US Senate' (2001) 64 *Law & CP* 181.
[136] 'I believe the administration was wrong to walk away from … the ICC protocol that we signed', W Clinton, 'My Vision For Peace', *The Observer*, 8 Sept 2002; *id The Seattle Times*, 20 Dec 2002 (arguing that the US should join the ICC — 'US must learn to lead in an interdependent world'). Although Clinton approved the signing of the Statute he stated at the time that 'I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied'.
[137] On designing see *Restatement*, above n 125 section 312 and the Comment on it.
[138] See T Aust, letter to *The Times*, 5 April 2002.
[139] *Financial Times*, 27 March 2002. B Zagaris, 'US Announces That It Will Unsign And Take Action Against The ICC', (July 2002) 18(7) *International Enforcement Law Reporter*.
[140] See R Gywn, 'Isolation Comes Naturally to the US', *Toronto Star*, 8 May 2002.
[141] An example would be China's signature of the International Covenant on Civil and Political Rights (1966).
[142] See CA Bradley, 'US Announces Intention Not to Ratify ICC Treaty', *ASIL Insights*, May 2002.

It also allowed the US to take measures which were contrary to the object and purposes of the Statute, for example, in its proposals in the SC or in its legal and political relationships with other states.[143]

3.8 Operations Established or Authorised by the United Nations Security Council: Security Council Resolution 1422 (2002)

Another strand of the US's strategy against the ICC was played out in relation to operations established or authorised by the United Nations Security Council, including peacekeeping.[144] It is hard to underestimate the political and practical importance of the US contribution to such operations and to UN peacekeeping. In 2002 there were over 45,000 UN peacekeepers from 87 countries in 15 missions. The US pays 27 per cent of UN peacekeeping budget. According to the US General Accounting Office, in the period 1996–2001, the US made a direct peacekeeping contribution of $3.45 billion and an indirect contribution of $2.42 billion. The US does not supply its soldiers to operations under UN command, but as of 30 April 2002, the US contributed 677 civilian police, 34 military observers and one soldier to the then 15 current UN peacekeeping operations. The US thus only contributes a little over 700 out of 45,159 peacekeepers. However, there are thousands of US soldiers serving in Bosnia, Kosovo and Afghanistan in UN supported peacekeeping operations.

There have been a small number of serious allegations against the conduct of members of UN peacekeeping missions. For example in Rwanda, two detachments of 'blue helmets' from Ghana were allegedly complicit in the genocide by handing over the Tutsi officials they were guarding to Interhamwe deathsquads.[145] The UN Secretary-General noted that the current system was that complaints against any peacekeeper are referred to the concerned state for investigation and action. The peacekeeper is sent back to his country. Thus, 'the working arrangement of UN peacekeeping missions also leaves military discipline to the decisions of the troops' own national command'.[146] He expressed the view that there had never been a case where the allegations were of such a nature as to fall within the ICC's jurisdiction:

> I think I can state confidently that in the history of the UN, and certainly during the period that I have worked for the organization, no peacekeeper or any other mission personnel have been anywhere near the kind of crimes that fall under the jurisdiction of the ICC.[147]

[143] See T Aust, '"Unsigning" of Law Treaty by US Sets No Precedent', *Financial Times*, 8 May 2002.
[144] Ironically the ICC will offer a degree of protection for peacekeepers by providing jurisdiction for crimes committed by attacking humanitarian and peacekeeping missions.
[145] See G Robertson, 'America Won't Help', *Manchester Guardian* (UK) 18 July 2000.
[146] R Wedgwood, above n 114 at 64.
[147] S/PV.4772 p.3 (12 June 2003). See also the Secretary-General's letter to Colin Powell, Secretary of State for the US, 3 July 2002, <http://www.iccnow.org/html/press.html>. Such letters are relatively unusual.

In addition, the argument was that:

> if American soldiers were ever to behave like this — and in the unlikely event that they were not subjected to US military discipline for such appalling behaviour — an ICC investigation would hardly seem an affront to American prestige.[148]

For the UN there was also a credibility problem:

> The UN's underlying credibility is at issue here. No peacekeeping force can be acceptable if its people cannot be held to account. To give blanket immunity to US troops for universal crimes like torture is to assert that Americans are above the law.[149]

3.8.1 Options to Protect US Personnel

Among the possibilities for the US to protect its forces and personnel against the ICC were to:

1. Secure a SC exemption in each case or veto the resolution
2. Secure a SC exemption generally or veto the resolution
3. Secure a SC resolution but withdraw any US troops or personnel
4. Secure a SC resolution which exempts the US from payment
5. Secure UN agreements with host states
6. Secure US agreements with host states.

The US raised the idea of SC resolutions on immunity from ICC proceedings at a fringe meeting of the G8 Foreign Ministers in Canada. Practical evidence of the first strategy came when the US sought to amend a SC resolution creating a new peacekeeping mission to East Timor so as to exempt prosecution of all UN troops by any international tribunal.[150] East Timor was not yet a party to the ICC at the date of the SC resolution but it had indicated its intention to ratify.[151] The proposed US amendment was dropped in the face of strong opposition, 13 votes out of 15. It was notable that as well as the UK and France, Russia and China also objected. Thereafter, on the first day after the entry into force of the ICC, the US withdrew three military observers and 75 civilian police from East Timor.

Although the US had to back down on East Timor it was clearly putting down a marker. It picked it up again when a draft SC resolution continuing the UN peacekeeping mission in Bosnia (UNMIBH) was considered. The US sought to make it clear that its participation in peacekeeping had to be based on an exemption

[148] M Kettle, 'Judge, Jury and Executioner on Human Rights, but Never in the Dock', *Manchester Guardian Weekly*, 28 June 2000.
[149] 'The Law Applies To All', *Toronto Star*, 23 June 2002.
[150] See J Bone, 'American Threat to Quit East Timor Over Treaty Clash', *The Times*, 21 May 2001.
[151] See its later statement to the 10th PrepCom for the ICC, 12 July 2002.

from the ICC's jurisdiction. The implicit threat was of withdrawal of the 8,000 American troops serving in NATO forces in UN authorised missions in Kosovo and Bosnia. Richard Williamson, the US Representative to the SC, stated that, 'there should be no misunderstanding that if there is not adequate protection for US peacekeepers, there will be no US peacekeepers'.[152] However, the US did not want to go for the option of withdrawing its own peacekeepers. It wanted a solution that allowed them to continue to contribute to peacekeeping. The timing of the US demands, in mid-June 2002, was very sensitive. They were only a few months before the police training mission part of UNMIBH was to be handed over to the EU on 1 January 2003. There was also confusion, possibly deliberately engineered by the US, over whether the US stance would mean the end of the Stabilisation Force in Bosnia (SFOR). The US force contribution to SFOR in Bosnia and Herzegovina was approximately 2,400 personnel. US personnel comprised just under 15 per cent of the total SFOR force of approximately 15,800 personnel. During the first half of 2002, 18 NATO nations and 17 others, including Russia, provided military personnel or other support to SFOR. There were also 5,200 US troops in Kosovo.

The US was in itself in a difficult policy position in Bosnia given its prior commitment to the country. It would have been almost unthinkable to desert Bosnia on the ICC issue. SFOR was arguably not under threat because it is under NATO command rather than UN. However, there could have been problems for Germany. Its laws only allow its troops to operate outside of German territory if under UN endorsement. A US veto of UN peacekeeping would also have had particular legal effects for Ireland which would have had to pull out of Bosnia if the UN mandate was not extended. Its policy of neutrality means that Irish forces only serve in UN mandated peacekeeping operations.[153] If states were to be forced by the US to choose between peacekeeping and the ICC then, on any utilitarian view, the former should prevail.[154] However, many states resented being faced with what they considered to be a false choice. In their view, international peace and security was not opposed by ICC. The ICC was primarily aimed at armed conflict rather than peacekeeping. The EU member states, which had strongly supported the ICC, might have had to decide the price of its principles. Would they be willing to take on the extra peacekeeping costs if the US actually pulled out of the UN missions?

> The EU must not abandon its principles. It has rightly declared its faith in the court as an advance in international justice. The US threat does not change that belief. If that means Washington pulling out of peacekeeping operations and the EU bearing a bigger burden, then so be it. Justice has a price.[155]

[152] Cited in 'US Links Peacekeeping to Immunity From Court', *New York Times*, 19 June 2002.
[153] See G McMahon, 'US Can Veto Irish on Peacekeeping', *Irish Times*, 17 July 2002.
[154] See M Elliott, 'In This Case, Might Is Right', *Time Magazine*, vol 160(3), 15 July 2002 (Europeans should ask themselves whether right now, the ICC is worth more than continued American engagement in the world. The answer is easy).
[155] 'Justice For All At The ICC', *Financial Times*, 2 July 2002.

For some ideologues in the US who are opposed to the ICC, and to US involvement in peacekeeping, it was a win-win situation — either the ICC or peacekeeping would be destroyed or damaged.[156]

The dispute over the Bosnia peacekeeping resolution was played out with a high degree of brinkmanship. On 23 June 2002, the SC voted to extend the Bosnia mission until midnight on 30 June 2002 (04.00 GMT, when the ICC came into force) to give itself more time to find a solution.[157] This was then extended until 3 July,[158] and then until 15 July 2002.[159] The US strategy drew concern from an extensive number of states, IGO's and NGO's. They argued that the US proposal would see the SC trying to rewrite the rules of a treaty. This meant it would be acting as a legislature and that was beyond its competence.[160] Russia in particular raised questions about whether the SC could limit the powers of the ICC, which was a different entity.

UN officials considered that such an immunity clause in the Resolution would be redundant because host countries of peacekeeping missions generally sign agreements with the UN or those providing troops that they will only be subject to the jurisdiction of their home authority. For the first time that diplomats could recall the US was in open dispute with its long-time allies, the UK and France.[161]

3.8.2 Security Council Resolution 1422 (2002)

Something had to give. The first sign of this was a British-French proposal which would require the ICC to defer any investigation of an American peacekeeper for 12 months so allowing the US to bring the peacekeeper home. This was purportedly based on Article 16 of the Statute, which provides that:

> No investigation or prosecution may be commenced or proceeded under this Statute for a period of 12 months after the Security Council, in a resolution adopted under chapter VII of the Charter of the United Nations, has requested the court to that effect; that request may be renewed by the Council under the same conditions.

This British/ French proposal finally emerged as SC resolution 1422 of 12 July 2002.[162] This provided as follows:

> The Security Council,
> Taking note of the entry into force on 1 July 2002 of the Statute of the International Criminal Court (ICC), done at Rome 17 July 1998 (the Rome Statute),

[156] See C Rice, above n 134 (military is not designed to rebuild a civilian society; soldiers being bogged down in peacekeeping roles).
[157] SC Resn 1418 (2002).
[158] SC Resn 1420 (2002).
[159] SC Resn 1421 (2002).
[160] See eg, 'CICC Memorandum on Bilateral Agreements Proposed By the US', <www.iccnow.org/documwents/otherissues/impunityarticle98/ciccart98memo20020823.pdf>
[161] See 'Right to the Brink — America and Europe Fall Out Over the ICC', *The Economist*, 7 June 2002.
[162] S/2002/747. See B MacPherson, 'Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings', (July 2002) *ASIL Insights*; Sarooshi in this volume.

Emphasizing the importance to international peace and security of United Nations operations,

Noting that not all States are parties to the Rome Statute,

Noting that States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity,

Noting that *States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes*,

Determining that *operations established or authorized by the United Nations Security Council* are deployed to maintain or restore international peace and security,

Determining further that *it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council*,

Acting under Chapter VII of the Charter of the United Nations,

1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
2. Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;
3. Decides that Member States shall take no action inconsistent with paragraph 1 and with their international obligations;
4. Decides to remain seized of the matter.[163]

Although the resolution was immensely controversial it was ultimately passed unanimously.[164] The resolution does not just benefit the US. It benefits any non-state party, for example, China, India and Pakistan.

It can legitimately be asked: what was the threat to international peace and security that opened the door for the use of Chapter VII by the SC?[165] It cannot be the existence of the ICC? It is probably necessary to contextualise to get to the threat.[166] The key determination by the SC was that it was, 'in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorised by the United Nations Security Council'. The argument is that without the immunity UN operations would be at risk and the non-continuation of those operations would be a threat to international peace and security. If there were no peacekeeping, war crimes and crimes against humanity would likely increase. That must be a defensible judgment by the members of the SC. The critics of the resolution also argued that it would be a blow to the credibility and deterrent effect of the ICC. It is difficult to see why this should

[163] *Emphasis added.*

[164] Of the states on the SC at the time of Resolution 1422, 6 had ratified, 7 had signed and 3 had done neither — the US (after its unsigning), China and Singapore.

[165] See C Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002)' 14 *EJIL* (2003) 85.

[166] Cf the arguments that Libya's failure to cooperate with terrorist investigations was a threat to international peace and security, see SC Resolutions 731 (2002) and 748 (2002).

as the same critics argue that peacekeepers were never intended to be defendants. The resolution only covers, 'United Nations established or authorized operation'. The interpretation of this might fall to the ICC to determine.[167]

The resolution asserts its consistency with Article 16 of the Statute. The resolution covers, 'current or former officials or personnel from a contributing State not a party to the Rome Statute'. It is not a blanket resolution. It is limited by the reference to 'if a case arises'. It does though indicate an intention to renew and this indeed was done in SC Resolution 1487 (2003). As in 2002, many members of the UN went on record as being opposed to the resolution.[168] The UN Secretary-General again expressed the view that it was unnecessary.[169] The result of the SC resolutions is that there are effectively two sets of rules for peacekeepers now — those from member states and those from non-member states.[170] However, the US did not get exactly what it wanted. There is no permanent, blanket immunity. Indeed, the word immunity is somewhat misleading and it does not appear in the text. Although Resolution 1422 (2002) was renewed in Resolution 1487 (2003) the vote on the latter was not unanimous. There were three abstentions — from France, Germany and Syria. If, in the future, France were to vote against a renewal, the effect would be to veto the resolution. Given France's diplomatic bruising in the Iraq War 2003, this seems unlikely in the short term

Resolution 1422 was a classic diplomatic compromise.[171] The then UK Ambassador to the UN argued that the SC had preserved two important institutions — the ICC and UN peacekeeping with the full contribution of all members of the UN. He described the resolution as providing for a time-out. He also explained that in one sense the issue was considered highly theoretical as, 'Nobody on the Council believes … that what we have provided for in this resolution will actually ever be triggered, but we had to come to a decision'.[172] Indeed, most Council members believed that the measure was ideological rather than practical. In their view it was never the intention of the states that drafted the ICC Statute that peacekeepers would be defendants before the court:

> in every UN peacekeeping mission, the US either has no personnel in the mission, the host state is not a party to the ICC, or the ICTY has primacy. Thus, total exposure to the ICC is zero in every case … . Given this, it appears that the intention is not to protect its own peacekeepers, but to undermine the court.[173]

[167] See Stahn above n 165 at Pt 5.
[168] See the discussion in S/PV.4772 (12 June 2003).
[169] See F Barringer, 'UN Renews US Peacekeepers' Exemption From Prosecution', *New York Times*, 13 June 2003.
[170] See K Ambos, 'International Criminal Law Has Lost Its Innocence', (Oct 2002) 3(10) *German Law Journal*; 'Rule of Law Should Apply To All', *Bankok Post*, 15 June 2003; 'Act To Protect Troops', *The Augusta Chronicle* (Georgia) 17 July 2003 (The world asks US troops to protect it at the drop of a hat, but won't lift a finger to protect US troops in return).
[171] 'Both Sides Lose', *The Economist*, 18 July 2002.
[172] J Grenstock, UK Ambassador to the UN, Statement on 15 July 2002.
[173] See <www.iccnow.org/html/USexposuretoICCchart.pdf>

Before and after passage of resolution 1422 there was sustained criticism of the US position and of the SC for accommodating it. It was one of the most intense debates in the Council's history. Critics were concerned that the resolution violated the Statute.

Virtually every state in the world that made its views known opposed the US position.[174] Other international organisations were also critical.[175] Only India, one of the largest contributors to UN peacekeeping operations, was supportive of its position. The massive and public criticism of the US was an amazing spectacle. In addition, at a special session of the ICC PrepCom on 3 July 2002 statements in opposition to the US position were made on behalf of approximately 120 countries. Similarly, statements on behalf of 72 countries, a number of which were not states parties, were made at an open session of the SC on 10 July 2002. They were almost universal in their criticism of the US position. One of the strongest critics was Canada. The open meeting of the SC was held at Canada's request. Canada's Ambassador to the UN warned that the credibility of the Council, the legality of international treaties, and the principle that all people are equal and accountable before the law were at stake:

> We have just emerged from a century that witnessed the evils of Hitler, Stalin, Pol Pot, and Idi Amin, and the Holocaust, the Rwandan genocide, and ethnic cleansing in the former Yugoslavia … Surely, we must have learned the fundamental lesson of this bloodiest of centuries, which is that impunity from prosecution for grievous crimes must end.[176]

The critics stressed that SC authorisation for every prosecution was specifically rejected in the Rome negotiations. Resolution 1422 was also criticised for its basis in Chapter VII. It had perversely converted the ICC into a threat to international peace. Canada, South Africa Brazil and New Zealand challenged the legitimacy of the SC interpreting and changing the meaning of treaties.[177] Germany and Belgium have stated that the SC resolution is inconsistent with Article 16, which was designed to deal with specific cases, not to be a generalised preventative measure.[178]

In response, the members of the SC argued that they were not rewriting the Rome Statute.[179] The EU considered that it maintained the integrity of the

[174] See S/PV.4568; 'Swapping Justice for American Exceptionalism', *The Nation*, Africa News, 24 July 2002.
[175] Resolution 1336 (2003) of the Parliamentary Assembly of the Council of Europe described Resolution 1442 and its renewal as 'a legally questionable and politically damaging interference with the functioning of the International Criminal Court'.
[176] S/PV.4568, p 4.
[177] S/2002/754.
[178] Amnesty International and Human Rights Watch both argued that the resolution was illegal. *Quaere* where could the legality of the SC resolution be challenged? Before the ICC? Before the ICJ? See Stahn above n 165.
[179] See B Zagaris, 'SC agrees to one-year deferral for UN peacekeeping' (2002) 18(9) *International Enforcement Law Reporter*; B MacPherson, 'Authority of SC to Exempt Peacekeepers from ICC Proceedings', (July 2002) *ASIL Insights*.

Rome Statute.[180] Japan welcomed the realistic solution that had been reached. The EU and Germany maintained their view that participants in UN peacekeeping missions did not need immunity and expressed their intent to continue to work for a long-term change in the US position. The UK view was that it was necessary to find a practical accommodation in order to save peacekeeping missions. There was a clear understanding that if the US did not get the exemptions, it would prefer to act through coalitions of the willing rather than the UN or through NATO.[181]

The passage of Resolution 1422 made it possible to pass other resolutions extending the peacekeeping missions for SFOR and UNMIBH for 12 months, as well as the observer mission in Prevlaka/ UNMOP.[182] In December 2002 the SC increased the number of peacekeepers in the Congo.[183] The US again tried to get language included exempting the peacekeepers from ICC's jurisdiction but it failed. For the US, Resolution 1422 was a first step only. The US Ambassador to the UN continued to warn states that, '[s]hould the ICC eventually seek to detain any American, the US would regard this as illegitimate — and it would have serious consequences'. As noted above, the US returned to the SC after 12 months and obtained a renewal of the terms of Resolution 1422.

In SC Resolution 1497 (2003), which authorised the deployment of a multinational stabilisation force in Liberia to support a ceasefire agreement, the US secured a broad ranging immunity from the ICC's jurisdiction and national jurisdictions:

> Decides that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of the contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by the contributing State.[184]

Another twist to the US strategy took place in August 2003 when the SC sought to adopt a resolution on the protection of humanitarian and UN personnel after an attack on the UN headquarters in Baghdad. The US insisted that any reference to the ICC in the resolution be deleted.[185]

[180] See 'Declaration of the EU Presidency on SC's unanimous decision concerning Bosnia and ICC', 13 July 2002.
[181] B Grgic, 'Europe, Strike a Deal on ICC', *Wall St.Journal*, 5 Sept 2002.
[182] See SC Res 1423 (2002).
[183] SC Res 1445 (2002).
[184] SC Res 1497 (2003) para 7. France, Germany and Mexico abstained. Amnesty International was very critical of the resolution.
[185] See SC Res 1502 (2003). See also SC Res 1509 (2003).

3.9 The US and Article 98 Agreements

We have considered some aspects of the US's attempted use of Article 98 above in the RPE and the relationship agreement.[186] Another element in the US strategy has been the conclusion of bilateral Article 98 agreements.[187] The US regarded SC Resolution 1422 as merely an interim solution. It stated that part of the compromise on SC Resolution 1422 was that other states, and particularly its European allies, had encouraged it to reach Article 98 agreements as a solution to its problems with the ICC Statute. This is exactly what it proceeded to do. The day that Resolution 1422 was passed the US instructed its embassies to seek Article 98 agreements. Article 98(2) has been cited above but it is convenient to repeat its terms:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of the consent for the surrender.[188]

The US launched a major diplomatic campaign to secure such agreements. It began renegotiating its more than 100 SOFA's around the world. It was clearly understood at the Rome Conference that SOFA's came within Article 98.[189] SOFA agreements protect all the NATO forces stationed throughout Europe.[190] The new question was whether Article 98 only protected pre-existing agreements or whether new agreements for the purpose of Article 98 could be entered into?[191] For example, the German view was that Article 98 only allowed for old SOFA type agreements (presumably as updated from time to time).[192] At the UN General Assembly's Sixth Committee in October 2002, Sierra Leone stated that with its regional partners it would seek an advisory opinion from the ICJ on Article 98 agreements. No such opinion has yet been requested.

[186] See above Pt 3.5.
[187] Under an early US proposal, if citizens or leaders of 'nonparty' countries were indicted, their governments would not have to turn them over to the court unless ordered to do so by the UN Security Council. The US then dropped the reference to the SC.
[188] See K Prost and A Schlunck, 'Article 98', in O Trifterrer (ed), *The Rome Statute of the ICC* (Nomos-Verlagsgesellschaft, Baden-Baden, 1999) 113; D Akande, 'The Application of International Law Immunities in Prosecutions for International Crimes', in J Harrison, M Wilde and R Vernon (eds), *Bringing Power To Justice? The Prospects of International Criminal Law* (McGill-Queens Press, Montreal/ Kingston, 2004); S Wirth, 'Immunities, Related Problems, and Article 98 of the Rome Statute' (2001) 12 *Crim Law Forum* 429.
[189] Wedgwood, above n 114 at 64–5.
[190] See the NATO SOFA of 19 June 1961, as supplemented by bilateral agreements between the USA and certain NATO member states.
[191] Amnesty International suggested that Art 98(2) only applied to exisiting SOFA's, below n 206, p 5, as did Prost and A Schlunck, above n 188.
[192] See also the Joint Opinion of Crawford, Sands and Wilde on 'Bilateral Agreements Sought By The United States Under Article 98(2) Of The Statute', <www.lchr.org/international_justice/Art98_061403.pdf>

The US view was that the one year period after the adoption of Resolution 1422 allowed the US to negotiate bilateral agreements — 'Article 98 agreements'. These can be concluded with countries that are parties to the Statute and with non-states parties and they are to the effect that US personnel and nationals are not to be detained, arrested or sent to the ICC. In April 2002 all US Ambassadors were required to explore whether other nations were open to creating mutual agreements that would protect their nationals from the reach of the ICC. The US administration warned foreign diplomats that their nations could lose military assistance if they became members of the ICC without protecting Americans serving in their countries from the reach of the ICC. The US exerted strong diplomatic and financial pressure on states to secure these agreements.[193] For example, it threatened to withhold military sales (such as F-16s to Chile), aid and training. The US decided not to identify specific countries that they were seeking Article 98 agreements with so that they would avoid being pressured not to negotiate with them. Even when agreements have been signed their terms have not always been published. Realistically, many of the states approached are too weak to resist. For example, there were reports of immense economic pressure on Nauru.

The standard justification issued by the US State Department for entering into a bilateral immunity agreement (BIA) is that:

> These agreements are necessary to protect American citizens from politically motivated prosecutions by a court of which we are not a member. We believe in justice and the rule of law and accountability for war crimes, crimes against humanity and genocide. As a sovereign nation the United States accepts the responsibility to investigate and prosecute its own citizens for such offenses should they occur.[194]

The US Article 98 proposal to governments was as follows:

A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,
B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,
C. Considering that the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate

[193] See E Becker, 'US Ties Military Aid To Peacekeepers Immunity', *New York Times*, 10 Aug 2002; T Malinowski, 'Bush's Court Crusade', Washington Post, 16 Aug 2002 (US policy hits many poor developing countries trying to build democracies the hardest); P Richter, 'No Give For US On Tribunal', *Los Angeles Times*, 28 Sept 2003. When particular agreements have become known they have often attracted domestic political opposition. See 'Ghanaian Opposition Denounces ICC Immunity Deal With US', *Agence France Press*, 4 Nov 2003; 'Senate Investigates Agreement Between US, Nigeria, *Africa News*, 17 Oct 2003.

[194] HRW, n 197 below, p 9 citing *Reuters*, 12 Feb 2003.

acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,

D. Bearing in mind Article 98 of the Rome Statute,

E. Hereby agree as follows:

1. *For purposes of this agreement, 'persons' are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.*
2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
   (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
   (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.
3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X.
4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.
5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.[195]

As stated in paragraph 1 above, the US wanted Article 98 agreements covering all US nationals. Its justification for this is as follows:

> … our legal experts find support in the usage found in other conventions such as the Vienna Convention on Consular Relations, whose use of the term 'sending state' refers to all persons who are nationals of the sending state.
>
> Our legal experts, moreover, have reviewed again the preparatory work of the Rome Statute, to consult what the Vienna Convention on the Law of Treaties refers to as

[195] *Emphasis added.*

'supplementary means of interpretation'. Some may be surprised to learn that the records contain no official travaux preparatoires that would either confirm or determine the meaning of Article 98(2) as relates to scope of coverage. In sum, the U.S. position on scope is legally supported by the text, the negotiating record, and precedent.

Why should the U.S. non-surrender agreements apply to all American citizens? Here, a practical perspective is appropriate, to explain why elected leaders — and not only American leaders — would find this approach entirely appropriate in the 21st Century.

The United States is a nation of immigrants; we have familial ties to localities all over the world. Our national interests know no bounds: we have diplomatic representation almost everywhere, and our private businesses and educational institutions are similarly represented far and wide.

The United States military is unique in its global presence and operations. Our personnel were found in over 100 countries over the past year. At one point in 2003, more than 400,000 U.S. military personnel were serving outside American territory. By next year, the U.S. will have over 50 treaty alliance commitments to defend the security of countries all over the world. One does not have to hold a view of American exceptionalism to acknowledge the profile and symbolic resonance of the American identity in the world.

But let us look further, at other citizens whose presence and involvement could readily be perceived by partisans as influential, even decisive, on one side or another of the violent conflicts that sometimes give rise to war crimes, genocide and crimes against humanity.

In Iraq this year, 600 media reporters, mostly American, deployed along with the coalition military forces, embedded in their operations. Non-governmental organisations numbering in the hundreds are, by the nature of their humanitarian mission, on the scene wherever societies are at risk from conflict. American corporations and their executives are posted in resource extraction areas where separatist or competing territorial claims remain unsettled.

The point, of course, is that American citizens, many of them educated and well-connected to influential actors abroad, are no less a target for potential resentment by the parties to a violent conflict than officials of the U.S. Government. You will note that Americans taken hostage in Lebanon, Colombia or the Philippines in recent years were evidently singled out not as much for their profession as for their nationality. The potential for accusations giving rise to politically motivated prosecutions cannot neatly be parsed among Americans.[196]

The US is confident that it will ultimately get Article 98 agreements from a large number of countries. As of 14 October 2003 the US had signed Article 98 agreements with the following 61 countries (by region):[197]

AFRICA–19

Botswana, Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Ivory Coast/Cote D'Ivoire, Madagascar, Malawi, Mauritania, Mauritius,

[196] Bloomfield, above n 89.

[197] See Human Rights Watch, *US Bilateral Immunity Agreements*, (as of June 2003), <www.iccnow.org> for details of individual states and agreements. Only a small number of the agreements had been ratified. By mid-Nov 2003 the US was claiming that there were 70 agreements all of which protected all US nationals, see Bolton, n 291 below.

Mozambique, Rwanda, Senegal, Seychelles, Sierra Leone, Togo, Uganda, Zambia

THE AMERICAS–9
Antigua and Barbuda, Bolivia, Colombia, Dominican Republic, El Salvador, Guyana, Honduras, Nicaragua, Panama

NORTH AFRICA AND MIDDLE EAST–3
Bahrain, Israel, Tunisia

ASIA–13
Afghanistan, Bangladesh, Bhutan, Cambodia, East Timor, India, Maldives, Mongolia, Nepal, Pakistan, Philippines, Sri Lanka, Thailand

EUROPE/CIS–10
Albania, Azerbaijan, Bosnia-Herzegovina, Georgia, Kazakhstan, Macedonia, FYR, Romania, Tajikistan, Uzbekistan

OCEANIA–7
Marshall Islands, Micronesia, Nauru, Palau, Solomon Islands, Tuvalu, Tonga

In addition, agreements have reportedly been signed in secret with Egypt, Kuwait, Liberia, Morocco and Nigeria.[198]

The first Article 98 agreement was signed with Romania in August 2002. Romania was desperate to join NATO. The US has stated that an Article 98 Agreement was not a condition of its supporting the applicants to join NATO and that states would not be put in a position of choosing between the US and the EU. Later in August 2002 Romania received the first instalment of substantial financial assistance from the US for flood aid/ disaster relief.[199] The agreement is intended to be of lasting effect. After criticism from the EU the Romanian government has stated that it wanted to amend the agreement to conform to the 'EU Guidelines' (considered below) and that it would not begin the process of ratification until the EU had clarified its position. An agreement with Israel was signed a few days later. The agreement was reciprocal. The list of Article 98 agreements has increased at a relatively rapid rate. Different states have different interests either with the US or with peacekeeping. Kyrgyzstan has been a base for US anti-terrorist operations. Gambia has a traditional role of sending peacekeepers.[200] India has not signed the Statute and supports some of the US views on it.[201] Sri Lanka is another

[198] 'Amnesty for US Citizens Boosted', *Washington Times*, 9 Oct 2003.
[199] See I Fisher, 'Romania Pins Hope for NATO Seat on US Friendship', *New York Times*, 23 Oct 2002.
[200] See 'Gambia, Banjul and the ICC — the Need for Implementing Legislation', *The Independent*, 10 Jan 2003 (supportive of the idea of complementarity).
[201] 'US, India Not To Surrender Nationals To Any Tribunal', *The Hindu*, 26 Dec 2002.

non-state party. A small group of US military personnel maintain an emergency airfield in Tajikistan. Israel is a major US ally and receives massive financial support from it. Pakistan has become a particularly important ally in the war against terrorism. East Timor ratified the Statute in September 2002. No US military forces were involved in the East Timor operation. None the less, the US Secretary of State wrote to East Timor asking for written guarantees that it would not co-operate with any ICC prosecution of a US citizen.[202] East Timor eventually signed an Article 98 agreement. Bosnia has signed an Article 98 agreement. It receives over $70 million per year in US assistance and is seeking membership of NATO.

Columbia has an extensive number of US forces on its territory engaged in military activities against terrorists and drug traffickers. It receives $130 million a year, which makes it the third-largest recipient of US military aid. Under *The American Servicemembers' Protection Act (2002)*, considered in Part 3.12 below, Columbia would have lost US military aid if it had not entered into an Article 98 agreement protecting US personnel from the ICC. It argued that agreements of 1962 and 2000 were sufficient but eventually it signed an agreeement. Columbia wanted it limited to officials. The US wanted more than this. Argentina said no to an Article 98 agreement. Instead they upgraded US military personnel to administrative embassy staff, thus conferring diplomatic immunity.

Somewhat ironically, Serbia has refused to sign an Article 98 agreement with the US. It considers that such an agreement would undermine the international legal system. However, it is under severe financial pressure from the US to do so — it receives over $100 million per year from the US. There are 4000 US troops in KFOR in Kosovo, which is within the territory of Serbia. Croatia would not sign an Article 98 agreement because, as it has to transfer it own citizens to the ICTY, it considered it perverse not to send Americans to the ICC. Estonia will sign an Article 98 agreement. It takes the view that it had a moral obligation to support the US position. It also considered it to be in its national interest to do so. In terms of the global security situation, 'It is clear that the US bears the greatest burden, the greatest responsibility'.[203] Latvia was looking at updating its 1923 bilateral extradition agreement with the US. Canada considers the NATO status of forces agreement gives the US sufficient protection. Japan and the Republic of Korea would only consider an Article 98 agreement after they had ratified the Statute. Australia is sympathetic to the US request. South Africa has granted immunity via an extradition treaty with the US.

As of 23 October 2003, 33 countries have publicly refused signing, for example, Canada, Germany, Norway, Switzerland and The Netherlands. They are against Article 98 agreements or consider them to be unnecessary. Germany is particularly critical, regarding the invocation of Article 98 as an attack upon the ICC.

[202] J Steele, 'East Timor Is Independent. So Long As It Does As It's Told', *The Guardian*, 23 May 2002.
[203] 'Estonian Prime Minister see moral obligation to support US over international court', *BBC Worldwide Monitoring*, 17 Oct 2002.

3.10 Article 98 Agreements and EU Member States

In August 2002 the US wrote to individual European governments to ask them take decisions on Article 98 agreements before the EU reached a united stand.[204] The US strategy on Article 98 agreements was to pick states off one by one. EU member states had to decide on a response. Without an EU position there would have been lots of inconsistent bilaterals. The EU also deplored the decision of a candidate country, Romania, to sign an Article 98 agreement without waiting for the EU to agree a common position.[205] A number of EU members were strongly against Article 98 agreements. For example, The Netherlands declined to sign an agreement on the basis that its exemptions would undermine the authority of the court. Germany and France were strongly against and issued a joint demarche against Article 98 agreements. Germany considered that the agreements could possibly be legal but thought they were not consistent with the spirit and sense of the Rome Treaty. NGO's were strongly opposed to Article 98 agreements.[206] However, Italy, the UK and Spain were ready to break ranks with their EU partners and to sign agreements with the US. The UK was heavily criticised for accepting the US position.[207] The UK's agreement on the Article 98 issue was portrayed as a victory for the US. It was reported that the UK was advised that granting exemptions for US personnel was 'entirely justifiable in legal terms'.[208] In its official submission to the EU's informal discussions on the issue, held at Helsingoer, Denmark, the place of the castle of Hamlet, the UK stated that:

> The US request … poses a difficult and delicate problem for us all. These are not just ingredients of a major transatlantic row but also have potential implications on the ground, eg for continued US involvement in peace support operations in the Balkans, which are important to us. … The UK has never shared US concerns about the ICC and has frequently tried to disabuse them of their fears. … But no one has succeeded in this. The administration's views on this are very strong indeed. We need a policy decision to engage with the US on this and head off the negative consequences on the ground that will flow from a refusal to cooperate.

The UK view was that while:

> … we understand US objections although we do not share them. We value the US role in international peacekeeping and we want to enable the US to continue to play

[204] See E Becker, 'US Issues Warning To Europeans In Dispute Over New Court', *New York Times*, 26 Aug 2002.
[205] For criticism of the EU response see G Sheridan, 'Democracy Takes A Back Seat To Eurocrats', *The Australian*, 29 Aug 2002 (EU's arrogant and hypocritical global role is becoming increasingly dictatorial).
[206] See Amnesty International, *ICC – US efforts to obtain impunity for genocide, crimes against humanity and war crimes*, <www.iccnow.org/aiusimpunity200208.doc>
[207] See I Black, 'UK accused of sacrificing new criminal court', *Manchester Guardian Weekly*, 9 Oct 2002.
[208] I Black, 'Straw Urges War Court Retreat', *The Guardian*, 2 Sept 2002. A Foreign and Commonwealth Office spokesperson was reported as stating that 'By definition, it would not be incompatible with the ICC Statute to conclude a bilateral agreement with the US', cited in P Shishkin, 'Eastern Europe is Pressured by US, EU on ICC Immunity', *Wall St. Journal*, 16 Aug 2002.

> that role and it is in that spirit that we are looking at the possibility of a bilateral agreement.[209]

The EU's political difficulties were compounded when the European Commission's non-binding legal advice on 28 August 2002 was that Article 98 agreements could undermine the value of the court and were not compatible with the ICC Statute.[210] The European Parliament was strongly against Article 98 agreements.

In the midst of the US-EU debate the US had pointed out that under a Military-Technical Agreement with Afghan Government of January 2002, members of the International Security Assistance Force, including British, French and German soldiers:

> may not be surrendered to, or otherwise transferred to, the custody of an international or any other entity or state without the express consent of the contributing nation.

Effectively, they could not be handed over to an international tribunal without the consent of their governments. This was exactly what the US was seeking. The UK, on behalf of 19 countries with peacekeepers in Afghanistan, had negotiatied the agreement. The US presented this agreement as evidence of double standards. The response given was that this was a bilateral agreement with the host state in a chaotic situation. It was not a permanent exemption.

At its meeting in Copenhagen in 2002, the European Council agreed on an EU policy. All EU members went along with the deal to preserve the semblance of a united front. The EU text was as follows:

> The Council noted the existence of a number of bilateral and multilateral instruments between member states and the US, as well as treaties with third states, which were of relevance. Member States were ready to engage with the United States in a review of these arrangements, which may fall into the category of agreements defined in Article 98(2) of the Rome Statute.
>
> The Council developed the set of principles to serve as guidelines for Member States when considering the necessity and scope of possible agreements or arrangements in responding to the United States' proposal.
>
> The Council expresses the hope that the United States will continue to work together with its allies and partners in developing effective and impartial international criminal justice. To this end, the Council proposes to develop a broader dialogue between the European Union and the United States on all matters relating to the ICC, including future relations between the United States and the Court. In particular this dialogue should address the following issues:
>
> — The desirability of the United States re-engaging in the ICC process
> — the United States is entitled to be an observer to the Assembly of States Parties;
> — The development of a relationship entailing practical cooperation between the United States and the Court in specific cases;

[209] Baroness Amos, House of Lords, 14 Oct 2002.
[210] 'Accords "would violate" Court Treaty', *Financial Times*, 28 Aug 2002.

— The application of presidential waivers of the ASPA legislation to the main provisions of this legislation, in particular vis-à-vis Member States and their associated countries.

ANNEX:

EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court

The guiding principles listed below will preserve the integrity of the Rome Statute of the International Criminal Court and — in accordance with the Council Common Position on the International Criminal Court — ensure respect for the obligations of States Parties under the Statute, including the obligation of States Parties under Part 9 of the Rome Statute to cooperate fully with the International Criminal Court in its investigation and prosecution of crimes falling within the jurisdiction of the Court.

The guiding principles are as follows:

— *Existing agreements*: Existing international agreements, in particular between an ICC State Party and the United States, should be taken into account, such as Status of Forces Agreements and agreements on legal cooperation on criminal matters, including extradition;
— *The US proposed agreements: Entering into US agreements — as presently drafted — would be inconsistent with ICC States Parties obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties*;
— *No impunity*: any solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity. Such provisions should ensure appropriate investigation and — where there is sufficient evidence
— Prosecution by national jurisdictions concerning persons requested by the ICC;
— *Nationality of persons not to be surrendered*: any solution should only cover persons who are not nationals of an ICC State Party;

Scope of persons:

— Any solution should take into account that some persons enjoy State or diplomatic immunity under international law, cf. Article 98, paragraph 1 of the Rome Statute.
— *Any solution should cover only persons present on the territory of a requested State because they have been sent by a sending State*, cf. Article 98, paragraph 2 of the Rome Statute.
— Surrender as referred to in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the Rome Statute.
— Sunset clause: The arrangement could contain a termination or revision clause limiting the period in which the arrangement is in force.
— Ratification: The approval of any new agreement or of an amendment of any existing agreement would have to be given in accordance with the constitutional procedures of each individual state.[211]

[211] *Emphases added.*

Stig Moller (Danish Foreign Minister, then holding the EU Presidency), described the deal as, 'A good compromise for the ICC':

> Considering the alternatives, the outcome we achieved was the best way to defend the court. Any other solution would have resulted in a split and a weakening of the strong EU position to support the ICC. A flat no to the US proposal on bilateral agreements, on the other hand, would have had a very damaging effect on trans-Atlantic relations.[212]

There are some important legal points to note about the EU position. The arrangements apply only to US soldiers or officials sent abroad. The language used is that of 'sending state' rather than 'state of nationality'. Human Rights Watch interpret this to mean that the agreements should 'only apply to military personnel, and other key civilians', serving in the EU member state's territory.[213] Crawford, Sands and Wilde have argued that:

> The ordinary meaning suggests that the presence of a person on the territory of a requested State must arise as a result of an act of the sending State (e.g., in sending to the requested State a diplomat or as a member of a visiting military force pursuant to a SOFA). On this basis, it is not sufficient for such a person to be a national of the State concerned. As a matter of ordinary meaning, a tourist or a contractor is not a 'sent' person, any more than would be a former foreign minister visiting a State Party in a private capacity. In our view the key factor requiring a nexus to the third State is not the status of the person or the activity he or she is performing, but rather the circumstances leading to his or her presence on the territory of the requested State Party. Such nexus would be assumed for persons who enjoy a certain status and are performing a particular activity, such as officials of the third State, e.g. a government minister or an ambassador or a soldier, who is in the territory of the requested State with the consent of that State to engage in official business of the sending State.
>
> In this regard, it should be noted that the US Agreements define the individuals covered by the obligation of consent as
>
> > current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
>
> In our view this covers a considerably broader class of persons than those who can properly be characterised as having been 'sent' by a State. 'Employees' may have been locally engaged; 'former Government officials' and 'nationals' may be resident in the requested State or visiting in a private capacity, e.g. for the purposes of business or tourism. In this way the agreements being sought by the US go well beyond the scope of the agreements envisaged by Article 98(2). We endorse the approach taken by the EU Guidelines, which provide *inter alia* that any solution in terms of Agreements entered into with the US …

[212] *Wall Street Journal*, 2 Oct 2002. See also EP Resolution P5_TA(2002)0521 calling for a clear common position in response to the US's efforts.
[213] See above n 197.

> should only cover persons present on the territory of a requested State because they have been sent by a sending State.
>
> … For present purposes, the limitation imposed by Article 98(2) concerns the relationship between the relevant person and the 'sending State': the person who is present on the territory of the requested State Party must have a nexus with the 'sending State' which goes beyond mere nationality, and his or her presence must have been occasioned by some positive act of the sending State.[214]

Under the EU Guidelines, there also has to be an agreement on the US side that Americans accused of war crime and crimes against humanity will be dealt with by US courts.[215] The agreements are not to be reciprocal, so citizens of the EU member states are not granted immunity in return.

The US has conducted further negotiations in the EU. As of November 2003, EU Members have so far refused to deviate from the EU position. No EU Member has signed a bilateral immunity agreement. The UK has held preliminary discussion on a bilateral agreement with the US in October 2002.[216] It will follow the EU principles. The US efforts to obtain these agreements generated a great deal of legal debate. The German government has issued its own legal analysis and elaboration on the EU guiding principles.[217] This analysis explains the German refusal to sign a bilateral agreement with the United States and expands upon what it considers to be the ambiguous elements of the guiding principles. The US is still pushing its version of the agreement which seeks blanket immunity.

3.11 US Legislative Responses

The US Congress held extensive hearings on the ICC and pursued its own strategy of opposition.[218] There has been little expression of support for the ICC.[219] Public opinion as reflected in the US news media is divided.[220] Anti-ICC Bills were introduced into both the House of Representatives and the Senate. The former was the *American Servicemembers' Protection Act of 2000*.[221] The Bill explicitly stated that the US would not intervene in any peacekeeping operation in countries that ratified the Statute. There could be exceptions for NATO countries. The then US Administration opposed the proposed legislation. It argued that it

[214] See above n 192, paras 43–45
[215] The EU state would also request non application of the death penalty.
[216] HC, 14 Jan 2003, vol 397, cols 211 WH – 231WH.
[217] See <http://www.iccnow.org/documents/otherissuesimpunityagreem.html>
[218] See Testimony of the Hearings before the House International Relations Committee, 25–26 July 2000.
[219] See <www.usaforicc.wg> for organisational and Congressional statements on the ICC.
[220] See RC Hottetot, 'The US Misjudges A Court', *Christian Science Monitor*, 10 April 2002.
[221] H.R.4654. The identical Senate text was S 2726, introduced by Senator Helms, the Chair of the Senate Foreign Relations Committee.

worsened its negotiating position, infringed the President's constitutional authority as Commander-in-Chief and to conduct foreign relations, damaged US national policy objectives, made it impossible for the US to engage in critical multilateral operations, and weakened essential military alliances.[222]

US ratification of the Statute was always unlikely given the hostility of the US Congress. In July 1998 the US Senate Foreign Relations Committee held hearings on the US position on the ICC. What then appeared to be the fairly extreme views of Senator Helms were that: (1) the US must never vote in the Security Council to refer a matter to the ICC; (2) the US must block any organisation of which it is a member from providing any ICC funding; (3) the US must renegotiate its status of forces agreements and extradition agreements to prohibit their partners from surrendering US nationals to the ICC; (4) the US must provide no US soldiers to any regional or international peacekeeping operation where there is any possibility that they will come under the jurisdiction of the ICC. This would effectively mean they would never provide any peacekekeepers. The US has not gone quite as far as Senator Helms but its position is not that far short of his views either. During a hearing of the Senate Armed Services Committee, its Chairman, John Warner discussed whether it was necessary to have legislation to protect and fund retired defence personnel in litigation. He stated that, 'we cannot let our people, whether it's in the current operations or future operations, be subject to legal attack for carrying out the orders of their commander in chief'.[223] The Defence Department was opposed to the ICC because it feared that a strong and independent court would expose American troops sent overseas to prosecution outside of the American judicial system.[224] This would be natural given its institutional interests. The ICTY's consideration of whether to investigate alleged war crimes in NATO's actions in Kosovo in 1999 only heightened US fears.[225] The Prosecutor compiled an internal legal analysis but subsequently announced that there would no formal inquiry.[226] That decision could have had the opposite effect of

[222] See the Testimony above n 218, both for and against the legislation.
[223] Congressional Hearing, 21 March 2000, Washington D.C.
[224] See above Pt 3.6.
[225] See 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (ICTY, The Hague, June 2000); SL Meyers, 'Kosovo Inquiry Confirms Worst US Fears of War Crimes Court', *The New York Times*, 3 Jan 2000, p 6, col 1.
[226] The complaint was initiated by a group of European and Canadian law professors and supported by Amnesty International. Among issues suggested were the use of cluster bombs, the striking of electrical grids and other targets with civilian uses, the decision to have planes fly at high-altitudes which reduced the risk to pilots but increased the risks of accidental bombings. Amnesty International still maintains that the United States committed a war crime when it attacked a Serbian television station (though the architects of hate radio in Rwanda are themselves accused of war crimes, and the United States is criticised for not having prevented those stations from broadcasting). A Human Rights Watch report argued that NATO's violations of international humanitarian law (but not war crimes as such) were responsible for roughly half the 500 civilian deaths caused by NATO bombs. See *Under Orders — War Crimes in Kosovo*, Part 16, <www.hrw.org/reports/2001/kosovo/> The response of the Prosecutor would suggest that HRW's analysis is badly flawed.

convincing the US that the consideration was professional, legalistic and based on the evidence rather than being politically motivated. It had the opposite effect. Another criticism that came from the US Congress was the role played by some NGO's in the negotiation process as members of State delegations.[227]

3.12 The American Servicemembers' Protection Act (2002)

The American Servicemembers' Protection Act (ASPA) was signed into law on 2 August 2002.[228] It formed part of the 'Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the US'. This was a veto-proof Bill authorising billions of dollars to combat terrorism. The version which finally passed was less radical than many of the previous ones. First, the ASPA authorised the US to use 'all means necessary, including military force, to rescue a US citizen taken into the courts custody'. This part of the ASPA caused deep concern in Europe. Some ridiculed it as the 'Hague Invasion Act' on the basis that it would literally authorise to US to invade The Netherlands to release a US citizen in custody at the ICC. The Netherlands was rather shocked by the passage of this provision.[229] A Statement from the US Embassy in The Hague in 12 June 2002 sought to allay these concerns:

> Should matters of legitimate controversy develop with the ICC's host country, the Netherlands, we would expect to resolve these controversies in a constructive manner, as befitting relations between close allies and NATO partners. We cannot envisage circumstances under which the United States would need to resort to military action against the Netherlands or another ally.[230]

The ASPA also gave the US President the right to take actions to protect Taiwanese personnel if they were taken into custody by the ICC.

Secondly, section 2007 ASPA imposed a prohibition on military aid to states parties to the ICC, but allowed for the possibility of waiver. It provided:

> Section 2007: Prohibition of United States Military Assistance to Parties to the International Criminal Court.
>
> (a) PROHIBITION OF MILITARY ASSISTANCE — Subject to subsections (b) and (c), and effective 1 year after the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute [i.e. 1 July 2003], no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.

[227] See McGoldrick, *Legal and Political Significance*, Part 3.3 in this volume.
[228] Pub Law 107–226, 22 USCA sections 7421–7433 (2 Aug 2002).
[229] There was an extensive debate in the Dutch Parliament on the ASPA.
[230] <http://www.usemb.nl.061202.htm>

(b) NATIONAL INTEREST WAIVER — The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition.
(c) ARTICLE 98 WAIVER — The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against United States personnel in such country.
(d) EXEMPTION — The prohibition of subsection (a) shall not apply to the government of —
  (1) a NATO member country;
  (2) a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand); or
  (3) Taiwan.

Subsection (b), the 'national interest' waiver, operates independently from subsection (c), which relates to the bilateral immunity agreements. Over 50 states were caught by the prohibition. However, after the exemptions allowed by subsection (d), this left 35 states as subject to the cuts in foreign aid — foreign military financing, international military education and training, and the provision of excess defence articles. The value of the cuts was estimated at $46 million for 2003 and $89 million for 2004. Many of those states affected have close relationships with the US and are engaged in the war against terrorism or against drug traffickers (such as Colombia and Ecuador):[231]

> The United States has cut off funds to train peacekeepers and police, teach good human rights practices and transport disaster relief to some of the world's poorest countries … This policy openly contradicts our other foreign policy priorities promoting democracy, peace and security.[232]

Assistance to 5 of the 35 was reinstated later in July when agreements were reached. The ASPA also allows for waivers on its otherwise general prohibition on US authorities cooperating with ICC. It states that nothing in the ASPA shall prevent the US from assisting international efforts to bring to justice persons accused of genocide, war crimes and crimes against humanity. Both concessions are limited to non-nationals.

[231] See 'Bungling Bully: Strong-Arm Diplomacy is Damaging US Interests Abroad', *Financial Times*, 3 July 2003; I Traynor, 'US Plays Aid Card To Fix War Crimes Exemption', *The Guardian*, 12 June 2003; MC Caballero, 'Key Allies Are Casualties of US War on Court', *International Herald Tribune*, 22 July 2003; R Cornwell, 'US Will Deny Aid To Countries That Refuse Court Immunity Deals', *The Independent*, 4 Nov 2003; J Forero, 'Colombia Accepts A US Deal On Exemptions In Rights Cases', *New York Times*, 19 Sept 2003.
[232] JK Hedges, 'Why Are We So Wary Of This Court'? *Washington Times*, 5 July 2003.

The EU's General Affairs Council expressed concern about the ASPA on the basis that its provisions could seriously undermine the work of the ICC.[233]

3.13 US Policy after the Establishment of the ICC — the 'War' on Terrorism

Despite the US opposition the ICC was clearly going to become a reality and sooner than had been predicted. Would the US veto SC references to the ICC? There were occasional positive messages from the US Administration. At one point, Ambassador Prosper said that the US would be willing to consider sending cases to the ICC through the SC. However, it would not provide funding, witnesses, evidence or intelligence.[234] If a particular individual was in the US, then presumably it would send that person to the state of their nationality or to the state where alleged offence occurred and let them send the person to the ICC if they want to. The US Ambassador likened the position of the US to that of Pontius Pilate, 'We've washed our hands — it's over'.[235] The US's alternative policies are like those in their alternative human rights strategy when they decided not to become parties to the international covenants. Rather, the US stressed a state focused view.[236]

One of the principal US arguments against the ICC has always been that of politically motivated charges. After the attacks on the US on 11 September 2001, concern was heightened that such charges would be calculated to interfere with the war against terrorism which had been declared by President Bush.[237] The war against terrorism has been led by the US and supported by a coalition of over 90 states.[238]

4. POLITICAL OPPOSITION TO THE ICC — OTHER STATES

4.1 China

China voted against the establishment of the ICC. It was opposed to the inclusion within the Court's jurisdiction of abuses during domestic armed conflicts. It believed that the offences listed in the Statute had a 'heavy dose' of human rights law. Hence the ICC would become an international human rights court, instead of being a criminal court that punished international crimes of exceptional gravity.

[233] 17 June 2002.
[234] PR Prosper, Press Briefing, 6 May 2002, <http://fpc.state.gov/9965.htm>
[235] P Slevin, 'US Renounces Its Support of New Tribunal for War Crimes', *Washington Post*, 7 May 2002, quoting Prosper.
[236] See K Wilson, 'Ambassador Defends 'New Diplomacy', *Ventura County Star*, 24 Oct 2002 (Pierre-Richard Prosper … considered nation-building a much better approach than the ICC has towards developing nations — 'The ICC is saying "You can't do it, developing nations, we're going to do it *for* you"').
[237] See C Greenwood, 'International Law and the "War Against Terrorism"' (2002) 78 *International Lawyer* 301; P Rowe, 'Responses to Terror: the New "War"' (2002) 3 *Melbourne JIL* 301.
[238] See 'Campaign Against Terrorism: A Coalition Update', <www.fco.gov.uk/files/Kfile/cicupdate,0.pdf>

It took the view that the Statute was incomplete.[239] Among the issues it has concerns over were the principle of complementarity, the rights of the Security Council in relation to the definition of aggression, the powers of the prosecutor and possible political influences on the ICC. None the less, it appreciated the need for and supported the establishment of the ICC.[240]

4.2 Libya

Libya voted against the establishment of the ICC. Libya has been portrayed by the US in particular as a rogue State.[241] The US has alleged that Libya has been a state sponsor of terrorism and was driven by an extreme ideology. In recent years there is evidence that Libya has retreated from any support of terrorism. In 2003 it accepted responsibility for the Lockerbie bombing and paid compensation for the terrorist destruction of a UK and a French aircraft. In response the SC lifted sanctions against Libya which had been in position for over a decade.[242] Part of Libya's objections to the ICC were related to US superpower domination:

> We can only approve this criminal court of Rome if we impose our conditions, because this court will try us only and will not try them. It is not in our interest, my brother leaders, for anything to proceed from the United Nations as long as the domination is by one single state, because everything will be in its interest … I can tell you that Libya will never approve this court in the light of the current conditions. Never. Because we are convinced that a CIA director would not be brought to be tried before this court, while he perpetrated crimes such as the assassination of Salvador Allende, Cabral, Lumumba or took part in the liquidation of any other person … [243]

4.3 Iraq

Iraq voted against the establishment of the ICC. Iraq is an important strategic power. Since its invasion of Kuwait in 1990, it has also been placed in the US's 'rogue' category, subjected to international monitoring, extensive economic sanctions and relative diplomatic isolation. The US denied visas to three Iraqi delegates to the 10th session of the PrepCom. They had attended previous sessions. It remains to be seen whether a post 2003-war regime in Iraq will ratify the Statute.[244]

[239] 'China Refuses to Sign Statute on ICC', *BBC Monitoring Asia Pacific — Political, Xinhua Official News Agency*, Beijing, 11 July 2002.
[240] See Statement of Ambassador Zhang, during the 58th session of GA, Sept–Oct 2003, <http://www.iicnow.org/documents/statements/governments2003.html>.
[241] In June 2000 the State Department declared that the term 'rogue' as applied to nations will be dropped and the more discriminating term 'states of concern' would be used. See 'Rogue States — Isolation Versus Enlargement in the 21st Century' (2001) 54 (2) *Journal of International Affairs.*
[242] See SC Res 1506 (2003).
[243] BBC Summary of World Broadcasts, 2 Sept 2000.
[244] An international coalition of lawyers and human rights groups is gathering evidence to determine whether American and British troops committed war crimes in Iraq in 2003. see <http://wfa.org/issues/wicc/factsheets/iraq.html> In December 2003, the Iraqi Governing Council approved the establishment of the Iraqi Special Tribunal — a war crimes court.

4.4 Israel

Israel voted against the establishment of the ICC. Israel remains an enigma but there is at least a historical irony: the state which was partly founded as a consequence of the Holocaust[245] voted against an international court that would have jurisdiction over many of the crimes involved therein. Although Israel shared US concerns at the exposure of non-nationals, its dominant concern was with the possibility of prosecution of Jewish settlers in relation to settlements in the occupied territories on the basis of its being a transfer of civilian population into occupied territories.[246] This was one of the most contentious issues. The text agreed in Rome on this crime did not reflect the US's or Israel's wishes and went beyond their view of customary international law. Israel followed the US in signing the Statute on the last possible day to allow its continued involvement in the PrepCom. Both States worked in the PrepCom to accommodate the concerns of Israel.[247] Israel then joined in the concensus on the Elements of Crimes. After the issue of population transfer into occupied territories was thought to have been resolved to its satisfaction, Israel was subsequently reported to be considering a change in its position.[248] If Israel's concerns on the specific issue were satisfied, any US argument of supporting Israel's position lost its force in that respect. Israel had also expressed concern at the freedom given to the independent prosecutor.

In 2002, Israel announced that it was not going to ratify the ICC Statute. On 28 August 2002, Israel followed the US in 'unsigning' the Statute, stating to the Secretary-General that it had no legal obligations arising from its signature. It followed the wording used by the US. The reasons cited by Israel included the fear of prosecution over their policies in the Palestinian territories. Another political factor was suspicions aroused by the UN Conference on Racial Discrimination in Durban in 2001 where zionism and racism were linked again, and the US had walked out because of its opposition to the way the agenda on racial discrimination was approached.[249] Israel has indicated that it will not join the ICC until the Middle East crisis is resolved. It is concerned at bias and that Arab countries may use ICC for what it sees as propaganda purposes. Syria, for example, could complain about any new settlements in the Golan Heights. As signature and ratification of the Statute is limited to States parties it would not appear to be possible for the Palestinian Authority to become a party. In relation to the Israel-Palestinian conflict it is important to remember that the ICC's jurisdiction under the Statute is not retrospective. Palestinian representatives have stated that they would present a complaint to the ICC relating to Israel's attack on Gaza in July 2002. The target was Salah Shehad, the head of the military wing of Hamas.

[245] The movement for a Jewish State can be traced to the end of the 19th Century.
[246] See Art 7 of the Statute; Roth, below n 293. As a close ally, the US shared the Israeli concerns.
[247] See 'The Israel-Palestinian conflict and the ICC', <http://www.iccnow.org/html/presswiccisrael.pdf>; Art 85(4)(1) of Fourth Geneva Convention.
[248] See country information at <www.iccnow.org>
[249] See A/CONF.189/12 (25 Jan 2002).

The one ton missile also killed 15 other people, including nine children, and injured some 150 others. There would seem to be no way that the complaint would be admissible. Israel is not a party. Nor is the Palestinian Authority because it is not a state.[250] One possibility for the ICC to have jurisdiction would be if some of the Israelis were dual nationals and the other state of nationality was a state party. The situation of alleged crimes under the Statute in the Golan Heights is also not problematic at the moment given that Syria has not ratified the Statute.

4.5 Other States which Voted Against The Statute or Abstained.

The other two states which voted against are thought to be Qatar and Yemen. However, the vote was unrecorded and others reports suggest that Algeria or Sudan voted against. None of these four states have become parties. As noted in the introduction, 21 states abstained. This is not an insignificant number. They included Indonesia, India, Malaysia and Thailand.

4.6 India

The abstainers included India, the world largest democracy. India has not signed because of certain reservations on principle.[251] It was strongly opposed to the ICC being dominated by the SC because it does not regard the historically fixed membership of the SC as legitimate. Therefore, it objected to the SC's referral and suspension powers. It wanted the first use of weapons of mass destruction (particularly nuclear weapons) to be specifically considered as a war crime. It objected to the non-inclusion of terrorism, particularly cross-border terrorism and terrorism that was externally inspired and assisted.[252] More generally, India considered that the ICC's jurisdiction ought to be restricted to exceptional circumstances. In US–India talks in May 2002, there was agreement on the serious inadequacies of the ICC, its negative impact on peacekeeping operations and the importance of co-operation between the US and India in opposing its applicability to non-states parties because they considered this to be beyond the limits of international law.[253] World-wide discussion of the attacks on the Muslim community in

[250] See J Jones, 'Toothless in Gaza: Was Israel's Assasination Of Salah Shehada A War Crime And, If So, Can Any Court Try It?', *The Guardian*, 27 July 2002. Israeli army commanders stated that intelligence reports mistakenly stated that only Shehada and his deputy would be in the building.

[251] See S Uma, 'Why India Should Support The International Criminal Court', Humanscape: <http://www.humanscapeindia.net> (May 2000).

[252] 'India's position of wanting to include terrorism within the jurisdiction of the ICC is both surprising and contradictory, for has it not been India's position for the past several decades that the problem of terrorism in Kashmir should be solved by bilateral means and not through the intervention/mediation of any third party or in the international forum?', Uma, above n 251.

[253] 'India, US Agree on Military Exchanges, Equipment Sales', *BBC Monitoring Reports*, 24 May 2002; N Koshy, 'India Joins US's Hague Invasion', *Foreign Policy in Focus*, 6 Jan 2003.

Gujarat in 2002 as a possible crime against humanity may have had an effect on the Indian debate on the ICC.[254]

5. SOVEREIGNTY, DEMOCRACY AND ACCOUNTABILITY

5.1 Sovereigntists versus Interdependence

At the risk of simplification, the debate on the ICC seems to be between states that have sovereigntist views[255] of their international relations (China, India, US, and perhaps Russia) and those that seem to accept structures of interdependence more readily (such as the EU member states).[256] Criminal law is closer to state sovereignty than, say, the environment. The debate on the ICC in many states was couched in terms of the surrender of sovereignty. Examples are Australia[257] and Ireland.[258] Most democracies have ratified the Statute but not two of the worlds biggest, the US and India. On 19 April 2002, Freedom House ranked 75 per cent of the States that have ratified as 'free' democracies.

US policy on the ICC fits into a general history of isolationism and reluctance to enter into major multilateral agreements, although the precise picture is more ambivalent and mixed.[259] It never ratified the Covenant of the League of Nations. The Genocide Convention (1948) was only ratified in 1989. The International Covenant on Civil and Political Rights (1966) was only ratified in 1992.[260] The International Covenant on Economic, Social and Cultural Rights (1966) has not been accepted. Only the US and Somalia are not parties to the International Convention on the Rights of the Child (1989).[261] China and the US are still only half into the international human rights treaty system. Even when the US executive has been in favour of international agreements, Congress has generally been much more hostile.

[254] See S Uma, 'The Gujarat Carnage and ICC', *The Hindu*, 7 May 2002 (urging the Indian government to ratify).
[255] PJ Spiro, 'The New Sovereingtists' (2000) 79 *Foreign Affairs* 9 (on anti-internationalism in US political tradition); C Bradley and J Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110(4) *Harvard Law Review* 815.
[256] See Simpson in this volume; 'The New Sovereignty', *The Gazette* (Montreal) 20 July 2003.
[257] See R Cassin, 'A Sovereignty More Notional Than National', *The Sunday Age* (Melbourne), 23 June 2002; Editorial, 'The International Court — A Potential Crime In Itself', *The Canberra Times*, 22 June 2002.
[258] The amendment to the Irish Constitution required for ICC ratification was concerned with its provisions on sovereignty.
[259] Eg, the US is a member of the WTO and its extensive range of agreements. It has not ratified the two additional Protocols to the Geneva Conventions of 1949 or the UN Convention on the Law of the Sea (1982). See generally EC Luck, *Mixed Messages: American Politics and International Organization, 1919–1999* (Brookings, Washington, 1999); JB Judis, 'Two Steps Backwards; Unilateralism Revisited', *The American Prospect*, 12 Aug 2002; 'America's Dubious Dissent', *The Hindu* (India), 3 July 2002 (on US's unilateralist international law view).
[260] See T Evans, *US Hegemony and the Project of Universal Human Rights* (Macmillan, London, 1996).
[261] The US has ratified two Protocols to the CRC.

5.2 US Ideology and Exceptionalism

Many have argued that US opposition seems more ideological than political.[262] British, Canadian and German troops have fought in Afghanistan alongside US troops and yet their governments were the leaders in forming the ICC. The US's opposition puts it alongside regimes it considers despotic such as Cuba, Iran, Iraq, North Korea and Sudan.[263] If the US has nothing to do with the ICC then it will have credibility problems saying why other states, including its axis of evil states, cannot do the same. The CICC argues that the US is putting itself on the wrong side of history.[264] Canada and the EU have sought to persuade the US that the ICC could serve American interests.[265]

The idea that the US is more ideological in outlook rather than political has some currency.[266] The US does not define the ICC as in its national interest. Henry Kissinger has suggested that:

> America defines its national interests in more strategic terms. Europe defers worries about the operation of such new institutions as the ICC partly because of the lower priority it gives to foreign policy altogether. The US is concerned with the immediate impact of an institution with a vague charter, unsettled procedures and subject to no system of checks and balances, which can affect the many Americans engaged in global responsibilities.[267]

The specific argument that the US was concerned at the vague definition of offences which could be open to abuse was weakened by its joining in the concensus on the Elements of Crimes. Part of US ideology is that power derives from the consent of the governed. National sovereignty is thus driven by democratic accountability. It sees the ICC as an instrument of unchecked power. It is not within the UN structure and represents an enormous transfer of power to the judges and to the Prosecutor.

[262] See J Dempsey, 'Europe's Divide Self', *Financial Times*, 10 July 2002; 'triumph of ideology over any rational assessment of how to combat the worst human rights crimes' (K Roth, 7 May 2002, <www.iccnow.org>). The President of the US Bar Association explained that, 'In the end opposition likely rests more on ideology about US sovereignty than it does about practical thinking' (12 June 2002).

[263] M Marquez, 'US Joins Cuba, North Korea in Rejecting World Court', *The Orlando Sentinel*, 21 May 2002.

[264] K Roth, <http://www.hrw.org/press/2002/05/icc0506.htm>

[265] See S Power, 'Prosecuting International Crimes Can Bolster American Security', *Wall St Journal*, 10 July 2002; 'The United States appears so focused on the negative aspects of an ICC that it has almost lost sight of both the court's potential value and the costs of American estrangement for the ICC', Sewall and Kaysen, above n 82.

[266] See C Tannock, 'The Case Against The ICC', *The Asian Wall St Journal*, 7 May 2002 (US has legitimate concerns).

[267] 'NATO At The Crossroads; NATO's Uncertain Future In A Troubled Alliance', *San-Diego Union-Tribune*, 1 Dec 2002. The US continues to argue that the scope of the offences in the Rome Statute are vague, see Bolton, n 291 below. See also Danner, n 87 above.

Related to unilateralism is the idea of American exceptionalism. America is different and has to be treated differently. Because of its global responsibilities it is a special target. Behind the US attempt to scuttle the ICC is the Bush administration's belief that the unilateral use of American military might is the paramount means of achieving US strategic interests world-wide. Viewed from that perspective, the ICC creates a powerful disincentive for US military engagement in the world. If American power is needed to quiet international trouble spots, the rules of that operation need to be written by America. This approach is argued to explain American exceptionalism, non-compliance with international agreements, non-ratification of signed treaties, rights narcissism and its distinctive rights culture. Christopher Patten has commented on exceptionalism and the ICC in the following terms:

> Another example [of American exceptionalism] perhaps even dearer to the hearts of internationally minded lawyers and human rights advocates, is the American refusal to submit to the authority of an international criminal court, manifest both at the time of the Court's establishment and subsequently, as the USA has tried to negotiate bilateral immunity agreements with states party to the ICC. … the United States was right to seek safeguards to ensure that the ICC would be used only for its intended purpose: to prosecute perpetrators of genocide and other crimes against humanity — not to pursue some politically motivated vendetta against the United States. Unfortunately the United States refused to take yes for an answer. … Having gained a series of elaborate safeguards, the USA then revoked its intention to sign the resulting agreement. Apart from the feeling that the USA was acting in bad faith in international negotiations and may do so again, this sort of behaviour does little to inspire confidence in American support for an international system based on universally accepted values, embodied in universally agreed laws. … I deeply regret the American decision on the ICC, because I admire the United States, and I know how its attitude to international agreements will be interpreted. It will be accused of putting itself above the law, of being happy to sit in judgement on others — rightly, and with vigour and determination as it is doing in relation to the International Criminal Tribunal for the Former Yugoslavia — but of refusing itself ever to stand accountable for its actions.[268]

The US is the world's only superpower.[269] So why should it be constrained by accepting international rules and international institutions?[270]

[268] C Patten, 'Globalization and the Law', http://www.europea.eu.comm/external_relations/views/patten/sp_141003.htm. See also 'ICC — No to American Exceptionalism', (Dec 2002) <www.fidh.org>.
[269] See S Brooks and W Woolforth, 'American Primacy in Perspective' (2002) *Foreign Affairs* 20 (on US dominance and on US having no rival in any critical dimension of power; most powerful states in the world have always sought to use that power to determine international rule and responses).
[270] See 'The Only Superpower And The ICC', *The Japan Times*, 26 Aug 2002 (on the importance of international norms); J Vincour, 'In Private, US And Europe Aren't Battling', *International Herald Tribune*, 17 July 2002 (on the idea of the US as an outlaw state); D Kraus, 'America's Global Leadership Measured by International Law', *Foreign Policy in Focus*, 17 June 2002; <www.fpif.org/commentary/2002/2006ilaw.html>.

With respect to American claims of exceptionalism, Byrnes and Charleworth have submitted that:

> Three motors drive this dramatic example of American exceptionalism. First, the US military sees itself as the military wing of the world's only superpower. The US gives itself the right to act unilaterally in defence of the world order, and thus beyond the reach of the standards that apply to lesser nations. In the Pentagon's view this is not merely patriotic but common sense. Second, the American political culture has a profound mistrust of foreign judges and legal procedures. At gut level, it is about the unacceptability in American eyes of, say, an Arab judge sitting in judgment on a US soldier.[271]

Byrnes and Charleworth submitted that, 'Australia should not blindly follow the pathologically unilateralist strain of United States antipathy to international institutions'.[272]

The US views international organisations with suspicion. It sees them as anti-American and anti-Israeli.[273] It had doubts about their legitimacy and their democratic credentials. They were often dominated by undemocratic regimes. Reference was often made to the US losing its seat on the UN Human Rights Commission for 2001–2002 while human rights abusing states remained members and even became its chair. The ICC was a continuation of this pattern of abuse of international institutions:

> there is a powerful stratum of the American right that sees the court as part of a vast leftwing conspiracy orchestrated by the UN. Its aim is to impose world government by stealth, the better to remove Americans' right to own guns and point missiles at other nations.[274]

From this perspective, some of the countries signing the Statute saw the ICC as a way to intimidate or influence the US. The key American fear is political prosecutions. It fears that the ICC will act under the sway of States opposed to US policy, as happened with several UN institutions, for example, UNESCO. The ICC could be controlled by enemies of the US, and those biased against the US and its citizens. There is a widespread belief in the US that anti-Americanism permeates many foreign elites. European elites in particular are considered to have an agenda of disparaging and diluting the sovereignty of nations. The US argues that this is ill-suited at the moment when the primacy of nation states needs to be re-affirmed:

[271] See A Byrnes and H Charleworth, 'Action Urged on Statute', *The Canberra Times*, 22 May 2002.
[272] *Id.*
[273] 'When the World Courts Abuse', *New York Post*, 24 June 2002; WF Buckley, 'Portable Immunity', LIV (14) *National Review*, 12 Aug 2002.
[274] *Id.*

> The ICC … presupposes , among much else, the universality of a common conscience. That presupposition is refuted by the very nature of the ICC's principal enthusiasts, the European elites who are incorrigibly tolerant of Yasser Arafat's terrorism, but scandalized by US 'unilateralism'.[275]

In a statement by Lincoln P Broomfield, Assistant Secretary for Political Military Affairs, on the US position on the ICC in September 2003 it was submitted that the US, 'Administration decided to set aside objections to the ICC and accept the reality of the Rome Statute and the Court'.[276]

5.3 US versus Europe — The Place of International Institutions

The ICC debate can also be located within a more general argument that European states have gone further than the US in accepting international institutions that limit or restrict 'sovereignty'. The general argument appears undeniable. The EU and the Council of Europe, particularly its European Court of Human Rights, evidence this. The US–EU debates on the ICC were pointed and presaged differences over the Iraq War in 2003. Many states in Europe acknowledged that they were mystified by US opposition to the ICC:

> There are many disagreements these days between the great power and the great majority of powers. None seems to be more precise, more pointed, or more philosophically complete than their differences over the international criminal court.[277]

There was talk of a 'fork in the road' in US–EU relations.[278] US–EU relations were in disarray.[279] It was argued that the disputes between the US and the EU were due to fundamental ideological differences rather than specific issue differences.[280] One difference was that Europeans placed a premium on

[275] GF Will, 'US Isn't Wary Enough Of New World Court', *The Seattle Post-Intelligencer*, 14 July 2002; *id* 'A Court That Is Hostile To The Rule Of Law', *International Herald Tribunal*, 12 July 2002.

[276] 'The US Government and the ICC', <www.state.gov/t/pm/rls/rm/24137.htm> (12 Sept 2003). See also JR Bolton, 'The US and the ICC', Remarks to the Federalist Society, Washington DC, 14 Nov 2002, <www.state.gov.t/us/rm/15158.htm>. For an excellent assessment of the importance of US support for the ICC see Statement of HH Koh to House Relations Committee, 11 July 2003, <www.iccnow.org>

[277] H Young, 'We Can't Allow US Tantrums To Scupper Global Justice', *The Guardian*, 2 July 2002; J Hall, 'Justice Denied? US Opposition To World Court Mystifies Europeans', *The Richmond Times*, 13 Oct 2002.

[278] See AM Slaughter-Burley, *The Future of International Law: Ending the US-Europe Divide*, <http://www.crimesofwar.org/sept-mag/sept-home.html>.

[279] See 'US Confronts EU on War Crimes Court — Immunity Pact Threatens Relations', *Washington Post*, 10 June 2003. On different approaches to international law see Q Peel, 'An Empire In Denial Opts Out: The US Opposition To The Creation Of ICC May Destabilise Transatlantic Co-Operation', *Financial Times*, 19 Aug 2002 (US has an empire but lacks imperial will).

[280] 'How the Atlantic Widened Under George Bush', *The Times* (London), 21 May 2002; Krauthammer, above n 41. On NATO–EU choices for states see W Pfaff, 'If forced to choose, Europe will ditch NATO', *International Herald Tribune*, 17 Aug 2002.

international law, international organisations and the diplomatic and judicial settlement of disputes:[281]

> The EU is continuing to do what it was set up to do: building a world peace by watering down national sovereignty, and expanding the network of international institutions and laws. Multilateralism and peaceful internationalism has become a kind of European white man's burden, a mission civilisatrice. The ICC is as much part of EU idealism as of the UN. It cuts little ice with the Russians or the Chinese, but Europeans believe in it. It is a fine ideal, and if the whole world were like Western Europe it would work very well. Alas, our peaceful EU is not well equipped to deal with gangsters — before they come to court. Against a Milošević it proved to be useless. Only American power saved millions of Bosnian lives. However, now that the Russians are down and out, the natural deference to American leadership is harder to maintain. For an alliance to work, you need a common enemy. And many Europeans don't see Iraq as a common enemy. Instead, that nagging fear of being dragged into wars by bellicose America, of being rudely wrenched from our peaceful dreams, is growing. But this is the fear of the powerless bystander. One reason for wanting the US to be part of the ICC, or other international institutions, is to check its power and curb its excesses. Perhaps even to pacify it. At the same time, we expect the US to do the dirty work for us.
>
> As long as this contradiction persists, we cannot expect the Americans to be keen on our European civilising mission. There is only one way out of this dilemma, which is to rebuild European military power. We cannot match the US, but we can share more of its burden. If we want the Americans to sign up to the ICC, we too must do the dirty work, and take the risk of being accountable.[282]

It was argued that Europe's concept of justice was shaped by atrocities committed by warring European states in the twentieth century, whereas US jurisprudence is guided by the 1789 Constitution and Bills of Rights and is thus more isolated than other jurisdictions.[283] From the US perspective, Europeans were seen as unreliable, except for the UK.[284] In addition, the US had a different understanding of sovereignty and power. John Bolton, the US Under-Secretary for Arms Control and International Security, argued that the:

> US has decided that the ICC has unacceptable consequences for its national sovereignty. Specifically, the ICC is an organisation whose precepts go against fundamental American notions of sovereignty, checks and balances, and national independence. It is an agreement that is harmful to the national interest of the US and harmful to our

[281] See A Moravcsik, 'The Quiet Superpower', *Newsweek*, 17 June 2002 (on the EU as civilian superpower).
[282] 'Why We Must Share America's Dirty Work', *The Guardian* (London), 16 July 2002. See also S Erlanger, 'America The Invulnerable? The World Looks Again', *New York Times*, 21 July 2002.
[283] See K Chongkittavorn, 'US–EU Dispute On ICC More Than Skin Deep', *The Nation* (Thailand), 19 Aug 2002.
[284] See D Rennie, 'US Reneges On Deal For War Crimes Court', *Daily Telegraph*, 7 May 2002. This reliability was again evidenced by the Iraq War of 2003. See N Neuwahl (ed), 'Transatlantic Relations After Iraq' (2003) 8 *European Foreign Affairs Review* (Special Issue).

> presence abroad. However, it is a misconception that the US is out to undermine the ICC.[285]

A backdrop to the ICC debate was the broader argument that the US's global presence acts as a brake on regional hegemony. Robert Kagan, in an article which attracted worldwide publicity, argued that while the EU see multilateralism as a way to constrain the US superpower, global US power was actually necessary for the survival of the European legal paradise:[286]

> Today's transatlantic problem, in short, is not a George Bush problem. It is a power problem. American military strength has produced a propensity to use that strength. Europe's military weakness has produced a perfectly understandable aversion to the exercise of military power. Indeed, it has produced a powerful European interest in inhabiting a world where strength doesn't matter, where international law and international institutions predominate, where unilateral action by powerful nations is forbidden, where all nations regardless of their strength have equal rights and are equally protected by commonly agreed-upon international rules of behavior. Europeans have a deep interest in devaluing and eventually eradicating the brutal laws of an anarchic, Hobbesian world where power is the ultimate determinant of national security and success.[287]

These kinds of divisions were vividly exposed by the Iraq War of 2003 but in a more complex way as Europe itself divided between what the US referred to as 'new' and 'old' Europe.

5.4 Political Accountability

One aspect of the US–EU differences concerned the idea of political accountability. For the US a crucial question was 'Who would the ICC be politically accountable to'? Referring to the ICC and its Prosecutor, Bolton argued that:

> They are effectively accountable to no one. The prosecutor will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight, elected or unelected, in the Statute of Rome. The prosecutor and his or her not-yet-created investigatory, arresting, and detaining apparatus are answerable only to the court, and then only partially. The Europeans may be comfortable with such a system, but that is one reason why they are European and we are not.[288]

[285] Remarks at Aspen Institute, Berlin, Germany, 16 Sept 2002. See also JR Bolton, 'The Risks and Weaknesses of the ICC from America's Perspective' (2001) 64 *Law & CP* 167.
[286] R Kagan, 'Power and Weakness', (June–July 2002) *Policy Review* 113 <www.policyreview.org>
[287] *Id.* See also RD Asmus and KM Pollack, 'The New Transatlantic Project', *Policy Review* (Oct 2002) 115.
[288] See J Bolton, 'Reject and Oppose the ICC', in Frye, above n 82, 37–52 at 44; Danner, n 87 above.

He continued:

> The ICC does not fit into a coherent 'constitutional design' that delineates clearly how laws are made, adjudicated or enforced, subject to popular accountability and structured to protect liberty. There is no such design. Instead, the Court and the Prosecutor are simply 'out there'.[289]

He also dealt with constitutional arguments relating to the encroachment upon US sovereignty and on constitutional liberties and safeguards.[290] The argument was that the US could not accept an international institution that claimed jurisdiction over American citizens higher than the US Constitution.[291] In 1999 he had described the ICC as the product of fuzzy-minded romanticism. It was not just naïve, it was dangerous.[292]

Whatever the general strength of the US critique against European institutionalism, on the specific issue of the ICC, other regions of the world that have not developed such strong institutions, such as Africa, Asia and Latin America, do not appear to see the sovereignty implications of the ICC as problematic.

5.5 Is the ICC a Delegation of State Powers?

EU member states and other advocates for the ICC have argued that it merely represents a delegation of power by states parties:

> If a state wishes to delegate this jurisdiction to an ICC, rather than to try the individual in its own courts, again, this is something it is clearly entitled to do ….[293]

However, critics of the ICC have argued that:

> … territorial jurisdiction cannot be transferred; there is no international precedent that would support the wholesale transfer of territory-based prosecutorial power to a supranational institution. ICTY and ICTR — SC based. Nuremberg — based on the right of victorious powers.[294]

[289] See GF Will, 'A Court That Is Hostile To The Rule Of Law', *The International Herald Tribunal*, 12 July 2002. (on terrorism as the leakage of violence); JC Hulsman and BD Schaefer, 'The Right Way To End the ICC Impasse', *The Heritage Foundation*, 12 July 2002.

[290] See Bolton, n 288 above; H Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80 *Foreign Affairs* 50, and response by K Roth, 'The Case for Universal Jurisdiction', *id* 150.

[291] See J Bolton, 'American Justice and the International Criminal Court', Speech at the American Enterprise Institute, 3 Nov 2003, <http://www.aei.org/news/newsID.19407,filter./ news_detail.asp> Another constitutional argument is that the Statute's prohibition on reservations is inconsistent with the Senate's constitutional prerogative to attach reservations.

[292] J Bolton, 'Courting Danger: What's Wrong with the ICC', (Winter 1998/1999) *The National Interest* 60. Madeleine Morris has also argued that the ICC lacks democratic credentials. See M Morris, 'Judgment Without Democracy', *Washington Post*, 24 July 2002.

[293] The Board of Editors, 'The Rome Statute: A Tentative Assessment', in Cassese *et al*, n 1 above, 1901 at 1911. See also K Roth, 'International Court Will Have No Jurisdiction Over Israel', *Washington Times*, 16 April 2002.

[294] LA Casey and DB Rivkin, 'Court Dismissed: The ICC Is A Snare And A Monstrosity — With No Standing', *LIV National Review* (11 Nov 2002).

The US has taken the latter view. Marc Grossman, Under-Secretary-General for Political Affairs, stated that:

> While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, the US has never recognized the right of an international organization to do so absent consent or U.N.Security Council mandate.[295]

6. CONCLUSIONS

To have any chance of being successful the ICC will need to maintain the substantial political diplomatic and financial capital that this essay has evidenced. Better national implementation and enforcement of international humanitarian law is a crucial objective. An extensive number of states have improved their laws and procedures in this respect. The Prosecutor has stressed the importance of the relationship between the ICC and national jurisdiction in implementing the principle of complementarity:

> … the first task of the Office of the Prosecutor will be to establish links with prosecutors and judges from all over the world. They continue to bear primary responsibility for investigating and prosecuting the crimes within the jurisdiction of the Court, and we are confident that they will make every effort to carry out their duties. We wish to interact with them in order to establish a network of national and international prosecutors who will co-operate with each other and develop the ability to function together.[296]

As for the political opposition to the ICC, history would suggest that the US may eventually come around on the ICC. This was the experience with some but not all of the international human rights treaties. The UN Secretary-General and the UN Under-Secretary-General for Legal Affairs, Hans Corell, have both expressed the view that US will eventually ratify. Time, patience and legitimacy may prove the US wrong in the sense that its reasons are unfounded in the practice of the ICC. US participation would be a strong encouragement for the other states that have opposed the ICC to come on board. It may take till the mid twenty-first century for a proper appreciation of the effectiveness of the ICC as an institution, and its effect on the national implementation of humanitarian law, to be made.

[295] Remarks to the Center for Strategic and International Studies, 6 May 2002, <www.state.gov/p/9949/htm> This view was repeated before the 6th Committee in Oct 2002 with the addition of 'and SC oversight'.

[296] Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, Monday, 16 June 2003, The Peace Palace, The Hague, Statement made by Mr. Luis Moreno-Ocampo, Chief Prosecutor, <http://www.iccnow.org/documents/statements/others/MorenoOcampo16June03.pdf>

PART VII

The Significance of the International Criminal Court

15

The Legal and Political Significance of a Permanent International Criminal Court

DOMINIC MCGOLDRICK

1. INTRODUCTION

PART OF THE fascination of the ICC lies in the range and depth of the issues it raises. These issues extend across law, politics and philosophy. The focus of much analysis of the ICC is on detailed questions of definition, procedure and textual analysis. By contrast, this chapter considers the broader significance of the ICC in terms of its permanence (Part 2), the pursuit of national and international justice (Part 3), its place in the international institutional peace and security structure (Part 4) and in the international legal order (Part 5).[1]

2. PERMANENCE

The precedents of the Nuremberg and Tokyo Tribunals gave an impetus to the development of international criminal law. However, the substantial impulse towards completion of the ICC project was sadly provided by the massive and systematic violations of humanitarian law in the Former Yugoslavia in 1993 and in Rwanda in 1994.[2] Particularly significant in Yugoslavia was that some of the atrocities, the 'ethnic cleansing' and the conditions in the detention camps, were reminiscent of the Nazi Germany era in general and some of the issues considered in the Nuremberg trial in particular. The establishment by the Security Council of the two ad hoc international criminal tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) had involved detailed consideration of the politics[3] and

[1] See D Shelton, *International Crimes, Peace and Human Rights — The Role of the ICC* (Transnational, Ardsley, NY, 2000).

[2] See McGoldrick, *Criminal Trials Before International Tribunals*, in this volume, Pt 3.1. During the Rome conference there was also repeated reference back to the atrocities of the Khmer Rouge in Cambodia (Kampuchea). See SR Ratner and JS Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd edn) (OUP, Oxford, 2001) Pt III; DF Orentlicher, 'International Criminal Law and the Cambodian Killing Fields' (1997) 3 *ILSA JICLJ* 706.

[3] DP Forsythe, 'Politics and the International Tribunal for the Former Yugoslavia' (1995) 5 *Crim LF* 401; DJ Scheffer, 'International Judicial Intervention' (1996) 102 *Foreign Policy* 34; MP Scharf, 'The Politics of Establishing an International Criminal Court' (1996) 6 *Duke JICL* 167; P Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishments' (1996)

practicalities of international criminal institutional procedures and the processes and elements of a contemporary international criminal justice system.[4] Though their progress was painfully slow, the two tribunals displayed the practical realities for international criminal tribunals. Even their critics came to accept that in the day-to-day operation they were fair and conscientious.

The 'permanent' ICC avoids the need for the establishment of ad hoc tribunals with all the attendant political and legal difficulties. These are exemplified by consideration of courts established or proposed for Sierra Leone, East Timor and Cambodia.[5] In August 2000 the SC took the first step towards establishing an independent special court to try war criminals in Sierra Leone by asking the SG to negotiate an agreement with the co-operation of the Sierra Leone government, which initially proposed the idea.[6] The special court was subsequently inaugurated on 2 November 2002. It has severe problems of resources and personnel.[7] In 2000, a UN panel of experts formed to investigate serious allegations against Indonesia of violence in East Timor recommended that the Security Council establish an international war crimes tribunal (like those for Yugoslavia and Rwanda) to try those responsible.[8] By contrast, an Indonesian human rights panel recommended to the country's Attorney-General that top military leaders be tried in Indonesian courts. In 2000, Indonesia established an ad hoc Human Rights Court. Also in 2000, the UN Transitional Administration in East Timor promulgated regulations under which the Dili District Court had exclusive jurisdiction over serious criminal offences, including genocide, war crimes and crimes against humanity. The Dili court faces serious practical and resource problems.[9] Indonesia has not been co-operative and refused to transfer indicted persons to the Dili Court. In 2002, the UN withdrew from negotiations with Cambodia on establishing 'Extraordinary Chambers' for crimes committed during the period of the Democratic Kampuchea because they would not satisfy international standards of justice. Cambodia refused to include provisions that would allow international law to override national legislation, particularly in respect of an amnesty granted

90 *AJIL* 501; Y Beigbeder, *Judging War Criminals: The Politics of International Justice* (St. Martins Press, New York, 1999); GJ Bass, *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals* (Princeton Univ Press, Princeton, 2000); J Colwill, *War Crimes, International Relations and the Law* (Dartmouth, Aldershot, 2002); F Megret, 'The Politics of International Criminal Justice' (2002) 13 *EJIL* 1261.

[4] See M Shaw, 'The ICC — Some Procedural and Evidential Issues' (1998) 3 *J Armed Conflict Law* 65–96.

[5] See D Turns, '"Internationalised" or Ad Hoc Justice for International Criminal Law in a Time of Transition: The Cases of East Timor, Kosovo, Sierra Leone and Cambodia' (2001) 6 *Austrian Rev International and European Law* 123; *Archbold International: Practice, Procedure and Evidence of International Criminal Courts* (Sweet & Maxwell, London, 2002) covers the courts in East Timor and Sierra Leone.

[6] SC Resn 1315.

[7] *Quaere* whether a court like that in Sierra Leone would satisfy the ICC standards for national prosecutions?

[8] *Report of an International Commission of Inquiry on East Timor*, UN Doc A/54/726 – S/2000/59.

[9] See S de Bertodano, 'US in the Dock over International Justice', *The Times*, 7 Jan 2003.

to Leng Sary, a former Khmer Rouge foreign minister. Negotiations between the UN and Cambodia resumed again in January 2003 and an agreement was reached in June 2003. UN backing can be important for the legitimacy of these quasi-international or internationalised courts.

For any conflict that begins or continues after 1 July 2002, the permanent ICC is in place and available. A permanent institution created on the basis of the consent of the State parties to the Statute will have 'greater' legitimacy than ad hoc institutions created by the SC, an organ of limited membership. The UN may be less willing to establish such courts once the ICC is functional because the ICC has wide support and it will be difficult to muster political and financial support for further ad hoc international tribunals.[10]

A factor in a court's institutional legitimacy is the degree to which it administers equal justice in comparable cases.[11] Equally important is whether it is perceived as doing so. The universal potential of the ICC enhances this element of legitimacy. The ICC is not based on the concept of universal jurisdiction but it potentially extends to the whole world via referrals by the SC and by the possibility for non-States parties to accept its jurisdiction.[12] Its investigations, prosecutions and judgments will be critiqued by standards of equal treatment. The ICTY has indicted individuals from all three political communities from the Former Yugoslavia. None the less, the perception has been that its is anti-Serbian and anti-Croatian.[13] This does not ensure that those individual communities accept that the ICTY is legitimate. This management of perceptions of war crimes courts is critical because in many conflict and post-conflict situations alleged war criminals can enjoy hero status within their communities. With international trials there can also be a perception that it is really the people of the State concerned that are being put on trial through representative figures. At both the ICTY and the ICTR the number of indictments and the number of indicted persons in custody gradually rose. With changing political fortunes, the level of those indicted and those in custody has risen from Camp guard (Tadić), Mayor (Akayesu), military generals (Kristić, Blaškić), Prime Minister of Rwanda (Kambunda) up to former President Milošević.[14]

The ICC could also be more cost efficient in the narrow economic sense. The economic and social costs of post-conflict reconstruction can be enormous. To the extent that the arguments that prosecutions deter atrocities and that the

[10] On political support for the ICC see McGoldrick, *National and International Responses to the ICC*, in this volume.
[11] See 'Justice For All', *Financial Times*, 2 July 2002.
[12] Art 12(2) Statute.
[13] Of the first 77 persons indicted, 3 were Bosniaks, 18 were Bosnian Croats, 52 were Bosnian Serbs, and 3 were Serbs. See 'Serb leader surrenders to "the tribunal of evil" ', *The Times*, 25 Feb 2003 (Serbian Radical Party leader Vojislav Seselj surrendered to the war crimes tribunal in The Hague yesterday, promising his supporters that he would 'destroy the tribunal of evil' during his trial).
[14] See D McGoldrick, 'The Trial of Slobodan Milošević: A Twenty-First Century Trial?' in RA Melikan, *The Trial in History — International and Domestic Trials* vol II (Manchester University Press, Manchester, 2003) 179–94.

absence of prosecutions prevents societal reconstruction are valid, then there is also a longer term saving for the international community.

A permanent institution can build up an institutional memory. This can assist with establishing its legitimacy and credibility. The ICC can ensure that its operational elements reduce the policy risks that States associate with unknown institutions. These elements include certainty, predictability, regularity, consistency and de-politicised decision making. It is difficult to predict the fortunes of international institutions. Once established, they tend to build a life of their own. Their political fortunes can ebb and flow, as has been the case, for example, with the International Court of Justice.[15]

3. ENSURING INTERNATIONAL JUSTICE

The Preamble to the Statute concludes with the resolution of the States parties 'to guarantee lasting respect for and the enforcement of international justice'. This is a broadly stated objective. It raises a series of questions. Justice for whom?[16] What kind of justice?[17] Is international justice different from national justice and if so how?[18] It may be helpful to consider the objective of justice from a series of perspectives — deterrence, impunity, legitimacy, legality, accountability, victims, gender, and the relation between national and international justice.

3.1 Deterrence

The Preamble to the Statute refers to the establishment of the ICC as being for the 'sake of present and future generations'. It records a determination 'to put an end to impunity for perpetrators and thus to contribute to the prevention of such crimes'.[19] The value and purpose of prosecutions for gross or systematic atrocities has been much debated.[20] In favour it is argued that prosecutions can assist with

[15] See V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP, Cambridge, 1996).
[16] Cf T Howland and W Calathes, 'The UN's International Criminal Tribunal for Rwanda. Is it Justice or Jingoism for Rwanda: A Call for Transformation' (1998) 39 *Va JIL* 135.
[17] See J Shattuck, 'From Nuremberg to Dayton and Beyond: The Struggle for Peace With Justice' (1999) 3 *Hofstra L & Policy Symp* 27; I Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *EJIL* 561.
[18] See L Sadat, *The ICC and the Transformation of International Law*, ch 3 (Transnational, Ardsley, NY, 2002); V Popovski, 'The ICC: A Synthesis of Retributive and Restorative Justice' (2000) 15(3) *International Relations* 1.
[19] See O Trifterrer, 'The Preventive and Repressive Functions of the ICC', in M Politi and G Nesi (eds), *The Rome Statute of the ICC — A Challenge to Impunity* (Ashgate, Aldershot, 2001); K Annan, 'Advocating for an International Criminal Court' (1997) 21 *Fordham ILJ* 363.
[20] See M Minow, *Between Vengeance and Forgiveness: Facing History After Genocide* (Beacon Press, Boston, 1998) 25–51; M Osiel, *Mass Atrocity, Collective Memory and the Law* (Transaction, New Brunswick, NJ, 1997); M Osiel, *id* 'Why Prosecute? Critics of Punishment for Mass Atrocity' (2000) 22 *HRQ* 118; 'Conference on War Crimes Tribunals' (1998) 13 *Am Univ ILR;* J Malamud-Goti,

the coming to terms with events and can reduce bitterness. Lack of accountability for crimes encourages perpetrators, fuels resentment, and perpetuates violence. Justice is attainable without sacrificing peace.[21] History must be faced.[22] Prosecutions can contribute to the restoration of international peace and security.[23] Critics argue that prosecutions are ad hoc, selective,[24] politicised,[25] deliver partial justice, usually by the 'victor's', perpetuate bitterness and prevent social and ethnic reconstruction. Prosecutions are not necessarily the best or most appropriate policy choice. Peoples and societies must decide for themselves and their decisions to choose alternative mechanisms for dealing with the past should be respected.[26]

That there is some relationship between potential prosecution and deterrence seems self-evident. However, the evidence is, perhaps necessarily, limited or non-existent.[27] From 1941 onwards the prosecution of German and Japanese war leaders was an explicit 'war aim' of the Allied Powers but there is no evidence of any deterrent effect. Repeated warnings to the conflicting parties in the Former Yugoslavia did not prevent continuing ethnic cleansing and atrocities. Atrocities continued after the establishment of the ICTY.[28] Moreover, the atrocities that took place in Kosovo in 1999 were clearly within the jurisdiction of the ICTY.[29]

'Transitional Governments in the Breach: Why Punish State Criminals?' (1990) 12 *HRQ* 1; RJ Golson (ed), *Memory and Justice on Trial* (Routledge, London, 2000).

[21] P Akhavan, 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda' (1997) 7 *Duke JICL* 325; *Id* 'Justice in The Hague, Peace in the Former Yugoslavia?' (1998) 20 *HRQ* 737.

[22] See Minow, above n 20, ch 6.

[23] This was explicitly stated in the SC resolutions establishing the ICTY and the ICTR.

[24] See TLH McCormack, 'Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law' (1997) *60 Alb LR* 68.

[25] See G Simpson, 'War Crimes: A Critical Introduction', in TLH McCormack and GJ Simpson (eds), *The Law of War Crimes — National and International Approaches* (Kluwer, The Hague, 1997).

[26] Many of these arguments were also raised in the context of the Spanish proceedings against General Pinochet of Chile and the related UK proceedings for his extradition. See *R v Bow Street Magistrate and others, ex parte Pinochet Ugarte* (Amnesty International and others Intervening) [1999] 2 All ER 97; R Brody and M Ratner (eds), *The Pinochet Papers: The Case Against Augusto Pinochet in Spain and Britain* (Kluwer, The Hague, 2000).

[27] See D Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 *Fordham ILJ* 473; P Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities' (2001) 95 *AJIL* 7.

[28] Eg, that at Srebrenica in 1995. See D Rohd, *A Safe Area: Srebrenica, Europe's Worst Massacre Since the Second World War* (Penguin, NY, 1997); JW Honig and N Both, *Srebrenica: Record of a War Crime* (Pocket Books, London, 1997). The Dutch Government stepped down after a critical report on Srebrenica published in 2002. See also '*The Fall of Srbrenica, Report of the Secretary-General Pursuant To General Assembly Resolution 53/35*', UN Doc A/54/549 (15 Nov 1999).

[29] The ICTY Prosecutor also examined whether there was sufficient evidence to indict any of those who took part in the NATO action in Kosovo, see n 129 below. She decided that there 'was no basis for opening an investigation into any of those allegations or into other incidents related to NATO bombing', <www.un.org/icty/pressreal/nato061300.htm>; 'Final Report of the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the FRY' (8 June 2000), (2000) 39 *ILM* 1257.

Historically, the likelihood of prosecution would probably correctly be judged to have been virtually non-existent.[30] That the ICC is permanent should serve to increase any deterrence effect. This deterrent effect may be greater for soldiers who receive training and education and operate within a command structure.[31] The general level and quality of humanitarian training around the world has increased immensely, particularly since the end of the Cold War. Where civilians take an extensive role as combatants, as is commonly the case in internal conflicts,[32] the deterrent effect of a potential prosecution may be negligible beside arguments of communal and State self-defence, peer pressure, nationalism and societal hatred induced by political and civil leaders, false stories and ethnic propaganda.[33] Another imponderable in the deterrence debate is that the atrocities could always have been much worse.

Even if the existence of the ICC increases the statistical probability of prosecution, in the face of the other pressures, it might not be significant enough to deter. To the extent that they act rationally, the existence of an ICC might make those engaged in conflicts reluctant to settle or accept defeat. Critics of the ICC have argued that the ability to give dictators and their military and civilian entourages a face-saving way out has historically been an essential component of democratic change.[34] For example, it was alleged that former Yugoslav President Milošević had been offered a safe departure but refused it. Even UN negotiated agreements have contained amnesties for serious crimes. An amnesty provision was part of the Lome Peace Agreement on Sierra Leone of July 1999.[35] Absent such a secure exit, it is argued that victorious political leaders will offer the best hope of protection from prosecutions, and this then serves as a disincentive to accept peaceful political change.

In response it is suggested that people in power rarely agree to go unless under pressure. The absence of a provision for amnesty in the Dayton Peace Agreement for Yugoslavia did not prevent its acceptance.[36] In relation to the Lome Peace Agreement on Sierra Leone, the UN SG specifically expressed the UN's understanding that the amnesties granted in that agreement to political leaders from the Revolutionary United Front did not apply to the crimes of genocide, crimes against humanity, war crimes and other serious violations of international

[30] 'There is some tantalising intercept evidence from 1993 that suggests that the proposal for a court gave pause to some of the Serbian commanders — until they realised that any such tribunal would take years to establish', J Power, 'Milosevic Trial Will Embarrass America', *The Statesman (India)*, 8 Feb 2002.

[31] See the website of International Committee of the Red Cross <www.icrc.org>

[32] See *Third Report of the SG on the Protection of Civilians in Armed Conflict*, S/2000/1300.

[33] See J Bourke, *An Intimate History of Killing: Face-to Face Killing in Twentieth Century Warfare* (Granta, London, 1999).

[34] See JR Bolton, Under Secretary for Arms Control and International Security, 'The United States and the International Criminal Court', Remarks at the Aspen Institute Berlin, Germany, 16 Sept 2002 <http://www.state.gov/t/us/rm/13538.htm>

[35] UN Doc S/1999/777.

[36] See (1996) 35 *ILM* 75.

humanitarian law.[37] The Security Council resolution approving the peace agreement was based on the amnesty provisions not applying to international crimes.[38] Moreover, new democracies that have emerged after authoritarian rule, such as South Africa, Argentina and South Korea, have supported the ICC. How the ICC will treat amnesties in the context of cases or situations that are referred to it is an open question.[39] The orthodox view is that it will depend on the circumstances of the amnesty — who agreed it and in what circumstances. Among the techniques built into the ICC Statute to deal with amnesties are the complementarity principle, the possibility of SC deferral and the exercise of prosecutorial discretion in the interests of justice.[40]

3.2 Ending the Culture of Impunity

The argument from deterrence is linked to that of impunity. To any degree that prosecutions could be a deterrent, then their absence has helped create a 'culture of impunity'.[41] A permanent ICC would increase the probability of prosecution for very serious offences. To that extent it would increase the degree of deterrence and contribute to ending that culture.[42] The argument is that consistent and predictable prosecutions, even if necessarily small in number, can have a limited deterrent effect.[43] They reinforce the normative values inherent in the basic rules

[37] 'The agreement provides for the pardon of Corporal Foday Sankoh and a complete amnesty for any crimes committed by members of the fighting forces during the conflict from March 1991 up until the date of the signing of the agreement … I instructed my Special Representative to sign the agreement with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in Art IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law', *Seventh Report Of The Secretary-General On The United Nations Observer Mission In Sierra Leone*, S/1999/836 (30 July 1999).

[38] SC Resn 1315, preambular para 5.

[39] See Sadat, above n 18 at 83, n 4; 'US non-paper on Amnesties', <gopher://gopher.igc.apc.org:70/00/orgs/iccnatldocs.prepcom4/amnesty.us>

[40] 'The further the reach of international criminal law and the concern of the international community, the more questionable becomes the validity of nationally implemented amnesties', J Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the ICC' (2001) 51 *ICLQ* 91 at 92; M Scharf, 'The Amnesty Exception to the Jurisdiction of the ICC' (1999) 32 *Cornell ILJ* 507; A Mendez, 'Accountability for the Past' (1997) 19 *HRQ* 255; D Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2002) 14 *EJIL* 481.

[41] See WA Schabas, 'Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems' (1996) 7 *Criminal LF* 523; N Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (OUP, New York, 1995); '*International Meeting on Impunity of Perpetrators of Gross Human Rights Violations*' (International Commission of Jurists, Geneva, 1993).

[42] See Akhavan, above n 27, *Beyond Impunity*, who submits that, 'The empirical evidence suggests that the ICTY and ICTR have contributed to peace building in postwar societies, as well as to introducing criminal accountability into the culture of international relations', at 9; Politi and Nesi, *Rome Statute*, above n 19.

[43] See T Meron, 'From Nuremberg to the Hague' (1995) 149 *Military LR* 107; A Roberts, 'The Laws of War: Problems of Implementation in Contemporary Conflicts' (1996) 6 *Duke JICL* 11.

of conflict. Indicted leaders effectively become prisoners in their own State. They are also subject to the follies of changing political fortunes. Such changes can be induced to some degree by outside diplomatic and economic pressure. For example, sanctions against Serbia were maintained because indicted persons remain at large or in positions or power. The handing over of Milošević to the ICTY was instrumental in securing $40 million in additional economic aid. Croatia has gradually been induced to co-operate with the ICTY. Sensing some of these political changes, more indictees have voluntary turned themselves over to the ICTY. Linked to these are broader geo-political changes stemming from the generalised spread of democracy since the 1980s and the end of the Cold War. The resulting political climate has become less propitious for those suspected or indicted for atrocities because the potential allies needed to provide degrees of political protection have reduced. Two major political and military leaders in the Former Yugoslavia, Karadžić and Mladić, remain at liberty but they are effectively inter-national fugitives.[44] NATO has argued that it does not have legal authority to search out persons indicted by the ICTY. It will only arrest them if it comes into contact with them in carrying out its duties, that is, in the normal course of its activities.[45] The only advance on this position over time was that it would interpret this authority in a 'robust manner'.[46]

3.3 Justice as Legitimacy

As noted above, as a permanent institution created on the basis of the consent of the States parties to the Statute will have 'greater' legitimacy than ad hoc institutions created by the SC, an organ of limited membership. As a potentially universal institution it has the opportunity to dispense equal justice in comparable cases in any part of the world. Its practice will be judged by whether its investigations, prosecutions and judgements satisfy standards of equal treatment. Institutionally the ICC appears to have greater legitimacy than the ad hoc tribunals for Yugoslavia and Rwanda. The Serbian population has not accepted the legitimacy of the ICTY. It is perceived as a political institution. Perhaps the strongest critic of the ICTR has been Rwanda itself.[47] Some critics have regarded both tribunals not as pursuing justice but simply as the pursuit of politics by another means. Moreover, conceptions of justice and standards of fairness change over time. [48] At the time of

[44] See LW Andrews, 'Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia' (1997) 11 *Emory Int L Rev* 471; D Orentlicher, 'Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes' (1997) 3 *ILSA JICL* 713.
[45] See NATO Press Release (96)26, (14 Feb 1996), <www.nato.int/docu/pr/1996/>
[46] See P Gaeto, 'Is NATO Authorised or Obliged to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia' (1998) 9 *EJIL* 174.
[47] See McGoldrick, *Criminal Trials Before International Tribunals*, in this volume, Pt 3.8.
[48] See C Warbrick, 'International Criminal Courts and Fair Trial' (1998) 3 *J Armed Conflict Law* 45; MS Ellis, 'Achieving Justice Before the International War Crimes Tribunal: Challenges for Defence Counsel' (1997) 7 *Duke JICL* 519.

Nuremberg, it was seen as an application of justice to afford a trial at all.[49] What international justice requires in the twenty-first century is much more specific than it was understood to require in the trials in 1946. By contemporary international standards, Nuremberg would be criticised for the absence of any appeal, for the wide admissibility of evidence and for limitations on the defendants.[50]

In as much as the ICC incorporates the institution of the SC into its legal structure and gives its specific powers, it becomes open to the same critique as the SC.[51] In particular, it further privileges the unequal power of the five permanent members. As well as giving them the power to refer cases to the ICC and to suspend cases from investigation and prosecution, the veto held by the permanent members will protect them from a SC referral to the ICC.[52] That the Prosecutor and States parties can also refer cases is only a partial answer. An example is Chechnya. The Russian Federation is the State of territorial and nationality jurisdiction. If it were not a state party at the relevant time the only possibility of referral would be from the SC, a possibility which the Russian Federation could veto. However, even those States that share the general critique of the SC took the view that it should not serve as a justification for not creating the ICC.

There have also been broader political and legal critiques against the ICC. The political compromises represented in the Rome Statute represent another triumph of the North's views of human rights and national sovereignty at the expense of those of the South or the developing world. The ICC will be a first world institution to try failing third world states. Louise Arbour, the former ICTY Prosecutor, expressed concern that developing countries might be overshadowed, 'There's a risk that developed countries could impose their own concept of morality and justice on developing countries. It can slide into moral and cultural imperialism if we're not careful'.[53] President Kagame of Rwanda is reported to have stated that there had to be guarantees provided that rich countries would not use the ICC as a political tool against poor countries.[54] Given the design of the ICC and its basis in the principle of complementarity, it is undoubtedly more likely that the national courts that are considered to be unable or unwilling to prosecute to the standard required will tend to be weaker States. The design favours stronger and more stable States and they are likely to be found in the first world. Kofi Annan noted that countries with good judicial systems, which applied the rule of law and prosecuted criminals promptly and fairly, had no need to fear the ICC. The ICC

[49] See JE Persico, *Infamy on Trial* (Viking, New York, 1994). Churchill and Stalin favoured summary execution. It is often forgotten that three defendants were acquitted of all charges and released.
[50] See R May and M Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha' (1999) 37 *Col J Trans L* 725.
[51] India is a notable critic of the SC. Reform has been under discussion in a UN committee for a over a decade.
[52] See Art 13(b) Statute.
[53] Statement on 29 March 2002.
[54] BBC Monitoring Report of Radio Kigali, 12 April 2002. See also *Towards Global Justice: Accountability And The International Criminal Court*, 4–8 Feb 2002, Report on Wilton Park Conference, para 2 (19 March 2002), Conference No WP 661, <http://www.wiltonpark.org.uk>

will have to manage any perception of inequality but it will not be able to balance its docket to reflect geo-political divides. However, predictions do not always come to pass. For example, Yugoslavia in the 1990s was not a third world country but if its history was repeated it would come within the ICC's jurisdiction. States from all continents of the world, both developed and developing, have signed and ratified the Statute. Some of the States opposed to the ICC are developed States, such as the US and Turkey, but also developing States with highly developed judicial systems, such as India.

The cultural relativism critique that is so prominent in human rights discourse has largely been absent from the ICC debate. This is perhaps because, 'some things are beyond cultural relativism. Massacre of innocent civilians is a crime in any culture'.[55] This is not to say that there were no issues where what could be described as human rights concerns were raised:

> Many states were particularly concerned about CAH, and the prospect that an activist court might use it to deal with any human rights issues and to impose a 'Western' standard on all states parties.[56]

Some conflicts on the Statute and EC were shaped by cultural factors, for example, on the death penalty, sexual offences, and forced pregnancy. The detailed EC have helped to reduce this fear of the Statute as a surrogate human rights instrument.

The Rome negotiations were attended by 160 countries,[57] 17 inter-governmental organisations, 14 Specialised Agencies, and 136 non-governmental organisations (NGO's) had observer status.[58] Over 200 NGO's were actually present. They were well organised and well informed. The Coalition for an International Criminal Court (CICC) was established in 1995.[59] By the time of the Rome Conference, it was composed of over 800 NGO's (sometimes referred to as 'civil society organisations') from around the world. It is now a network of over 2,000 NGO's.[60] 'On the Record', was a daily NGO electronic publication linked to the Rome conference. The extensive material provided by Amnesty International was heavily relied on by delegations and was very influential.[61] Major American NGO's such as Human Rights Watch and the American Bar Association have supported the ICC.

[55] Anon, 'Asia Must Take Its Own Stand on Human Rights', 5 April 2002, A Shimbum Publishers, <http://groups.yahoo.com/group/icc-info/message/1768>

[56] In the debate on ratification in Australia, concern was expressed that the definition of genocide could cover Australia's treatment of Aborigines.

[57] UN Trust funds provided the expenses, which allowed representatives from fifty of the world's least developed countries to attend the Rome meeting and delegates to attend Prepcom meetings.

[58] For details see Annexes 2–4 to the Final Act.

[59] See WR Pace and J Schense, 'The Role of Non-Governmental Organizations', in A Cassese, P Gaeta and RWD Jones (eds), *The Rome Statute for an International Criminal Court* (OUP, Oxford, 2002) 105.

[60] The CICC has a number of regional groupings and networks in Africa, Latin America, the Middle East, Asia, Europe, and North America. Its objectives have naturally evolved to reflect the different stages of the ICC project.

[61] Eg, ten leading NGO's adopted eleven principles on an ICC, see *On the Record*, vol(I), Issue 2, 5–6.

After the adoption of the Statute, NGO's have contributed to the work of the PrepCom.[62]

National and international NGO's play many important roles in many fields of international law and international relations.[63] However, it is possible to identify more focused and organised pressure from them in relation to a series of international instruments. Indeed, in some contexts they have become part of the negotiation process as members of State delegations. International instruments in relation to which NGO's have played a particularly significant role include the Convention on the Rights of the Child (1989), the Ottawa Landmines Convention (1997)[64] and the ICC Statute (1998). The work of the CICC thus forms part of what has been termed the 'new diplomacy' of NGO's as part of an asserted 'international civil society'.[65] That diplomacy extends beyond the negotiation of the relevant international instrument. The CICC's work continued after the adoption of the Rome Statute. It has focused on a global ratification campaign to achieve the necessary ratifications to bring the ICC into existence. Its work includes education, disseminating information, monitoring of national developments.[66] National NGO's across the globe have worked on ICC issues. Thousands of seminars, meetings and briefings have been organised. For example, in 2003, the World Federalist Association co-ordinated a national grassroots campaign to raise awareness about how the ICC will help victims of atrocities. Canadian organisations have worked with over 80 countries from five regions to help establish the ICC and implement the Statute into national law. National and international parliamentary organisations have been active in support of the ICC.[67]

Although the ICC was widely supported by the NGO community, that community largely comes from and reflects the dominant concerns of the northern countries. NGO's are pressure groups who represent particular elites. They do not necessarily represent the people or world opinion and they lack the ability to confer general legitimacy.[68]

[62] See 'NGO Contribution to the Making of the Elements and Rules', R Lee (ed), *The International Criminal Court — Elements of Crimes and Rules of Procedure and Evidence* (Transnational, Ardsley, NY, 2001) 427–91.

[63] See the discussion on the role of transnational human rights movements in the US State Department's Annual Human Rights Report for 2000. Another notable NGO initiative has focused on achieving debt reduction for the world's poorest countries.

[64] See the NGO perspective in MA Cameron, RJ Lawson and RW Tomlin (eds), *To Walk Without Fear: The Global Movement to Ban Landmines* (OUP, Oxford,1999).

[65] The SG of the UN, Kofi Annan, is a strong advocate of the role of NGO's, see his Speech to World Conference on Civil Society (Dec 1999). For critical perspectives see D Davenport, 'Unmasking "New Diplomacy"', *Scripps Howard News Service (US)*, 4 Sept 2002.

[66] See <www.iccnow.org> See also <www.npwj.org>

[67] Eg, Inter-Parliamentary Conference, 107th Conference, Morocco, March 2002, <www.ipu.org>, called on world's Parliaments to ensure ratification of the Rome Statute; Parliamentarians for Global Action — an association of 1,350 legislators from 103 countries to promote the resolution of global issues.

[68] See K Anderson, 'The Ottawa Landmines Convention Banning Landmines, the Role of International Non-Governmental Organisations and the Idea of International Civil Society' (2000) 11 *EJIL* 91.

3.4 Justice as Legality

Some of the issues here, such as the vagueness of the offences, have been addressed elsewhere in this book.[69] Although reservations to the Statute are not permitted, a high proportion of the States parties have made declarations or statements on ratification to alleviate domestic concerns or indicate their understanding of the interpretation of the Statute. Two States, France and Cambodia, have used the seven year opt-out for war crimes in Article 124.

The Nuremberg and Tokyo trials were based more on common law than civil law.[70] In the ICTY there has been a notable evolution in the direction of civil law procedural practices, for example, in the role of the pre-trial judge, case management, disclosure, and increased focus on issues of evidence and procedure.[71] The provisions of the Statute represent a hybrid of common and civil law. Non-western legal traditions are not represented in the Statute to any significant degree.[72] Gradually an international criminal procedural system is emerging in its own right as a kind of third way.[73]

3.5 Justice for Victims

A clear theme that runs through the ICC is that of justice for victims.[74] The ICC is the most victim sensitive international institution, building on the efforts of the ICTY and the ICTR.[75] The interests of victims are taken into account in a

[69] See McGoldrick, *Criminal Trials Before International Tribunals*, in this volume, Pt. 4.2; 'The definition of crimes … is breathtakingly broad and elastic and gives the ICC wide discretion in interpreting such offences', CG Landolt, 'New international court lacks basic rules of impartiality', *Windsor Star*, 27 July 2002; 'The problem is not just that the ICC is "above the law" but that there is not much clear and pertinent law to be above', GF Will, 'Tribunal Court Needs Oversight', *The Deseret News* (Salt Lake City), 7 July 2002.

[70] See A Orie, 'Accusatorial v Inquisitorial …', in Cassese *et al*, above n 59 at 1439.

[71] *Archbold International: Practice, Procedure and Evidence of International Criminal Courts* (Sweet and Maxwell, London, 2002); R May *et al* (ed), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer, The Hague, 2000); R May and M Wierke, *International Criminal Evidence* (Transnational, Ardsley, NY, 2002); JRWD Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (2nd edn) (Transnational, Ardsley, NY, 2000); PM Wald, 'To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings' (2001) 42 *Harvard ILJ* 535.

[72] See Sadat, above n 18, ch 4.

[73] See M Delmas-Marty, 'The ICC and the Interaction of International and National Legal Systems', in Cassese *et al*, above n 59 at 1915 (on the hybridisation of rules); M Findlay, 'Synthesis in Trial Procedures? The Experience of International Criminal Tribunals' (2001) 50 *ICLQ* 26 (on styles of trials); V Tochilovsky, 'Trial in International Criminal Jurisdictions: Battle or Scrutiny' (1998) 6 *European Journal of Crime Criminal Law and Criminal Justice* 55; C Safferling, *Towards an International Criminal Procedure* (OUP, Oxford, 2000).

[74] See S Garkawe, 'The Position of Victims in the Proposed International Criminal Court', *Int'l J Victimology*, <www.jidv.com>; M Bachrach, 'The Protection and Rights of Victims under International Criminal Law' (Spring 2000) *The International Lawyer* 34 at 7; 'Victims and Witnesses', in Lee, above n 62 at 427–91.

[75] A Cassese, 'The ICTY and Human Rights' 4 *EHRLR* 329, describes the ICTY being 'essentially set up for the victims of crimes', at 330.

relatively systematic way in the ICC including in the definition of crimes, the EC, the RPE, in the criteria for the judiciary, prosecutor, registry, the submission of their views and concerns to the court, the provisions on reparation, the trust fund for victims.[76]

3.6 Gender Justice

Humanitarian law has been heavily critiqued for its treatment of women.[77] It is a classic example of a patriarchal system.[78] The laws are adopted by men for men and in the interests of men. Although women have historically been victims in conflicts,[79] they are largely invisible in the law of war. The law has been inadequate in recognising rules to protect women. Implementation and enforcement of such rules as have existed have been inadequate. The ICTY and ICTR have sought to operate in a much more gender-sensitive manner.[80] The establishment of the ICC presented an opportunity to express a contemporary perception of gender justice in humanitarian law.[81] The Women's Caucus for Gender Justice sought to ensure that gender was taken account of in all aspects of the ICC.[82] The Statute has been described as 'the most gender sensitive piece of international humanitarian law.'[83] Gender interests are taken into account in a relatively systematic way in the ICC including in the definition of crimes,[84] the EC and the RPE,[85] in the qualifications and criteria for elections for the judiciary,[86] the possibility for the

[76] See D Donat-Cattin, 'The Role of Victims in ICC Proceedings', F Lattanzi and WA Schabas (eds), *Essays on the Rome Statute of the ICC* (Ripa Fagnano Alto, Sirente, 1999) 251, and CP Muttukumaru, 'Reparation for Victims', *ibid* 303.

[77] See KD Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Nijhoff, The Hague, 1997). C Lindsey, *Women Facing War* (ICRC, Geneva, 2001).

[78] H Charlesworth and C Chinkin, *The Boundaries of International Law — A Feminist Analysis* (Manchester University Press, Manchester, 2000) 324–37.

[79] 'Rape and sexual assault have always been a part of warfare', CPM Cleirin and MEM Tijssen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural and Evidentiary Issues' (1994) 5 *Crim LF* 471.

[80] *Id.*

[81] KD Askin, 'Women's Issues in International Criminal Law — Recent Developments and the Potential of the ICC', in Shelton, above n 1 at 47; VL Osterveld, 'The Making of a Gender-Sensitive ICC' (1999) 1 *International Law Forum* 38; B Bedont, 'Gender-Specific Provisions in the Statute of the ICC', in Lattanzi and Schabas, above n 76 at 183; R Copelon, 'Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law' (2000) 46 *McGill LJ* 217.

[82] See 'On the Record', vol (I), Issue 2, 6–7; Women's Caucus for Gender Justice, <www.iccwomen.org>

[83] See statements of H Fry, Secretary of State on the Status of Women of Canada, Special Session of the General Assembly on 'Women 2000: Gender Equality, Development and Peace for the Twenty-First Century', 8 June 2000; A Costa Lobo (Portugal), speaking on behalf of the EU Commission on Status of Women (44th session).

[84] See eg, BS Moshan, 'Women, War and Words: the Gender Component in the Permanent ICC' (1998) 22 *Fordham JIL* 154; DM Koenig and KD Askin, 'International Criminal Law and the ICC Statute', in KD Askin and M Koenig (eds), *Women and International Human Rights Law* vol (II), (Transnational, Ardsley, NY, 2000) 3.

[85] See, eg, 'Evidence in Cases of Sexual Violence', in Lee, above n 62 at 369–91.

[86] Art 36(8) Statute.

Prosecutor to appoint advisers with legal expertise on sexual and gender violence,[87] the establishment by the Registrar of a Victims and Witnesses Unit.[88] The SC has welcomed the inclusion as a war crime of all forms of sexual violence and noted the role the ICC could play to ending impunity for perpetrators of such crimes.[89] The women Heads of State who met at the Millennium Summit expressed support for the ICC.[90]

3.7 Justice as Accountability: Recording History and the Search for the Truth

Inherent in prosecutions is a limited idea and form of accountability of those exercising power.[91] Depending on the particular case and the approach of the particular court, prosecutions can provide a detailed historical record of the broader social and political context for mass crimes. The ICTY and ICTR cases have done this. This social process may be a necessary and significant part of reconciliation. From this perspective, trials are not just a means to punish, but a narrative that rescues the memory and truth in a given society about what happened, and provide a solid basis for real reconciliation.

Before accountability can be achieved there must be mechanisms and institutions to ascertain the truth or the reality of a situation. Therefore, as well as being related to a general sense of accountability, there can be a relation between prosecutions and the search for the truth. In some legal systems, notably of the civil law kind, the pursuit of the 'truth' by the court is the stated objective of criminal proceedings. The Statute contains some references to the truth. Article 54(1) provides that, 'The Prosecutor shall, in order to establish the truth, extend the investigation …'.[92] However, in many national systems there is no such aim. Prosecutions represent an institutionalised form of societal conduct. They are concerned with the establishment of guilt or innocence in defined legal contexts and based on 'evidence' which is 'admissible' in the particular forum. They reduce history and drama to technicalities and procedures.[93] Generally, international criminal tribunals take a wider approach to the admissibility of evidence than national tribunals.[94] Whether the process of establishing guilt or innocence

[87] Art 42(9) Statute.
[88] Art 43(6) Statute.
[89] Statement of President of the Security Council Relating to International Women's Day, (9 March 2000).
[90] 5 Sept 2000.
[91] NJ Kritz, 'Accountability for International Crimes and Serious Violations of Fundamental Human Rights: Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59 *Law & CP* 127; A Neier, *War Crimes, Brutality, Genocide, Terror and the Struggle for Justice* (Times Books, New York, 1998); A D'Amato, 'Peace vs Accountability in Bosnia' (1994) 88 *AJIL* 500, and responses at 715 (Paust), 717 (Ferencz) and (1995) 89 *AJIL* 923 (Akhavan).
[92] See also Arts 69 and 70.
[93] See K Anderson, 'Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials' (1994) 7 *Harv HRJ* 281.
[94] See May and Wierda, above n 50.

reveals the 'truth' or 'truths' of a situation will at best be an indirect or incident consequence.

The value of prosecutions in achieving accountability has to be judged besides other mechanisms and institutions. 'Truth and Reconciliation Commissions' have emerged as an alternative societal technique for coming to terms with atrocities. The generic reference to 'truth' is notable and they have involved elements of confession and storytelling, the involvement of victims and, in some cases, the granting of amnesty under certain conditions. The commissions in South Africa, Chile, Argentina, Brazil, and Uruguay are the most famous but various forms and models have been developed in an increasing number of states.[95] One of the most recently established is that in Sierra Leone.[96] Commissions are under consideration for Bosnia and Indonesia. Truth Commissions have been subject to critical scholarly and political attention.[97] One of the issues for the future will be the relationship between truth commissions and the ICC: would a Truth and Reconciliation Commission be an adequate response for the purpose of satisfying the complementarily principle? The issue was controversial in Rome and is not specifically answered in the Statute. The answer would almost certainly depend on the circumstances of its establishment and functioning.[98]

The development of the international law of human rights since 1945 has also been premised on the idea of accountability.[99] The spread of democracy around the world since the 1970s and the end of the Cold War have accelerated its influence. However, human rights regimes, at both regional and global levels, have a much broader range of objectives than trials or truth commissions.[100] They have mainly been designed with longer-term preventive and monitoring functions. The UN mechanisms for dealing with gross and systematic violations are heavily politicised and ponderous.[101] Some treaty organs like the Human Rights Committee under the International Covenant on Civil and Political Rights have requested special reports where serious violations appear to be taking place and stated that they will refer matters to the SC if they consider it appropriate. Individual complaint

[95] See PB Hayner, 'Fifteen Truth Commission's, 1974–1994: A Comparative Assessment' (1994) 16 *HRQ* 597; *id Unspeakable Truth: Facing the Challenge of Truth Commissions* (Routledge, New York, 2002); NJ Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols (United States Institute of Peace Press, Washington DC, 1995); A McAdams (ed), *Transitional Justice and the Rule of Law* (University of Notre Dame Press, Notre Dame, IN, 1997); R Teitel, *Transitional Justice* (OUP, New York, 1999); JD Tepperman, 'Truth and Consequences' (2002) 81(2) *Foreign Affairs* 128 (noting M Ignatieff's comments that TRC's can reduce the number of lies).

[96] See Second Report of the SG Pursuant to SC Resn 1270 (1990), S/2000/13 (11 Jan 2000).

[97] See Minow, above n 20, ch 4. See also MP Scharf, 'The Case for a Permanent Truth Commission' (1997) 7 *Duke JICL* 375.

[98] See R Goldstone, 'Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals' (1996) 28 *NYUJILP* 485; A Cassese, 'Reflections on Modern International Criminal Justice' (1998) 61 *MLR* 1.

[99] See Ratner and Abrams, above n 2.

[100] See AM Weisburd, 'Implications of International Relations Theory for the International Law of Human Rights' (1999) 38(1) *Columbia J Trans Law* 45.

[101] See P Alston, 'The Human Rights Commission', in P Alston (ed), *The United Nations and Human Rights* (2nd edn) (OUP, Oxford, 2004, forthcoming).

mechanisms like that in the First Optional Protocol to the ICCPR are most effective in respect of low level violations. Although they may have been premised on the idea that dealing with low level violations prevents the escalation into high level violations,[102] they struggle to deal with situations of mass atrocity.

3.8 National and International Justice: The Relationship of the ICC with National Investigations and Prosecutions

As the ICC is based on the principle of complementarity, it is only intended to operate when national investigatory and judicial institutions are unable or unwilling to act. The relationship with national prosecutions and courts will be a central element in the success of the ICC. If a State carries out its obligations to investigate a suspected crime, even if it is decided that there is no reason to prosecute the suspect, the ICC cannot interfere unless there is evidence that the investigation or prosecution were not genuine.[103] A decision that a national system is unable or unwilling to investigate or prosecute will almost inevitably be controversial. What if the inability arises because another State is not co-operating? Does that render the first State as unable or unwilling? What if the foreign State is co-operating with the prosecution but not with the defence or vice versa?

In one sense, the ICC will be most effective when its existence operates to encourage national institutions to comply with their responsibilities under international humanitarian law to investigate and prosecute.[104] Implementation of the Statute may thus pave the way for fuller implementation of the principal international humanitarian law treaties, namely the four Geneva Conventions of 1949 and the two Protocols of 1977. It may be a catalyst to the increasing number of prosecutions for serious international crimes in national systems.[105] Notable recent examples are the attempted prosecutions of General Pinochet (Chile) in Spain[106] and President Habre (Chad) in Senegal.[107] In 2002, a Spanish judge asked the UK authorities to detain Henry Kissinger for questioning in relation to war crimes and terrorism in Chile and Argentina during the 1970s.[108]

[102] As is the case with the ECHR, see D Harris, M O'Boyle and C Warbrick, *Law of the ECHR* (Butterworths, London, 1995).
[103] Art 17 Statute provides more detailed guidance.
[104] See JI Charney, 'International Criminal Law and the Role of Domestic Courts' (2001) 95 *AJIL* 120.
[105] See H Fischer, C Kress and S Luder (eds), *International and National Prosecution of Crimes Under International Law* (Berlin Verlag Arno Spitz, Berlin, 2001).
[106] H Fox, 'The First Pinochet Case: Immunity of a Former Head of State' (1999) 48 *ICLQ* 207; RJ Wilson, 'Prosecuting Pinochet: International Crimes in Spanish Domestic Law' (1999) 21 *HRQ* 927.
[107] The indictment of former President Habre of Chad was the first such example in Africa. Six national and international organisations were parties to the case — see <www.prospect.org> The prosecution was stopped on jurisdictional grounds. Senegal was the first State to ratify the ICC Statute.
[108] In April 2002 a District judge in London refused to issue a warrant for the arrest of Kissinger on charges of war crimes under the Geneva Conventions Act 1957. Under the Geneva Conventions Act 1957 there is no jurisdiction to deal with 'war crimes'. The only jurisdiction is in relation to grave breaches of the Geneva Convention 1949. See <www.icai-online.org/56482,46136.html>

Using legislative provisions on universal jurisdiction,[109] Belgiam indictments have been issued against Iranian, Congolese, Israeli[110] and Palestinian leaders.

The assertion of universal jurisdiction without some other connecting factor remains controversial for States. Curiously, universal jurisdiction appears to be accepted in principle but in practice national legislation permitting prosecutions does not exist, is very limited, or has extensive conditions attached, for example, requiring the residence of the accused. This controversy was evidenced by the individual opinions in the ICJ judgment in the Arrest Warrant case (*Congo v Belgium*).[111] States might be more in favour if the universal or quasi-universal jurisdiction was being exercised by the ICC rather than by States.[112]

In the context of the debate on the Pinochet proceedings, Rosenberg has suggested that, 'an outside threat of justice that could strengthen a nation's own ability to try its criminals'.[113] Chile certainly responded to attempts to prosecute Pinochet by initiating its own procedures.[114] Similarly, there may be an increase in civil actions claiming injury and damages based on the alleged commission of serious crimes. The actions in the US brought under the Alien Tort Claims Act and the Torture Victim Protection Act represent the most highly developed examples of this.[115] Cases have concerned, for example, events in Paraguay, Guatemala, Argentina, Haiti, and Ethiopia. In 2000, after an earlier default judgment, damages of $4.5 billion were awarded against Bosnian Serb leader Radovan Karadžić for war crimes, genocide, rape, torture and other gross violations of human rights against Bosnian Muslims.[116]

4. THE ICC AND THE INTERNATIONAL INSTITUTIONAL PEACE AND SECURITY STRUCTURE

In the course of time the ICC could play an important role in deterrence, ending the culture of impunity and ensuring the various aspects of international justice, in part by encouraging States to live up to their responsibility to investigate and prosecute the relevant offences.[117] Another question is how it will fit into the existing international institutional structure? The ICTY and ICTR are part of

[109] See Turns, in this volume.
[110] In Feb 2003 the Belgian Supreme Court held that proceedings could not be continued while Prime Minister Sharon was in office.
[111] The majority of the court avoided the issue by dealing only with the immunity issue. See D Turns, 'Arrest Warrant of 11 April 2000 (*DRC v Congo*) The ICJ's Failure to Take a Stand on Universal Jurisdiction' (2002) 3(2) *Melbourne J IntL* 383. Belgian legislation was amended in 2003 to comply with the decision of the ICJ on the immunity issue.
[112] It must be recalled that the ICC is not based on a universal jurisdiction approach.
[113] T Rosenberg, 'In Chile, the Balance Tips Toward the Victims', *NY Times*, 22 Aug 2000.
[114] These were stayed because of the state of health of Pinochet.
[115] See C Scott, *Torture as Tort* (Hart, Oxford, 2001).
[116] *Doe v Karadžić* and *Kadić v Karadžić* (2001) 95 *AJIL* 143; <www.ccr-ny.org>
[117] See TJ Farer, 'Restraining the Barbarians: Can International Criminal Law Help?' (2000) 22 *HRQ* 90.

the UN structure. The ICTY is integrated into NATO diplomacy. The concern of some States, particularly the US, has been that the ICC is not institutionally integrated in these ways.[118] It stands alone in splendid judicial isolation. The ICC simply continues the path of what has been termed 'international legal imperialism' — the increasing dominance of normative international legal rules, orders and instiutions (sometimes globally referred to as regimes) over domestic institutions and notions of sovereignty.[119] David Reiff has argued that the ICC is a 'Court of Dreams':

> It is too weak to bring wrongdoers to justice. It is as if the advocates of the court have all concluded that history is at an end,[120] or at least they can interrupt history's tragic march and replace it with international legal norms and the moral convictions of human rights activists, international lawyers, and humanitarian workers. Were there really such as thing as the international community, such assumptions might be warranted. But, as anyone who has been in a place like Rwanda — or watched how decisions are made at the UN, NATO, or the European Union — knows, the international community does not exist. What exists, for better or worse, are tribes, peoples, nation States, and international alliances. It's rank wishful thinking to pretend otherwise.[121]

He continues by suggesting that the ICC is an institutional structure for an international political structure that does not exist:

> In reality, it is the court that is the counsel of despair. Its real rationale derives from the hope that, somehow, law can deliver us from situations which politics and statecraft have failed to deliver us. But the law can never do this, and this time is no exception.[122]

As Wedgwood eloquently expresses it,

> we must be willing to admit that a permanent international criminal court is a good idea whose time has not yet come.[123]

An assessment of these broader critiques is only possible on the basis of a more detailed consideration of the political compromises in the Statute and of the range and nature of States that have aligned themselves with the critique.

[118] See M Reisman, 'Scenarios of Implementation of the Statute of the ICC', in Politi and Nesi, above n 19 at 281 (viewing the Statute as an attempt to amend the Charter) and the comments by Beatrice Le Fraper Du Hellen, *ibid* 299 (ICC designed to be sensitive to political concerns).
[119] See M Weller, 'Security Council Action on the ICC' (2002) 78(4) *International Affairs* 694. Pinochet-type prosecutions and civil claims relating to international wrongs are elements of this. Cf N Berman, 'In the Wake of Empire' (1999) 14 *Am ULR* 1521.
[120] The allusion is to F Fukuyama, *The End of History and the Last Man* (Macmillan, London, 1992).
[121] D Reiff, 'Court of Dreams', 219 (10) *The New Republic* (7 Sept 1998).
[122] *Id.* See also D Moberg, 'Courting Disaster', *In These Times* (US), 10 June 2002 (be wary of penchant for seeking legal solutions to political problems).
[123] R Wedgwood, 'The Pitfalls of Global Justice', *The New York Times*, 10 June 1998, at 29, col A; DP Forsythe, 'International Criminal Courts: A Political View' (1997) 15 *Neths HRQ* 5.

It is submitted, however, that the ICC is not an isolated piece of an international jigsaw. It is an instrument for maintaining international peace and security by the pursuit of justice. It is an instrument that is available to States, to the Prosecutor and to the SC. It will need to be evaluated in terms of peace and security. The idea of trials can have a seducing effect. It is enticing to use legalism rather than politics.[124] Rebecca West welcomed the Nuremberg Trial as, 'a sort of legalistic prayer that the Kingdom of Heaven should be with us'.[125]

What is vital is that the existence of the ICC does not become an excuse for not taking other measures that are necessary to prevent and respond to mass atrocities.[126] The exercise of the whole range of peaceful diplomatic strategies must be used. Education and dissemination of humanitarian and human rights law to the military, and increasingly, to civilian populations remain the most effective long-term strategies.[127] They form part of the pre-existing social and cultural constraints that can serve, to some extent, to inhibit brutality in times of crisis.[128] However, resort to political, economic and even military sanctions must remain open.[129] Kosovo was a paradigm example.[130] There may be contexts where a military victory is a practical prerequisite to prosecutions. Thomas Smith has highlighted this concern of the ICC being turned into a 'virtuous excuse' for states,

> … there are a number of reasons — an a priori preference for law over coercion, public opinion tilting away from intervention and strongly toward tribunals, growing unease over the use of force in humanitarian missions, UN caution, member-state wariness, and possibly the ICC's own ban on aggression — to believe that even when faced with urgent human rights disasters, decision-makers may defer to the court rather than risk intervention. By viably and visibly punishing the worst human rights criminals, the ICC may become a virtuous excuse for states to turn a blind eye to atrocities, a moral free ride on the coattails of humanitarian law.[131]

[124] See B Paskins and J Gow, 'The Creation of International Tribunals from the Perspectives of Pragmatism, Realism and Liberalism' (2000) 15(3) *International Relations* 11.
[125] Foreword to A Neave, *Nuremberg: A Personal Record*, (Little, Brown, Boston, 1978) 5.
[126] See R Goldstone, 'Assessing the Work of the United Nations War Crimes Tribunals' (1997) 33 *Stanford JIL* 1; DM Smolin, 'The Future of Genocide: A Spectacle for the New Millennium' (1999) 22 *Fordham ILJ* 460; TW Smith, 'Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism' (2002) *International Politics* 175.
[127] See M Ignatieff, *The Warrior's Honour, Ethnic War and the Modern Conscience* (Metropolitan Books, New York, 1997); WJ Fenrick, 'International Humanitarian Law and Criminal Trials' (1997) 7 *Trans LCP* 23.
[128] See above n 33 on why violations are committed.
[129] 'Faced with a Hitler or a Pol Pot, the world doesn't require a court. It requires cops, or internationally speaking, a war', P Ruehl, ' World Criminal Court? No Thanks', *Australian Financial Review*, 18 June 2002; P Ackerman, 'Hollywood Dose of Future Reality', *The Daily Telegraph (Sydney),* 18 June 2002; D McGoldrick, 'The Tale of Yugoslavia: Lessons for Accommodating National Identity in National and International Law' in S Tierney (ed), *Accommodating National Identity: New Approaches in International and Domestic Law* (Kluwer, The Hague, 2000) 13–64; J Moore (ed), *Hard Choices — Moral Dilemmas in Humanitarian Intervention* (Rowman and Littlefield, Lanham, 1998).
[130] See Security Council Resolutions 1160 and 1244 on Kosovo; 'NATO's Kosovo Intervention' (1999) 93 *AJIL* 831; ME O'Connell, 'The UN, NATO, and International Law After Kosovo' (2000) 22 *HRQ* 57.
[131] See Smith above n 126 at 178.

5. THE INTERNATIONAL LEGAL ORDER

5.1 Historic Step

When the ICC was agreed in 1998, there was widespread recognition among States, inter-governmental organisations, specialised agencies, and non-governmental organisations that it represented an 'historic step' for the international community in general, and for international law and international justice in particular. It filled a gap in the international legal order and architecture.[132] Many States and civil societies seem to consider it to be the most significant development in international law since the UN Charter in 1945.[133] Harold Koh has characterised the creation of the ICC as 'an international *Marbury v Madison moment*'.[134]

Many States, including the UK and other European States, see the ICC as an important symbol in the development of international law. Assessing symbolism requires a long-term view. The Nuremberg trial is still being evaluated for what it symbolised.[135]

In 1972, Chou En Lai, Chinese Premier and second in command to Mao Zedong, was asked by Henry Kissinger whether the French Revolution in 1789 had benefited humanity? After considering the matter for a while he replied that, 'it is too soon to tell'.

5.2 Public International Law

Is the Statute the most significant event in public international law since the UN Charter in 1945? Is the ICC a 'constitutional moment' that changes the structure of international law?[136] There are big gaps in the ICJ part of the system given the optional nature of its jurisdiction and the minority of States which have made declarations under the optional jurisdiction clause of Article 36(2) ICJ Statute. The ICC could have an important inspirational and educational effect. On a philosophical level it purports to signify global justice, human rights and the rule of law as universal values. The British Government described the ICC as, 'a major advance in international justice'.[137] In March 2002, the UK Ambassador to the

[132] See UN Press Release on 2 July 2002; '[A]t long last, the world has this missing link for the advancement of peace', UN SG's Address to Assembly of States Parties to ICC Statute, 11 Sept 2002.
[133] Chris Patten, the EU's External Relations Commissioner, commented that 'The ICC is the most important advance in the international rule of law since the establishment of the UN', IP/02/991 – Brussels, 3rd July 2002, <www.europa.eu.int/comm/external_relations/see/news/ip02_991.htm>
[134] Cited in NA Lewis, 'US to Renounce its Role in Pact for World Tribunal', *New York Times*, 5 May 2002. In *Marbury v Madison* (1803) the US Supreme Court established its power of judicial review on the actions of the political branches of government.
[135] See D Bloxham, *Genocide on Trial* (OUP, Oxford, 2001).
[136] See LN Sadat and SR Gorden, 'The New Criminal Court: An Uneasy Revolution' (2000) 88 *Geo LJ* 381.
[137] Queen's Speech, Opening of UK Parliament, Nov 1999.

UN stated that, 'The ethics and justice system have gone global and resides within the UN'.[138] Javier Solano, the EU's High Representative for Common Foreign and Security Policy, commented that, 'Europeans believe that it is part of "what we might call world government" '.[139] The Australian Foreign Minister described the ICC as a major human rights initiative. Pope John Paul described the ICC as an:

> important step forward … We must thank God that in the conscience of peoples and nations there is a growing conviction that human rights have no borders, because they are universal and indivisible.[140]

Human rights organisations around the world have praised the ICC. Human Rights Watch (US) described the ICC as a, 'historic step forward for the protection of human rights and the enforcement of international law'.[141]

The weakness of international humanitarian law has always lain in its lack of enforcement. Under the ICC complementarity regime, domestic investigations and prosecutions by a State may serve as a ground for inadmissibility.[142] By stimulating States to investigate and prosecute the offences in the Statute themselves, the ICC does go to the heart of that weakness. The ratification process has entailed extensive consideration of national laws and procedures on humanitarian law to ensure that they parallel the ICC regime. A Cinderella subject on the periphery of international law has moved centre stage.

Lawyers will seek to use the terms of the Statute, the Elements of Crimes and the Rules of Procedure and Evidence as evidence of customary international law.[143] The guiding policy of many States, including the US and the UK, was that the substantive provisions of the Statute should not extend beyond the provisions of customary international law[144] and the EC or RPE could not compromise the integrity of the Statute. At various points in this work the provisions are tested against customary international law, for example, on superior orders. Customary international law forms part of the applicable law but in the event of inconsistency with the Statute, then the Statute prevails.[145] However, it must be kept in mind

[138] Jeremy Greenstock, UN, New York. See also the SC discussion on 'justice and the Rule of Law: The UN Role', S/PV.4833 and 4855 (24 and 30 Sept 2003).
[139] *La Vangardia* (Spain), 7 July 2002.
[140] Message for World Day of Peace, para 7, (1 Jan 2000, Holy See). The Holy See has not ratified the Statute.
[141] '*Summary of Key Provisions of the ICC Statute*' (HRW, New York, Sept 1998), <www.hrw.org/hrw/campaigns/icc/icc-statute.htm>
[142] Art 17 Statute.
[143] This may also be true of elements of the ICC's Relationship Agreement.
[144] Art 10 of the Statute provides that, 'Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'. See WA Schabas, *An Introduction to the ICC* (CUP, Cambridge, 2001) 23. Of course, the States parties to the ICC can undertake procedural or co-operation provisions that are more extensive than under customary law.
[145] Art 21(1)(b) Statute.

that the ICC is a criminal court rather than an academy. As a former judge at the ICTY, Patricia Wald, has commented in relation to the ICTY that:

> The court's image is that it is meant to develop notions of international law and flesh them out. That's a very academic notion. But in the first place this is an international criminal court.[146]

Domestic and international courts quickly began to refer to the Statute. In March 2000, the Amsterdam Court of Appeal in the Netherlands ruled on a petition filed by relatives of two victims of murders in Suriname in December 1982. The petitioners moved the Court to order the prosecution of a Mr Bouterse for having ordered soldiers under his command to torture and execute 15 people, or for having personally participated in the events. The Court considered whether the Dutch Courts could and should be charged with trying the case. In determining whether the alleged acts were punishable under customary international law as war crimes or crimes against humanity (the crime of torture was also considered), the Court relied, inter alia, on the jurisprudence in the ICTY (Tadić and Furundzija) cases, and the ICTR (Akayesu) case, as well as on Article 7 of the ICC Statute.[147] The East Timor Tribunal has used the Rome Statute as a guideline.[148] The ICTY,[149] the Canadian Supreme Court[150] and the ICJ[151] have all referred to the Statute. In time, the ICC's jurisprudence will be relied on in the same way as that of the ICTY and the ICTR.

5.3 The Effect of the Attacks on the US on 11 September 2001

The attacks on the World Trade Centre in New York in 2001 came three years after the Statute. However, their scale and significance was such that there is a serious debate about whether the world after those attacks is different than the one before.[152] For Michael Ignatieff, 'The question after September 11 is whether the

[146] See PM Wald, 'The ICTY Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court' 5 *Journal of Law and Policy,* <www.law.wust.edu/igls/Unconfpapers/p_87_Wald.pdf>; 'An American With Opinions Steps Down Vocally At War Crimes Court', *New York Times*, 24 Jan 2002.

[147] Professor Dugard of Leiden University was requested to advise the Court on the applicable customary international law, addressing in particular whether a State has the power, or even the obligation, to exercise extraterritorial jurisdiction in this matter.

[148] Los Palos East Timor Court, Special Panel on Serious Crimes. The East Timor Action Network, an NGO, has criticised the ad hoc court on East Timor in Jakarta, 'Its jurisdiction is too limited, its indictments badly drawn, and powerful military figures sit in the courtroom to intimidate the judges. Indonesia has refused to extradite any suspects to East Timor'. See <www.etan.org> *Quaere* how would the complementarity principle apply to the East Timor Court?

[149] See *Furundzia*, para 227.

[150] See *United States v Burns* [2001] 1 SCR 283.

[151] See *Arrest Warrant Case*, above n 111.

[152] See M Byers, 'International Law, Terrorism, the Use of Force and International Law After 11 September' (2002) 51 *ICLQ* 401; J Strawson (ed), *Law After Ground Zero* (Glass House Press, Sydney, 2002); A Cassese, 'International Law — Terrorism is also Disrupting Some Crucial Legal

era of human rights has come and gone?'[153] The US Ambassador for war crimes, Pierre-Richard Prosper, has commented that:

> It is clear that September 11th has changed the world and the way we look at transnational threats and crimes. The tragic events of September 11th have forced us to re-examine our traditional notions of security, our understanding of our attackers, and our approaches to bringing the perpetrators to justice.[154]

Since 2001 a 'War against Terrorism' has been undertaken. This has been led by the US but supported by the SC. The SC has imposed obligations on all States to co-operate against terrorism.[155]

There are links between the attacks on the US and the ICC. The UN High Commissioner for Human Rights, Mary Robinson, categorised the attacks as a 'crime against humanity'. This is one of the core crimes within the jurisdiction of the ICC, although it has no retrospective jurisdiction.[156] The ICC only has jurisdiction over a limited number of crimes. Terrorist related offences were not included because of objections from States and, somewhat ironically as it now appears, from the US in particular. Their argument was that the offences were better dealt with by national systems operating in co-operation with other States. Since 2001, States such as Turkey, which wanted terrorist offences included, have again pressed their case.[157]

The 'War on Terrorism' has required a coalition against terrorism.[158] It has put the US in the position of requiring extensive co-operation from States. US President Bush identified an 'axis of evil' composed of Iran, Iraq and North Korea. Each of these is not a party to the ICC Statute.[159] While seeking, and often appearing to demand co-operation from other States, the US has rejected and actively opposed the ICC.[160] The supporters of the ICC see it an instrument of the very kind of global order and co-operation that the coalition against terrorism requires. The UK Foreign Secretary, Jack Straw noted the apparent inconsistencies in the US position. He warned the US that it should not take a stand on ICC if it wished to bolster a 'relationship floundering on differences in the war against

Categories of International Law' (2001) 12 *EJIL* 993; AM Slaughter-Burley, 'The Future of International Law: Ending the US-Europe Divide', <www.war.org/sept-mag/sept-home.html>; M Cox (ed), 'September 11 and after' (2002) 16(2) *International Relations*.

[153] M Ignatieff, 'Is the Human Rights Era Ending?', *New York Times*, (5 Feb 2002).
[154] 'Address at The Peace Palace in The Hague', 19 Dec 2001, <www.state.gov/s/wci/rm/8053.htm> He also deals with US Military Commissions, the possible use of federal courts, and gives statistics on use of military tribunals.
[155] See SC 1373, 1377 (2001) and 1456 (2003).
[156] Art 11 Statute.
[157] On the terrorist bombings in Bali in Oct 2002 see R LaForgia and G Niemann, 'Try Culprits at ICC', *The Australian*, 16 Oct 2002.
[158] See <http://www.homeoffice.gov.uk/terrorism/index.html>
[159] Interestingly, many states that have signed the Statute have not ratified the Chemical Weapons Convention or the 12 anti-terrorist Conventions.
[160] See McGoldrick, *National and International Responses to the ICC*, in this volume, Pt 3.

terrorism and trade policy'.[161] US objections to the ICC have to be weighed against the need to preserve the coalition against terrorism. Moreover, some of the US actions in responding to terrorism appear to be inconsistent with some of its international human rights and humanitarian obligations. These include its treatment and categorisation of detainees and the establishment of military tribunals with no right of appeal.[162] For those States that see the ICC as another human rights instrument,[163] or as another instrument of law that could be used against terrorists,[164] the US position again appears inconsistent at worst, and hypocritical at best.[165] For many States, prosecution by an ICC is a better alternative than the kind of secret military tribunals established by the US.

6. CONCLUSIONS

This chapter has considered the broader significance of the ICC in terms of its permanence, the pursuit of justice, its place in the international institutional peace and security structure and in the international legal order. Some aspects are necessarily speculative but they do seek to set out the criteria against which future assessments of the ICC will be based. The emphasis has been on seeing the ICC as part of complex political and legal system. As with any institution the ICC will have the challenge of establishing its credibility and legitimacy in the hostile world of national and international politics. It will need to tread a fine line between conservatism and dynamism, between caution and activism, between co-operation with States and judgements on their willingness or ability to prosecute and investigate. It will have to navigate between the different interests of States, international institutions, defendants and victims.[166] It will have to use modern communication techniques to ensure that its work is understood and not distorted.[167] It will need to understand the irony pointed out by the late Professor McCoubrey that:

> the prospect of significant numbers of war criminals actually being tried by such a Tribunal is relatively slight. This is not necessarily a matter to be regretted, it must

[161] Statement on 28 March 2002.
[162] See *Decision Relating to Detainees at Guantanamo Bay*, Cuba, Inter-American Commission on Human Rights (2002) 41 *ILM* 532; JJ Paust, 'Anti-Terrorism Military Commissions: Courting Illegality' (2001) 23(1) *Michigan JIL* 1; 'Agora: Military Commissions' (2002) 96 *AJIL* 320.
[163] The US is one of only two members of the UN that are not party to the Convention on the Rights of the Child. It is also not a party to the ICESCR or to the CEDAW.
[164] D Scheffer, 'International Court Would Help in Fight Against Terrorism', *St Louis Post-Dispatch*, 7 Feb 2002; G Barthos, 'Fight Terror With Law, Not Fury', (ICC as a hedge against anarchy), *Toronto Star*, 17 Jan 2002.
[165] See AM Slaughter-Burley, 'Tougher Than Terror', *The American Prospect*, 28 Jan 2002, 22 (noting that military tribunals have historically been used to try spies and saboteurs and that a stronger system of criminal justice will help to prosecute this new form of war).
[166] See M Morris, 'Complementarity and its Discontents: States, Victims and the ICC', in Shelton, above n 1 at 177; Speech of the Registrar at the Assembly of States Parties, regarding defense issues, Second Session of the Assembly of States Parties, <http://www.icc-cpi.int/library/organs/registry/BC-ASP-100903-defense-EN.doc>
[167] The ICTY website receives 675,000 hits per month. For the ICC's website see <www.icc-cpi.int>

> always be borne in mind that primary duty of enforcement rests and must continue in the present condition of international relations upon nation states.[168]

The most convincing evidence that the ICC was successful would be that it never needed to be used. As the ICC Prosecutor stated at the ceremony where he made his solemn undertaking on taking up his post:

> As a consequence of complementarity, the number of cases that reach the Court should not be a measure its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.[169]

However, if the ICC was never used states parties would find it difficult to maintain the diplomatic, political and financial capital needed to maintain it. Somewhere in between the two scenarios the ICC must find its proper place. The judges of the ICC[170] and the Prosecutor[171] are acutely aware of their political and legal responsibilities.[172] The Prosecutor has also pointed to a seeming paradox:

> the ICC is independent and interdependent at the same time. It cannot act alone. It will achieve efficiency only if it works closely with other members of the international community … For that reason, States Parties will necessarily continue to play an active role so that the Court can enhance the wide support that it enjoys today and achieve universal participation … Interdependence is also requested by the complementary nature of the Court. The Court is complementary to national systems. This means that whenever there is genuine State action, the Court cannot and will not intervene.[173]

Whatever its theoretical attraction, complementarity is an unproven doctrine.[174] To reward its supporters and to disarm its critics the ICC will have to ensure that the safeguards built into the Rome Statute are properly and effectively applied. This will result in the Prosecutor and the judges finding that most applications and cases are not within the ICC's jurisdiction or are not admissible.[175]

[168] H McCoubrey, 'War Crimes Jurisdiction and a Permanent ICC — Advantages and Disadvantages' (1998) 3 *J Armed Conflict Law* 9.
[169] Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, Monday, 16 June 2003, The Peace Palace, The Hague, Statement made by Mr Luis Moreno-Ocampo, Chief Prosecutor, <http://www.iccnow.org/documents/statements/others/MorenoOcampo-16June03.pdf>
[170] Statement of the President, at the Second Session of the Assembly of States Parties, The Hague, 9 Sept 2003, <http://www.icc-cpi.int/presidency/PKSpeechEN.pdf> and the other speeches at <http://www.icc-cpi.int/presidency/speeches.php>
[171] See the statement of the Prosecutor at the Second Session of the Assembly of States Parties, The Hague, 9 Sept 2003 <http://www.icc-cpi.int/otp/030909_prosecutor_speech.pdf>
[172] The judges of the ICC are drafting a Code of Ethics for Judges.
[173] *Id.*
[174] See J Bolton, 'American Justice and the International Criminal Court', Speech at the American Enterprise Institute, 3 Nov 2003, <http://www.aei.org/news/newsID.19407,filter./news_detail.asp>
[175] This has been a regular experience for the International Court of Justice.

International lawyers may understand. However, it will demand a sophisticated public information strategy to make this comprehensible to a discerning public audience looking to an international legal system for answers after the traumas of the attacks on the United States on 11 September 2001 ('9–11') and the Iraq War 2003.[176]

[176] See D McGoldrick, *From '9–11' to the 'Iraq War 2003' — International Law In An Age Of Complexity* (Hart, Oxford, 2004).

Appendices

Appendix I: The Judges of the International Criminal Court (Elected in 2003)

Name/State of nationality/term of office

BLATTMANN, René, Bolivia, 6 years

CLARK, Maureen Harding, Ireland, 9 years

DIARRA, Fatoumata Dembele, Mali, 9 years

FULFORD, Adrian, United Kingdom, 9 years

HUDSON-PHILLIPS, Karl T., Trinidad and Tobago, 9 years

JORDA, Claude, France, 6 years

KAUL, Hans-Peter, Germany, 3 years

KIRSCH, Philippe, Canada, 6 years [*President*]

KOURULA, Erkki, Finland, 3 years

KUENYEHIA, Akua, Ghana, 3 years [*First Vice-President*]

ODIO BENITO, Elizabeth, Costa Rica, 9 years [*Second Vice-President*]

PIKIS, Gheorghios M., Cyprus, 6 years

PILLAY, Navanethem, South Africa, 6 years

POLITI, Mauro, Italy, 6 years

SLADE, Tuiloma Neroni, Samoa, 3 years

SONG, Sang-hyun, Republic of Korea, 3 years

STEINER, Sylvia H. de Figueiredo, Brazil, 9 years

USACKA, Anita, Latvia, 3 years

Appendix II: Signatures and Ratifications of the Rome Statute of the International Criminal Court

As of 28 January 2004: 138 Signatories and 92 Ratifications

State	*Signature*	*Ratification, Accession(a)*	*State Party Number*
Afghanistan		10 Feb 2003 (a)	89
Albania	18 Jul 2002	31 Jan 2003	88
Algeria	28 Dec 2000		
Andorra	18 Jul 1998	30 Apr 2001	30
Angola	7 Oct 1998		
Antigua and Barbuda	23 Oct 1998	18 Jun 2001	34
Argentina	8 Jan 1999	8 Feb 2001	28
Armenia	1 Oct 1999		
Australia	9 Dec 1998	1 Jul 2002	75
Austria	7 Oct 1998	28 Dec 2000	26
Bahamas	29 Dec 2000		
Bahrain	11 Dec 2000		
Bangladesh	16 Sep 1999		
Barbados	8 Sep 2000	10 Dec 2002	87
Belgium	10 Sept 1998	28 Jun 2000	13
Belize	5 Apr 2000	5 Apr 2000	8
Benin	24 Sep 1999	22 Jan 2002	49
Bolivia	17 Jul 1998	27 Jun 2002	71
Bosnia and Herzegovina	17 Jul 2000	11 Apr 2002	60*
Botswana	8 Sep 2000	8 Sep 2000	18
Brazil	7 Feb 2000	20 Jun 2002	69
Bulgaria	11 Feb 1999	11 Apr 2002	60*
Burkina Faso	30 Nov 1998		
Burundi	13 Jan 1999		
Cambodia	23 Oct 2000	11 Apr 2002	60*
Cameroon	17 Jul 1998		
Canada	18 Dec 1998	7 Jul 2000	14
Cape Verde	28 Dec 2000		
Central African Republic	7 Dec 1999	3 Oct 2001	41
Chad	20 Oct 1999		
Chile	11 Sep 1998		
Colombia	10 Dec 1998	5 Aug 2002	77
Comoros	22 Sep 2000		
Congo	17 Jul 1998		
Costa Rica	7 Oct 1998	7 Jun 2001	33
Cote d'Ivoire	30 Nov 1998		

(Continued)

Continuation of Appendix II Table

State	*Signature*	*Ratification, Accession(a)*	*State Party Number*
Croatia	12 Oct 1998	21 May 2001	32
Cyprus	15 Oct 1998	7 Mar 2002	55
Czech Republic	13 Apr 1999		
Democratic Republic of Congo	8 Sep 2000	11 Apr 2002	60*
Denmark	25 Sep 1998	21 Jun 2001	35
Djibouti	7 Oct 1998	5 Nov 2002	82
Dominica		12 Feb 2001 (a)	29
Dominican Repbulic	8 Sep 2000		
East Timor		6 Sep 2002 (a)	79
Ecuador	7 Oct 1998	5 Feb 2002	52
Egypt	26 Dec 2000		
Eritrea	7 Oct 1998		
Estonia	27 Dec 1999	30 Jan 2002	50
Fiji	29 Nov 1999	29 Nov 1999	5
Finland	7 Oct 1998	29 Dec 2000	27
France	18 Jul 1998	9 Jun 2000	12
Gabon	22 Dec 1998	20 Sep 2000	21
Gambia	4 Dec 1998	28 Jun 2002	73
Georgia	18 Jul 1998	5 Sep 2003	92
Germany	10 Dec 1998	11 Dec 2000	25
Ghana	18 Jul 1998	20 Dec 1999	6
Greece	18 Jul 1998	15 May 2002	67
Guinea	7 Sep 2000	14 July 2003	91
Guinea-Bissau	12 Sep 2000		
Guyana	28 Dec 2000		
Haiti	26 Feb 1999		
Honduras	7 Oct 1998	1 Jul 2002	76
Hungary	15 Jan 1999	30 Nov 2001	47
Iceland	26 Aug 1998	25 May 2000	10
Iran (Islamic Republic of)	31 Dec 2000		
Ireland	7 Oct 1998	11 Apr 2002	60*
Israel	31 Dec 2000		
Italy	18 Jul 1998	26 Jul 1999	4
Jamaica	8 Sep 2000		
Jordan	7 Oct 1998	11 Apr 2002	60*
Kenya	11 Aug 1999		
Kuwait	8 Sep 2000		
Kyrgyzstan	8 Dec 1998		
Latvia	22 Apr 1999	28 Jun 2002	74
Lesotho	30 Nov 1998	6 Sep 2000	16
Liberia	17 Jul 1998		

(Continued)

Continuation of Appendix II Table

State	*Signature*	*Ratification, Accession(a)*	*State Party Number*
Liechtenstein	18 Jul 1998	2 Oct 2001	40
Lithuania	10 Dec 1998	12 May 2003	90
Luxembourg	13 Oct 1998	8 Sep 2000	19
Macedonia (F.Y.R)	7 Oct 1998	6 Mar 2002	54
Madagascar	18 Jul 1998		
Malawi	2 Mar 1999	19 Sep 2002	81
Mali	17 Jul 1998	16 Aug 2000	15
Malta	17 Jul 1998	29 Nov 2002	85
Marshall Islands	6 Sept 2000	7 Dec 2000	24
Mauritius	11 Nov 1998	5 Mar 2002	53
Mexico	7 Sep 2000		
Monaco	18 Jul 1998		
Mongolia	29 Dec 2000	11 Apr 2002	60*
Morocco	8 Sep 2000		
Mozambique	28 Dec 2000		
Namibia	27 Oct 1998	25 Jun 2002	70
Nauru	13 Dec 2000	12 Nov 2001	45
Netherlands	18 Jul 1998	17 Jul 2001	37
New Zealand	7 Oct 1998	7 Sep 2000	17
Niger	17 Jul 1998	11 Apr 2002	60*
Nigeria	1 Jun 2000	27 Sep 2001	39
Norway	28 Aug 1998	16 Feb 2000	7
Oman	20 Dec 2000		
Panama	18 Jul 1998	21 Mar 2002	56
Paraguay	7 Oct 1998	14 May 2001	31
Peru	7 Dec 2000	10 Nov 2001	44
Philippines	28 Dec 2000		
Poland	9 Apr 1999	12 Nov 2001	46
Portugal	7 Oct 1998	5 Feb 2002	51
Republic of Korea	8 Mar 2000	13 Nov 2002	83
Republic of Moldova	8 Sep 2000		
Romania	7 Jul 1999	11 Apr 2002	60*
Russian Federation	13 Sep 2000		
Saint Lucia	27 Aug 1999		
Saint Vincent and the Grenadines		3 Dec 2002 (a)	86
Samoa	17 Jul 1998	16 Sep 2002	80
San Marino	18 Jul 1998	13 May 1999	3
Sao Tome and Principe	28 Dec 2000		
Senegal	18 Jul 1998	2 Feb 1999	1
Serbia and Montenegro	19 Dec 2000	6 Sep 2001	38

(Continued)

Continuation of Appendix II Table

State	*Signature*	*Ratification, Accession(a)*	*State Party Number*
Seychelles	28 Dec 2000		
Sierra leone	17 Oct 1998	15 Sep 2000	20
Slovakia	23 Dec 1998	11 Apr 2002	60*
Slovenia	7 Oct 1998	31 Dec 2001	48
Solomon Islands	3 Dec 1998		
South Africa	17 Jul 1998	27 Nov 2000	23
Spain	18 Jul 1998	24 Oct 2000	22
Sudan	8 Sep 2000		
Sweden	7 Oct 1998	28 Jun 2001	36
Switzerland	18 Jul 1998	12 Oct 2001	43
Syrian Arab Republic	29 Nov 2000		
Tajikistan	30 Nov 1998	5 May 2000	9
Tanzania (United Rep.)	29 Dec 2000	20 Aug 2002	78
Thailand	2 Oct 2000		
Trinidad and Tobago	23 Mar 1999	6 Apr 1999	2
Uganda	17 Mar 1999	14 Jun 2002	68
Ukraine	20 Jan 2000		
United Arab Emirates	27 Nov 2000		
United Kingdom	30 Nov 1998	4 Oct 2001	42
United States of America**	31 Dec 2000		
Uruguay	19 Dec 2000	28 Jun 2002	72
Uzbekistan	29 Dec 2000		
Venezuela	14 Oct 1998	7 Jun 2000	11
Yemen	28 Dec 2000		
Zambia	17 Jul 1998	13 Nov 2002	84
Zimbabwe	17 Jul 1998		

* 10 countries deposited their instrument of ratification simultaneously at a special UN ceremony on 11 April 2002, crossing the threshold of 60 ratifications needed for the Rome Statute to enter into force. Due to their concerted efforts, each country was designated the 60th State Parties member.
** The US unsigned the Statute and so is not included in the number of signatories

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