A Response to the American View as Presented by Ruth Wedgwood

Gerhard Hafner, Kristen Boon, Anne Rübesame and Jonathan Huston*

Abstract

In her article in this issue Ruth Wedgwood identifies several features of the Statute of the International Criminal Court that raise American concerns. Although these concerns may have political bearing, the Statute provisions are widely within the scope of existing international law. Explicitly allowing amnesties as a ground for denying surrender of a person to the Court would run counter to the need to avoid impunity for the crimes in question, given their nature, the international concern they merit and their existing legal status. The Statute includes clauses that allow the Court to discontinue prosecution in the general interest of justice. Amnesties may be a relevant factor in such a decision. The Security Council has a significant right to refer cases to the Court, as well as the power to suspend a prosecution. The Statute allows for indefinite renewal of the suspension period. The ICC does not exercise universal jurisdiction. Its jurisdiction is based squarely on traditional modes of jurisdiction exercised by states. There is no principle in international law that prohibits states from conferring their sovereign jurisdiction to an international entity. Problems of pacta tertiis *do not arise, since the Statute does not impose legal obligations on non-state parties. The language in the Statute regarding direct and indirect transfer is a valid interpretation of the Geneva Conventions. Additionally, the Statute must be interpreted according to governing provisions of international law, including the Geneva Conventions themselves. There are several provisions in the Statute which deal with non-compliance with requests of the ICC for cooperation. Further provisions will be elaborated by the Assembly of States Parties.*

When the final plenary meeting of the Rome Conference on the Establishment of an International Criminal Court began, rumours spread that a vote would be requested

* Gerhard Hafner was a member of the Austrian Delegation to the Rome Conference, and is currently a member of the International Law Commission. Kristen Boon, Anne Rübesame and Jonathan Huston are JD Candidates at NYU School of Law. In her research for this article, Kristen Boon was supported by an International Fellowship from the AAUW Educational Foundation. The views expressed in this article are solely those of the authors.

on the text of the Statute which had already been adopted in the Committee of the Whole. Indeed, the United States delegation asked for a non-recorded vote, which resulted in a vote of 120 in favour, seven against (including the United States and Israel) and 21 abstentions. The vote of the United States delegation did not come as a surprise. Until the very last moment, the delegation had attempted to prevent agreement on certain issues which it considered to be major flaws of the Statute, and which it argued would present obstacles for US consent. In her contribution to this debate, Ruth Wedgwood[1] quite correctly elaborates on these issues and the problems they present for the United States. An evaluation of Wedgwood's arguments in order to assess their actual weight would seem to be a worthwhile next step in the debate. In particular, the arguments connected with the omission of amnesties, the role of the Security Council, jurisdiction, transfer of population and enforcement deserve closer scrutiny and will be dealt with in this paper.

1 Amnesties

In the first part of her article, Wedgwood points to the political difficulties that might arise from the exclusion of amnesties as a ground for denying the surrender of a suspect to the ICC. In fact, various discussions were held on the question of amnesties, and arguments both in favour and against their inclusion were put forward. The status of reconciliation commissions and the need to ensure a smooth transition from a criminal to a democratic regime were particularly emphasized. This juxtaposition of the duty to prosecute and to reach a situation of justice and peace[2] is corroborated and confirmed by a letter dated 21 January 1999 from Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia, and an *aide-mémoire* of the same date relating to the development of a formula to bring top Khmer Rouge leaders to trial. This instrument stresses, on the one hand, the importance of punishing people responsible for the crimes, in particular genocide, committed between 1970 and 1998. On the other hand, it underscores the need not to jeopardize the ongoing national reconciliation process since 'national reconciliation and peace are indispensable requirements of the Cambodian nation and people, and the trials of offenders to find justice for Cambodia are the goal and obligation to be fulfilled'. These people 'need both peace and justice'.

This juxtaposition seems to require a solution which balances the duty of prosecution with the fact that peace is not always achievable by such means.

This need to give priority to considerations of peace over those of justice in exceptional circumstances brings us face to face, in the domestic system of some states such as Austria, with the principle of legality. According to this principle, the relevant organs are obliged to take all necessary measures of prosecution, irrespective of the political implications of the situation. But even in those countries which hold to this principle there may exist cases where political considerations could take precedence.

[1] 'The International Criminal Court: An American View', this issue, at 93.

[2] Cf. d'Amato, 'Peace vs. Accountability in Bosnia', 88 *AJIL* (1994) 500.

Political considerations may motivate certain cases of extradition, for instance, according to relevant law (unless there is an international legal obligation).[3]

Existing treaty practice also demonstrates respect for amnesties as a defence against extradition. For example, under the UN Model Treaty on Extradition,[4] a mandatory ground for refusal exists 'if the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty'.[5] Even the most progressive treaty on extradition, that of the European Union of 1996, again contains such an exception.[6] The arguments put forward against this practice and considerations dictated by political necessities included the need to avoid impunity, the existing legal situation of the crimes within the jurisdiction of the ICC, the particular nature of such crimes, and the fact that the Statute itself provides certain escape clauses.

However, impunity has become a major issue of the United Nations,[7] as is revealed by documents such as the Annual Report of the Secretary-General. In his 1998 Report, the Secretary-General stated that the Statute of the ICC aims at putting 'an end to the global culture of impunity — the culture in which it has been easier to bring someone to justice for killing one person than for killing 100,000'.[8] Other instances where measures to combat impunity have been elaborated include the Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions[9] and, within the framework of the protection of human rights, the reports submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This Sub-Commission produced a final report on the question of impunity of perpetrators of human rights violations (economic, social and cultural rights),[10] as well as an addition under the heading of 'The administration of justice and the human rights of detainees'[11] which dealt extensively with this problem. The problem of impunity is also commonly included in reports on the progress of conciliation measures in politically unstable areas of the world. Finally, the Statute of the ICC itself commits the ICC to combat impunity, as is expressed in para. 5 of its

[3] The Austrian Act on Extradition and Judicial Assistance in Criminal Matters (Official Journal — BGBl. — No. 529/1979) provides in sect. 34 para. 1 that the Federal Minister of Justice decides on extraditions, also taking into account the interests of the Republic of Austria.

[4] A/RES/45/116 of 14 December 1990.

[5] Article 3(e).

[6] Article 9 (Amnesty) reads: 'Extradition shall not be granted in respect of an offence covered by amnesty in the requested Member State where that State was competent to prosecute the offence under its own criminal law.' It is interesting enough that 'this Article is new in relation to the European Convention on Extradition and the Benelux Treaty but retains the rule already set out in Article 4 of the second additional Protocol to the European Convention. It is in line with Article 62(2) of the Convention on the application of the Schengen Agreement.'

[7] Cf. the international documents on the issue of impunity in: <http://www.derechos.org/nizkor/impu/engl.html>.

[8] UN Doc. A/53/1, Annual Report of the Secretary-General on the Work of the Organization 1998, of 27 August 1998, para. 180.

[9] UN Doc. A/51/457 of 7 October 1996, Annex, paras 118 *et seq.*

[10] UN Doc. E/CN.4/Sub.2/1997/8 of 27 June 1997.

[11] UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997.

Preamble.[12] It would therefore have run counter to the basic objectives of the United Nations if respect for amnesties granted by individual states had become an obligation of the ICC.

The existing legal situation relating to crimes within the jurisdiction of the ICC likewise denies the possibility of respect for amnesties, as is documented by an in-depth analysis undertaken by Amnesty International.[13] As far as genocide is concerned, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948[14] unequivocally imposes upon states parties the duty of punishing the crime of genocide.[15] Similarly, the Geneva Conventions do not contain any exception to the duty of punishment for grave breaches of the Conventions; this is imposed on all states parties irrespective of where and by whom such breach was committed.[16] Granting immunity from prosecution and punishment because of an amnesty would therefore run the risk of violating duties under humanitarian law.[17]

Nevertheless, it must also be noted that Article 6(5) of the (Second) Additional Protocol relating to the protection of victims of non-international armed conflicts[18] requests authorities in power 'to endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'. This provision, however, relates to the particular nature of armed conflicts within a state, as the national criminal law would apply to all such combat activities. It aims to assimilate combatants in such conflicts with those of international conflicts, who are usually not prosecuted for normal combating activities (unless they violate humanitarian law). Hence, the intention of this provision is not to grant immunity from prosecution for breaches of humanitarian law, but only for that which results from activities in normal combat. Roht Arriaza develops this interpretation from the context of this provision;[19] and it is backed up by an authoritative interpretation undertaken by the International Committee of the Red Cross delivered to the ICTY and ICTR in 1995 and 1997.[20] It seems, therefore, rather difficult to use Article 6(5) of the Second Additional Protocol as a vehicle to require ICC respect of amnesties.

As far as crimes against humanity are concerned, once again the legal situation reflected, for instance, in the UN Convention against Torture and Other Cruel,

[12] 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . .'.

[13] Amnesty International, *The International Criminal Court. Making the Right Choices — Part III. Ensuring Effective State Cooperation* (1997), at 47.

[14] 78 UNTS 277.

[15] Article I.

[16] Cf. e.g. Article 49 of the First, Article 50 of the Second, Article 129 of the Third and Article 146 of the Fourth Geneva Convention. See Amnesty International, *supra* note 13, at 48, note 183.

[17] Amnesty International, *supra* note 13, at 49.

[18] 16 *ILM* (1979), at 1391.

[19] Roht-Arriaza, 'Combating Impunity: Some Thoughts on the Way Forward', 59 *Law and Contemporary Problems* (1996), at 87, quoted in Amnesty International, *supra* note 13, at 47, note 176.

[20] Amnesty International, *supra* note 13, at 49, note 186, the letter from the Head of the Legal Division of the ICRC to Douglas Cassel was reproduced in Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities', 59 *Law and Contemporary Problems* (1996) 212.

Inhuman or Degrading Treatment or Punishment[21] and the general policy expressed in various documents relating to the problems of impunity in the human rights context[22] provide ample proof that respect for amnesties would run counter to established practice.[23]

A further argument can be derived from the legal nature of the crimes within the jurisdiction of the ICC. As has been recognized from the outset, these crimes are considered to be of 'international concern'. The Statute reflects this nature in its Preamble by referring to the 'most serious crimes of concern to the international community as a whole' as well as in Article 1 which limits the jurisdiction of the ICC to 'the most serious crimes of international concern'. According to the rule *ut res magis valeat quam pereat* this particular qualifier of the crimes coming under the jurisdiction of the ICC must be interpreted as having a meaning which produces a particular legal effect. The wording suggests that it is intended to imply that all states have an interest in combating these crimes and that all states' interests and rights are therefore affected. This notion also transpires in the characterization of such criminals as *hostes iuris gentium* and enemies of humankind. In this regard, the duty to exercise jurisdiction over those crimes can be considered an *erga omnes* duty, the violation of which makes all states injured states under the meaning of Article 40 of the International Law Commission's draft articles on State Responsibility. According to this draft provision, injured state means, *inter alia*, 'if the right infringed by the act of a State arises from a multilateral treaty, any other State Party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto'.[24]

This particular structure can also be applied to crimes of such a nature insofar as the ICC could be regarded as protecting the interests of all states parties. Only the ICC itself, and not individual states therefore, will be able to decide on whether certain crimes can be prosecuted. The ICC could be regarded as defending the interests of the community of states parties. Unlike the horizontal relations in extradition and judicial assistance, the relation between the ICC and states parties is a vertical one.

Finally, there is no need for such a clause concerning amnesties, as the Statute itself provides sufficient safeguards against excessive prosecutorial latitude. In this regard, not only does the basic principle of complementarity ensure such restraint, but so too do clauses like Article 53 (Initiation of an investigation). Under this Article, the Prosecutor, in deciding whether to initiate an investigation, shall consider whether, taking into account the gravity of the crime and the interests of the victims, there are nevertheless substantial reasons to believe that an investigation would not serve the interests of justice. Hence, individual interests measured by the gravity of the crime and the interests of victims must be weighed against a more general interest of justice. This juxtaposition of the various interests involved recalls the request by the

[21] A/RES/39/46.

[22] See *supra*, notes 9, 10 and 11.

[23] See Amnesty International, *supra* note 13, at 50.

[24] Article 40, para. 2 lit. f; cf. *Yearbook of the International Law Commission* (1985, II), at 25.

Cambodian authorities, referred to earlier, which calls attention to the need to balance these interests. It can therefore be expected that this balance of interests, which is subject to examination by the Pre-Trial Chamber either at the request of the Security Council, an individual state which referred the matter to the ICC, or by the Prosecutor *proprio motu*,[25] will be used to decide whether the interests in ensuring conciliation and a smooth transition of power by not instituting proceedings will override those of seeking justice without regard to (shortsighted) political necessities. Nevertheless, the interests of the community of states are protected in that decisions to forego prosecution are no longer left to individual states, but rather rest with the ICC as an institution representing common interests.

2 The Role of the Security Council

Ruth Wedgwood finds the role of the Security Council under the Statute to be unnecessarily diminished because of delegations' 'reluctance to permit any significant role for the Security Council'. Under the Statute, the Security Council not only has the right to refer cases to the Court,[26] but also has the power to suspend an investigation or prosecution before the Court.[27] Therefore, the Security Council's role is crucial, even if it does not have full control over case referrals to the Court. Such control would result in the Security Council exercising a *dominating* function rather than merely a *significant* one.

Wedgwood points out that the Council has the ability to suspend the ICC's activity for a period of 12 months with the possibility of one renewal. She argues that this is not sufficient because delicate situations will often continue for many years. However, the language of the Statute provides for the possibility of more than one renewal of the Council's request not to investigate or prosecute. Article 16 specifies that a 'request may be renewed by the Council under the same conditions' without restricting the number of times the Council can make such a renewal request.[28]

Based on her reading of the renewal provision, Wedgwood asserts that the Rome Statute attempts to limit the power of the Security Council in a way that hints of a 'palace revolution' and urges that the Court should not strip the Council of its primary role in peace enforcement and peacekeeping. She argues that the Statute is not the place for Security Council reform and wonders whether the five-week conference rushed to a conclusion that is detrimental to the role of the Security Council. She substantiates her remarks by again referring to the renewal provision and writes, '[t]he Rome [S]tatute attempts to limit the power of the Security Council — forbidding the Council from suspending the investigation of a matter for more than 24 months even in a situation where the Council holds that immediate criminal prosecutions

[25] See Rome Statute of the International Criminal Court, opened for signature 17 July 1998, Article 53(2), UN Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

[26] See *ibid*, Article 13(b).

[27] See *ibid*, Article 16.

[28] See *ibid*.

would complicate its efforts for, say, a ceasefire'. As already indicated, however, Article 16 allows for repeated renewal, thus failing to limit the Security Council's powers in the way Wedgwood describes. This compromise was elaborated not only during the five-week Rome Conference, but over the course of six Preparatory Committee sessions extending over three years.

On the issue of the Security Council's right to veto an investigation, the positions of the delegations participating in the negotiations were very diverse.[29] States supported either (1) affirmative action before the court could act;[30] (2) affirmative action to require the Court not to act (Singapore proposal);[31] or (3) no provision at all. With regard to the first option, only Malawi expressly supported the option which prohibits the Court from commencing a prosecution arising from a situation with which the Security Council is dealing, unless the Council otherwise decides.[32] This option would give each permanent member of the Council an effective veto over the Court's investigations. Regarding the second option, 32 states expressed support for such a provision. Of those states, 12 supported the Council's right to renew its veto and four opposed such renewal. For option three, 11 states preferred that the Security Council have no veto power.[33] The United States seemed to support the veto provision, but insisted that the Security Council should not be limited to situations arising under Chapter VII. New Zealand expressed concern at the implied politicization of the Security Council in one of a number of interventions.[34] New Zealand reiterated that the Council has to be open and transparent in its links with the Court. During New Zealand's term as a Council member it had witnessed first-hand how political the Council can be. New Zealand referred to the secret informal consultations where the permanent members of the Security Council have the upper hand in the agenda-setting opposed to the smaller states who rotate every two years.[35] The Czech Republic had already stated in its opening remarks that it could not support the idea that the Security Council should have the power to preclude proceedings before the Court if a situation is being dealt with by the Security Council under Chapter VII. The Czech Republic argued that 'it must be kept in mind that Chapter VII situations are precisely those in which crimes within the Court's jurisdiction are most likely to be committed'.[36] Indonesia reminded the delegates that the Non-Aligned Countries met in Cartagena where they reiterated their declaration on the need to ensure that the

[29] The language of the legislative history is taken from the article Rübesame, 'The Role of the Security Council in the ICC', *N.Y.U.J. Int'l. L. & Pol.* (forthcoming).

[30] See Article 10(7) Option 1, UN Doc. A/CONF.183/2/Add.1 (1998) [hereinafter Draft Statute].

[31] See *ibid,* Article 10(7) Option 2 and Article 10(2) further option.

[32] Information taken from the NGO team reports. Trigger Mechanisms and Admissibility Team, Report 5, (30 June 1998). The publication of the team reports by the NGO Coalition for an International Criminal Court is forthcoming.

[33] Egypt, Iraq, Libya, Nigeria, Oman, Pakistan, Senegal, Sudan, Syria, Tunisia and Venezuela. See *ibid.*

[34] 'New Zealand Protests at Security Council 'Secrecy', On the Record insert in *Terra Viva* (IPS/No Peace Without Justice), 23 June 1998, at 2.

[35] See *ibid.*

[36] Czech Republic, Opening Statement at the Rome Conference for the Establishment of an International Criminal Court (16 June 1998).

Court should be impartial and independent, especially from political influence of any kind, including that of the United Nations organs, in particular the Security Council, which should not direct or hinder the functioning of the Court nor assume a parallel or superior role to the Court.[37] The Italian Minister for Foreign Affairs called for solutions that balance relations between the Security Council and the Court, ensuring that it can perform its judicial functions in total independence and without hindrance.[38]

The final provisions in the Statute, which relate to the position of the Security Council, in particular Articles 13 and 16, reflect a compromise between the positions discussed above, without, however, restricting the power that this main organ of the United Nations enjoys under the Charter.[39]

3 Jurisdiction

Past attempts to deal with international atrocities have been *ad hoc* in nature. The International Military Tribunals for Nuremberg and the Far East, and the recent International Criminal Tribunals for the Former Yugoslavia and Rwanda have temporal and territorial restrictions on jurisdiction. The ICC will not face these limits. The ICC will be a permanent institution, with automatic jurisdiction over the core crimes of genocide, crimes against humanity, war crimes and aggression (once it is defined).[40] Once a state ratifies the ICC treaty[41] or consents to jurisdiction on an ad hoc basis,[42] it automatically recognizes the Court's jurisdiction over all core crimes committed by its nationals or on its territory.[43]

The principle of complementarity establishes the boundaries of the Court's jurisdiction. Unlike the ad hoc tribunals which take primacy over national courts, the ICC proceeds on the opposite assumption. Complementarity, as established in the Statute's Preamble and in Articles 1 and 17 to 20, assumes that national courts will take jurisdiction.[44] The ICC can only exercise its jurisdiction if states are unable or unwilling to prosecute relevant cases.[45] Complementarity illuminates two of the most salient features of the ICC. First, by creating more effective mechanisms at the international and national levels for prosecuting international crimes, the ICC is

[37] Indonesian Minister for Justice, Mr Muladi, Opening Statement before the Plenipotentiaries Conference of the Establishment of the International Criminal Court (16 June 1998).

[38] Minister of Foreign Affairs of Italy, Mr Dini, Opening Statement before the Plenipotentiaries Conference of the Establishment of the International Criminal Court (17 June 1998).

[39] The question of whether the Security Council could adopt a resolution under Chapter VII of the UN Charter interfering with the activities of the ICC will need to be discussed. In this regard, problems could arise such as how the ICC as a subject of international law separate from that of the State Parties could become bound by such resolutions of the Security Council. This matter could be addressed by the relationship agreement still to be worked out.

[40] See Rome Statute, *supra* note 24, Article 5.

[41] See *ibid,* Article 12(1).

[42] See *ibid,* Article 12(3).

[43] With the exception of an optional seven-year opt-out provision for war crimes: see *ibid,* Article 124.

[44] See *ibid*, Articles 1, 17 to 19.

[45] See *ibid,* Article 17(2) and (3).

meant to serve as a deterrent — not just a response — to the perpetrators of serious international crimes. Second, the complementarity regime is premised on the belief that national courts should be the first to act. If the ICC does its job, it will never — or at least rarely — need to take jurisdiction over a case.

Despite the safeguards afforded by complementarity, the United States has been critical of the Court's jurisdictional regime. Under certain circumstances, the Rome Statute permits the Court to exercise jurisdiction over the nationals of states which have not consented to the Court's jurisdiction. This may occur if nationals of a non-state party are accused of committing a core crime on the territory of a state which is party to the Statute, or a state that consents to the Court's jurisdiction on an ad hoc basis. Detractors claim that this potential jurisdiction over the nationals of non-state parties is a contravention of international law and threatens the legitimacy of the ICC. They argue that the consent of the state of nationality of the accused is mandatory if an international criminal court is to exercise jurisdiction. Furthermore, they accuse the Court of asserting universal jurisdiction, undermining accepted principles of state sovereignty.

Despite the Court's potential jurisdiction over nationals of non-state parties, it is important to clarify at the outset that it does not wield universal jurisdiction. At the March–April 1998 session of the Preparatory Committee, Germany introduced a proposal that would have granted the Court universal jurisdiction over all core crimes.[46] This would have allowed the Court to prosecute a crime without securing the consent of any state. While many delegations and NGOs at the Rome Conference found this idea attractive, it was quickly conceded that universal jurisdiction would stretch existing interpretations of international law too far and would be politically unacceptable to key states. A number of alternative proposals were put forward which would have required the consent of any one of several states with sufficient jurisdictional ties to the crime. The most popular solution was proposed by the delegation of South Korea.[47] This proposal would have required the consent of any one of the following states: the state of nationality of the accused; the state on whose territory the crime was committed; the state of nationality of the victim; or the state with custody over the accused.

The United States, however, sought to require the consent of the state of nationality of the accused in every circumstance. Although this position found little support among other delegations, the jurisdictional provisions in the final version of the Statute were tailored to accommodate American concerns. Article 12(2) requires the consent of the state of nationality of the accused *or* of the state on whose territory the crime in question was committed.[48] Rather than making jurisdiction exclusively contingent on the consent of the state of nationality (as the American proposal envisioned), this compromise provision recognizes the consent of the territorial state as a sufficient basis for jurisdiction.

[46] See UN Doc. A/AC.249/1998/DP.2.

[47] See Article 8, UN Doc. A/CONF.183/C.1/L.6.

[48] See Rome Statue, *supra* note 25, Article 12(2).

The jurisdictional regime in the Rome Statute bears no relation to universal jurisdiction (except for cases resulting from situations referred by the Security Council). Rather, Article 12 is rooted in classical bases of jurisdiction that are undisputed in international law. A state may prosecute its own nationals for crimes committed anywhere in the world.[49] Similarly, a state may claim jurisdiction over persons committing crimes on its territory, without regard to the nationality of the person.[50] It is universally recognized that when a state exercises its criminal jurisdiction over persons committing acts on its territory, the state of nationality need not give its consent. Nationality and territoriality are each an independent and sufficient basis for jurisdiction.

By ratifying the ICC treaty, states parties allow the Court to exercise jurisdiction in a given case if they are unable or unwilling to prosecute. The Court may only assert jurisdiction if the traditional bases for the exercise of jurisdiction (nationality or territoriality) apply. It is within the sovereign power of a state to allow an international body to exercise jurisdiction in the same way in which that state may exercise jurisdiction. There is no rule in international law prohibiting a state from conferring its adjudicatory authority on an international court.[51]

Since the Statute's jurisdictional authority derives exclusively from the undisputed jurisdictional authority of the states that are party to the Statute or that have consented to the Court's jurisdiction on an *ad hoc* basis, Article 12 does not raise problems under international law.

Nevertheless, the United States maintains that the Rome Statute violates the principle of *pacta tertiis nec nocent nec prosunt*, by which a treaty may not create obligations (or rights) for a state not party to the treaty without that state's consent. This rule of customary international law is codified in Article 34 of the Vienna Convention on the Law of Treaties (to which the United States is not a party).[52] It is undisputed that the Rome Statute does not create direct legal obligations for non-state parties. However, the ICC treaty may have an effect on the practice of non-state parties. If a national of a non-state party is accused of committing a crime on the territory of a state party, the Court may exercise jurisdiction if it determines that neither state is able or willing to prosecute (nor any other state that has jurisdiction). Since the Court makes such a determination *inter alia* on the basis of the non-state party's attempts (or lack thereof) to prosecute the accused, the non-state party is forced to meet the Statute's threshold for ability and willingness if it wishes to prevent the Court from asserting jurisdiction over its national. Hence, in order for a non-state party to protect its nationals from prosecution by the Court, it must, according to the Statute's complementarity provisions, prosecute its nationals itself.

Although this may appear to be an obligation imposed on non-state parties, which

[49] See P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997) 111.

[50] See *ibid*, at 110.

[51] The European Court of Human Rights, for instance, derives its exercise of jurisdiction directly from the adjudicatory authority of the states parties to the European Convention on Human Rights.

[52] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, Article 34, 1155 UNTS, 331 (entered into force 27 January 1980), reprinted in 8 *ILM* (1969) 679.

would be prohibited under international law by the principle of *pacta tertiis*, it is only a practical consequence of the ICC treaty regime, not a legal one. The non-state party is under no legal obligation to abide by the Statute's provisions on complementarity. It need only alter its practice if it chooses to prevent the Court's assertion of jurisdiction over a national accused of committing a core crime on the territory of a state party. The fact that most states would indeed choose to do this says less about *pacta tertiis* than about political realities.

The complementarity provision of the ICC treaty actually provides a safeguard to non-state parties that is not afforded by domestic judicial systems. Whereas a state on whose territory a crime has been committed may assert jurisdiction regardless of whether the state of nationality is willing and able to prosecute, the Court defers to the state of nationality's jurisdiction if this state genuinely prosecutes the case.[53]

Note that a jurisdictional regime requiring only the consent of the state of nationality of the accused does not solve the supposed *pacta tertiis* problem. Under such a proposal, any other state with jurisdiction over the crime (such as the territorial State) must abide by the Statute's provisions on complementarity in order to prevent the case from being tried by the Court, whether or not that state is party to the Statute. If, for instance, the national of a state party commits a crime on the territory of a non-state party, a jurisdictional provision requiring only the consent of the state of nationality would compel the non-state party on whose territory the crime was committed to demonstrate willingness and ability to prosecute if it wishes to prevent the Court from asserting jurisdiction. The *pacta tertiis* accusations levelled by the United States at the Rome Statute would thus apply equally to a jurisdictional regime requiring only the consent of the state of nationality of the accused.

While the concerns of the United States address the general preconditions to the exercise of the Court's jurisdiction of Article 12(1) and (2), they are particularly acute with regard to the ad hoc consent provision of Article 12(3), the amendment provision of Article 121(5), and the opt-out provision for war crimes of Article 124. Under Article 12(3), a non-state party on whose territory a crime has been committed may consent to the jurisdiction of the Court over nationals of non-state parties accused of committing these crimes. It may do so arguably without subjecting its own nationals to the Court's jurisdiction. This creates an uncomfortable asymmetry. Article 121(5) allows states parties to shield their own nationals from jurisdiction over new crimes added to the Statute under the amendment procedures. Non-state parties may not similarly shield their nationals. Article 124 allows states parties to opt out of jurisdiction over war crimes for the first seven years after the Statute's entry into force. Non-state parties may not similarly opt out. Collectively, these provisions accord more rights to states parties than to non-state parties.

Although this paradoxical arrangement rightly causes political concerns, its legal

[53] As a practical matter, Article 18, Rome Statute, *supra* note 24, allows any state (whether party to the Statute or not) to request a deferral of the Prosecutor's investigation in order for the state to investigate the situation itself. As such, this article provides a mechanism by which non-state parties can postpone the Court's exercise of jurisdiction.

basis is sound. By becoming a party to the treaty, states acquire rights under Articles 121(5) and 124 that they would not have if they remained outside the treaty. This is fully consistent with the Vienna Convention on the Law of Treaties and the customary law it codifies. Furthermore, the conferral of jurisdiction under Article 12(3) poses no more legal problems than the automatic conferral of jurisdiction under Article 12(1).

A further consideration is that the provisions on complementarity require the Court to meet certain thresholds before taking a case. Delegates insisted that the provisions be elaborated as clearly as possible in order to preclude the Court's arbitrary exercise of jurisdiction. Whereas the complementarity provisions specify that the Court will only take jurisdiction in exceptional circumstances, the American argument rests on the assumption that states will readily confer jurisdiction on the Court.

The compromise proposal suggested by one member of the United States delegation, which is mentioned by Wedgwood and which tried to solve the issue of restriction of jurisdiction through the acknowledgement of the acts in question as acts of the state, also raised a large number of problems. An in-depth discussion of these problems was precluded by the late stage of the Conference at which the proposal was introduced.

On the one hand, this concept would have moved the problem from the level of individual responsibility to that of exclusive state responsibility. Thus, this would have involved a total change of the parameters of responsibility, as it cannot be excluded that even different definitions of crimes were to be applied, depending on the kind of responsibility. As long as there is no compulsory jurisdiction relating to states, a state could very easily acknowledge an act as its own without running a great risk of being brought before an international court. The prosecution would then totally depend on the interstate relations existing between the states concerned.

On the other hand, it must not be forgotten that as regards such crimes the states would in any case have the right, if not even the duty,[54] to apply their criminal jurisdiction to the individuals, irrespective of their nationality. Consequently, the only issues where a universal jurisdiction could be doubted are some crimes relating to non-international conflicts and perhaps crimes against humanity. But even there, the threshold for the exercise of jurisdiction by the ICC is so high[55] that for the crimes remaining within the reach of the ICC an optional universal jurisdiction could easily be argued. And the conditions regarding the exercise of jurisdiction sufficiently ensure that there exists a certain link between the crime and the state exercising jurisdiction by surrendering the suspect to the ICC.

It is therefore doubtful whether an interpretative statement reflecting the original proposal would be compatible with Article 120 of the Statute which excludes any reservation. Although this provision does not exclude unilateral declarations, such a declaration would certainly amount to a reservation and would therefore be

[54] The duty to prosecute can be inferred for instance from the Geneva Convention on war crimes.

[55] See, in particular, Article 8(3) for crimes in non-international conflicts and Article 7(2) for the crimes against humanity.

inadmissible.[56] An authoritative interpretation shared by all states parties would, however, be very difficult to achieve, since the first states to ratify the Statute will undoubtedly be those which favour a broad individual responsibility. By contrast, an interpretative declaration does not seem beyond reach, which aims at establishing a symmetric liability as far as Article 12(3) is concerned.

4 Transfer of Population

In its explanation of vote following the adoption of the Rome Statute, the Israeli delegation commented upon the paradoxical situation whereby, despite the bitter history of the Jewish people, this delegation was obliged to cast a negative vote due to the problematic formulation of the war crime of 'transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory'.[57] According to Ruth Wedgwood, this formulation departs from the Geneva Convention and will thus pose an obstacle to the Statute's ratification by both the United States and Israel.

Although the wording actually differs from that of Article 49 of the Fourth Geneva Convention[58] and, consequently, also from that of Article 85(4)(a) of the First Additional Protocol,[59] the addition 'directly or indirectly'[60] is not discarded *prima facie*

[56] Cf. Gerhard Hafner, Article 120, in O. Triffterer, *The Rome Statute, A Commentary Article by Article* (forthcoming).

[57] See Article 8(2)(b)(viii). According to this delegation, this crime was inserted as a means of utilizing and abusing the Statute of the International Criminal Court and the International Criminal Court itself as one more political tool in the Middle East conflict; see: <http://www.un.org/icc/>.

[58] Article 49: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'

[59] Article 85(4)(a): 'the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention'.

[60] This addition was inserted into the text only at the Rome conference. The Zutphen text (A/AC.249/1998/L.13) still contained various alternatives:

> Option 1
> the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;
> [*24] Option 2
> the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
> Option 3
> (i) the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;
> (ii) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
> Option 4

from a possible interpretation of the former legal instruments.[61] The introductory phrase of Article 8(2)(b) limits the Court's jurisdiction with regard to other serious violations of the laws and customs applicable in international armed conflict to those within the established framework of international law. Hence, a clear limitation to excessive interpretation of this crime is introduced. Furthermore, even the addition to the crime of transfer of population cannot result in this crime being associated with a meaning that goes beyond existing international law for the purpose of defining the jurisdiction of the ICC. It is not yet clear how the elements of crimes will lend a more precise definition to this crime; the proposal presented by the United States in the Preparatory Commission, however, restricted the definition of this crime by adding the conditions that 'the accused intended that such transfer would endanger the separate identity of the local population in such occupied territory' and 'that the transfer worsened the economic situation of the local population and endangered their separate identity'.[62] These conditions would certainly allay fears about an extensive interpretation.

5 Enforcement

In her article, Wedgwood expresses her surprise 'that there was not more discussion at Rome of how the ICC could hope to enforce its orders'. It is true that only limited discussions took place in Rome and that these discussions were mostly concentrated on the role of the Assembly of States Parties in this regard. However, this issue had been dealt with even prior to the Rome Conference, although the relevant discussion to a large extent was lost in the darkness of the undocumented history of the Ad Hoc Committee and the Preparatory Committee.[63] Already in the sessions of these Committees, delegations drew attention to the problem of state responsibility and its relation to individual responsibility. At the Rome Conference itself, proposals were submitted which would have accorded a greater role to the Assembly of States Parties in dealing with the issue of non-compliance with the requests by the ICC. It became

No paragraph (f).

The argument of Israel was not directed against the additional element in the formulation, but rather against the inclusion of this crime into the catalogue of war crimes because it was not included amongst the grave breaches of the Fourth Geneva Convention; see: Zimmermann, 'Die Schaffung eines ständigen Internationalen Strafgerichtshofes. Perspektiven und Probleme vor der Staatenkonferenz in Rom', 58 *ZaöRVR* (1998) 68.

[61] Cf. Zimmermann, *supra* note 60, at 68.

[62] UN Doc. PCNICC/1999/DP.4/Add.2, at 11.

[63] In the Preparatory Committee the 'view was expressed that consideration should be given to situations in which a State refused to assist in an investigation in an attempt to shield an individual from criminal responsibility or was unable to provide such assistance owing to the lack of an effective, functioning judicial or legal system. It was suggested that it might be possible to envisage a role for the Security Council in certain situations. It was also suggested that the Statute should envisage a special chamber that would consider refusals or failures to comply with requests for assistance and render appropriate decisions.' 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), (GA, 51st Sess., Supp. No. 22, A/51/22, 1996), para. 345.

quite clear from the outset that a primary role for the Security Council, similar to that which it enjoys in relation to the ICTY and ICTR, was beyond reach due to a widespread resistance to confer broader powers on this organ.

As it stands now, the Statute deals with this issue in Article 87(5) with regard to states not party to the Statute that have entered into an ad hoc arrangement or an agreement with the Court, and in Article 87(7) with regard to states parties. Two further provisions may become relevant in this context: Article 112 on the power of the Assembly of States Parties to consider any question relating to non-cooperation and Article 119 dealing with the settlement of disputes between the states parties and the Court. According to these provisions, the first instance to deal with a question of non-cooperation is the Court itself which may make a first finding. After the Court, it is up to the Security Council to tackle this issue in cases referred by it to the Court or the Assembly of States Parties in all other cases. Although certain discussions were held as to the measures that the Assembly should have the power to take in cases of non-cooperation, there was, however, no sufficient time left to ponder this question in more detail; thus, the kind and amount of measures were left open. It will therefore be up to the Assembly to decide on the possible reactions to a case of non-compliance. Thus, neither the scope nor the limits to such measures can be envisioned as yet.

As to the settlement of disputes, two basic considerations prevailed and were reflected in Article 119 accordingly: on the one hand, it was considered necessary to involve the Assembly of States Parties in the dispute settlement and, on the other, it was not considered possible to provide a compulsory jurisdiction of the ICJ.

However, it must also be borne in mind that the question of non-cooperation, if it should amount to a dispute in the sense of Article 119, requires that a legal obligation of cooperation exist. However, Article 87 is not very clear in this regard: Article 86 states the legal obligation of all states parties to 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court' but only 'in accordance with the provisions of this Statute'. Article 87 only confirms the authority of the Court to make requests to states parties for cooperation. Although this request could be considered as binding in light of the general obligation of Article 86, Article 93, however, entitles states to invoke existing fundamental legal principles of general application within their national laws as grounds for denial of execution of particular measures of assistance.[64] In such cases, consultations shall take place; if no solution can be achieved, the Court has to make concessions to the national laws

[64] These particular measures of assistance comprise, according to Article 93(1):
(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 paragraph 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;

insofar as it has to modify the initial request. Hence, it seems that a clear-cut obligation exists only insofar as the non-compliance would amount to preventing the Court from exercising its functions and powers under the Statute.

That this duty of cooperation constitutes the sensitive angle which only makes the Court function is proven by the existing practice with regard to the Ad Hoc Tribunals. In particular, the *Blaskić* case already offered ample opportunity to consider this duty of cooperation, and the ICTY had to recognize that legislative practice of states did not always fully respect the clear wording of Security Council Resolution S/RES/827 (1991).[65] The sometimes vague formulation of the Rome Statute merely reflects the experience gained by these Tribunals.

6 Conclusions

In light of these arguments, the position of the United States, as reflected in Ruth Wedgwood's article, loses its legal support insofar as the Rome Statute only marginally exceeds the limits drawn by existing international law. Although it attempts to exempt the prosecution of such crimes from the exclusive influence of states, it can hardly be construed as establishing a supranational institution which will interfere with core issues of state sovereignty. In this sense it is by no means as powerful as the European Court or the Commission of the European Communities. As far as the ICC does break new ground in international law, whether such a development is the only means for effectively combating such crimes is open to question. Although we might praise the international community for agreeing on such new legal instruments, we should also deplore the fact that such a development is necessary.

(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.

[65] Cf. for instance, Hafner, 'Limits to the Procedural Powers of the International Tribunal for the Former Yugoslavia', in K. Wellens (ed.), *International Law: Theory and Practice* (1998) 651.