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The International Criminal Court: An American View

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Abstract

The international community has been chastened by the recent record of brutal civil wars. Violation of humanitarian standards has become a tactic of war. The attempt to strengthen enforcement of the law of war through a permanent international criminal court is thus a signal event. The negotiations conducted in Rome in 1998 did not solve all the difficulties that attend a permanent court. These include the problem of amnesties in democratic transitions, the necessary role of the Security Council in UN security architecture, the conflict between broad jurisdiction and developing the law, the role of consent as a treaty principle and third party jurisdiction, the handling of treaty amendments, and the inclusion of 'aggression' as a crime with no agreement on its definition. The necessary role of the United States in providing effective enforcement of ICC judgments warrants continued negotiation to overcome these differences.

The achievement in Rome in July 1998, framing a treaty for a permanent international criminal court,¹ is a millennial event. The twentieth century has been a bloody epoch; its close is best marked with a promise to act against those who disregard the fundamental laws of war and humanity. Cambodia, Bosnia, Rwanda, the Congo, Sierra Leone, and now Kosovo, show that political and military leaders often prefer the intimidation of terror to any reputation for decency. Though only an army can interrupt genocide, the forms of justice are a means to strengthen the norms against indiscriminate violence, integral to the honour of the profession of arms. The awe and finality of trial can help teach respect for humanitarian standards, showing that the safeguard of civilians and non-combatants is a demand of the law, and not a matter of arbitration.

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¹ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998) (adopted 17 July 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court) (published at <http://www.un.org/icc>) [hereinafter ICC Statute].

1 The Achievements of Rome

It is the appointed work of a period of relative stability to create international architecture for the future. The work of the International Law Commission, the Preparatory Committee, and the Diplomatic Conference in Rome was in pursuit of a most worthy end. The resulting Statute for a permanent international court has met many important goals. Ad hoc tribunals have the obvious weakness of requiring a new start-up each time, with sharp limits on *ratione tempore* and *materiae*. The International Criminal Court will have potential jurisdiction over all serious violations of the law of war, in civil conflicts and international engagements, as well as the crime of genocide.² The ICC will be able to prosecute crimes against humanity even where they occur outside a state of war.³ Sexual offences as a weapon of war are newly highlighted, with systematic rape denounced as a war crime; the problem of enforced pregnancies was adroitly handled to avoid a stalemate between the Vatican and women's groups.⁴ In the Rome negotiations, the important idea of 'command responsibility' was broadened to encompass civilian as well as military leaders. In an age of bureaucratic murder, where, for example, the prefecture system in Rwanda was harnessed in service of the genocide, it is important to ensure that seniority is not used as a device to avoid responsibility. Under the Rome standards, a military commander will be duty bound to monitor and control the actions of his subordinates in the field, and a civilian superior may not consciously disregard what his subordinates are doing.⁵ Prescient of the Pinochet case,⁶ the Rome Statute holds public officials liable for plainly criminal acts; the exercise of office, even as a head of state, confers no underlying immunity.⁷

There are other achievements as well. The Rome treaty's doctrine of 'complementarity' recognizes that the primary responsibility for enforcing the laws of armed conflict must still rest with the nation-state, and that an international tribunal with distinctly limited capacity should intrude only where national courts are practically disabled from action.⁸ The treaty's focus on war crimes that are 'part of a plan or policy' or 'large-scale commission'⁹ makes an appropriate distinction between the defalcations that are often committed in war and the truly extraordinary situations that merit international attention. Rome's proviso that later amendments

² *Ibid.* Arts. 5, 6, 8.

³ *Ibid.* Art. 7.

⁴ *Ibid.* Art. 7(1)(g). Article 7(2)(f) defines 'Forced pregnancy' as 'the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law', and notes that '[t]his definition shall not in any way be interpreted as affecting national laws relating to pregnancy'. See Allen, 35 *National Catholic Reporter* (11 Dec. 1998) 13.

⁵ ICC Statute, Art. 28.

⁶ See Judgment — *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division), 24 March 1999.

⁷ ICC Statute, Art. 27; but see *ibid.* Art. 98.

⁸ *Ibid.* Art. 17.

⁹ *Ibid.* Art. 8(1).

to the scope of the treaty should not bind dissenting states¹⁰ is also a realistic accommodation to nation-state concerns about uncertain governance regimes. A permanent court is needed to meet the outrages that have animated public conscience in the last decade — atrocities against civilians and non-combatants, largely in civil conflicts, and need not provide a remedy for all other ills.

It is a difficult task to involve the greater part of the international community in a project such as the International Criminal Court, and the signature of 79 countries as of this writing shows that the conference diplomacy in Rome got something right.¹¹ But it is a necessary service to the project of the Court to also suggest, as a friend, what may not have been so well engineered. The intricacy of a high-tempo five-week conference suggests that these omissions simply reflect the necessary adjustments after a first cut. So, as a designated hitter for the task, and wishing to avoid any hint of churlishness, let me also focus on some of the limitations of Rome. These will centre on several questions: what was not discussed in Rome, several features of the Rome text which may preclude an immediate American signature, and the wisdom of multilateral 'take-it-or-leave-it' treaties.

2 Amnesties

First, Rome skirted the question of amnesties. The architects of institutions must pay some attention to history, and democratic transitions in this century have generally occurred in circumstances that did not permit the criminal trial of outgoing leaders. It is a difficult task to persuade a military junta or putsch leader to leave power voluntarily. Sometimes a military defeat may provide the impetus, as in Argentina's loss in the Malvinas war. Sometimes a military leader may overestimate his own popularity, not calculating that he will lose a referendum, per the example of Augusto Pinochet. The regularization of government may be needed to give confidence to economic investors. But in any of these cases, the transition is delicate, and may have to be purchased at the cost of an amnesty. The recent examples of South Africa, El Salvador, Guatemala and Argentina, not to mention most Central European Communist regimes, are at hand, where circumstances may have permitted a truth commission, with pointed recital of incidents and names, but not free-ranging prosecutions. The UN Security Council does not sit in daily session to guarantee the institution of democratic rule within the polities of the UN's many non-democratic

¹⁰ *Ibid.*, Art. 121(5).

¹¹ As of 29 March 1999, the following countries had signed the Rome Statute of the International Criminal Court: Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Belgium, Bolivia, Burkina Faso, Burundi, Bulgaria, Cameroon, Canada, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Denmark, Djibouti, Ecuador, Eritrea, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Jordan, Kyrgyzstan, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritius, Monaco, Namibia, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Portugal, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Tajikistan, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, Uganda, United Kingdom, Venezuela, Zambia and Zimbabwe.

members. Indeed, one need only look at the faint-hearted language of the 1996 ‘Agenda for Democratization’ issued by the United Nations to take this point.¹² Countries that want to regain democracy are on their own, most of the time.

Many of us hope that taking responsibility at an international level for the prosecution of gross human rights violations — including systematic war crimes, torture and disappearances — will increase the number of instances when a transition can be stabilized without casting a blind eye to the past. There is less point in threatening a barracks coup if a defendant is already in the Hague (or London) awaiting trial; an international actor is not directly vulnerable to pressure. But one must recognize that militaries can still attempt confrontation, holding local democracy hostage, making plain what the cost of any prosecution may be.

What to do in such situations requires prudential judgment and high statesmanship. Sometimes a truth commission, organized under local or international auspices, will be the only course, at least assuring victims that their histories are not forgotten. Sometimes prosecutions can be attempted. But no plenary discussion of this vexing problem was had in Rome. In the August 1997 session of the Preparatory Committee, the United States circulated a nonpaper paper, suggesting that a responsible decision by a democratic regime to allow an amnesty was relevant in judging the admissibility of a case. In conversation, experienced international war crimes prosecutors have also suggested that this is a sensible rule of the road for the ICC. But the Rome Statute omits any direct account of the problem of amnesties, and the failure to acknowledge the legitimacy of considering local amnesties under the Statute may prove troublesome. Common law systems allow prosecutorial discretion, and the ICC will have more work than it can possibly handle; but civil law systems hold that cases must be fully prosecuted, and that a prosecutor is bound to act on any matter where evidence is available. The Rome Statute permits matters to be initiated by referral from states as well as the Security Council and by *proprio motu* decision of the prosecutor, and a complaining state may not always be interested in the conditions of the affected country.

The reluctance to permit any significant role for the Security Council helped to prevent any graceful accommodation of the problem of amnesties. If war crimes investigations were referred to the ICC by the Security Council, the question of domestic stability could be factored in. As a parallel, one may note the reluctance of the Security Council to recommend an ad hoc war crimes tribunal for the Congo under Chapter VII in July and August 1998, when questions of regional stability were foremost in mind. Under the Rome Statute, the Council can suspend the ICC’s activity for a limited term,¹³ but this does not solve the dilemma since the delicacy of a transition will often continue for many years.

The Rome Statute does allow the prosecutor to decline a case where it is not of ‘sufficient gravity’,¹⁴ or where ‘[t]aking into account the gravity of the crime and the

¹² See Boutros Boutros-Ghali, *An Agenda for Democratization*, UN Doc. A/51/761 of 20 December 1996.

¹³ ICC Statute, *supra* note 1, Art. 16.

¹⁴ *Ibid.*, Art. 17(1)(d).

interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'.¹⁵ The ambiguity of this provision limited in its language to the demanding word of 'justice',¹⁶ and the omission of any attempt at conference consensus on the issue of amnesty, warrants no easy confidence that the matter will be discreetly handled. It is hard to see how the Rome Statute will accommodate the danger to democratic transitions in a principled way, when the issue was left sublingual. One may also question whether a judgment of high politics and prudence was best allocated to a prosecutor, rather than an international council of state.

3 The Missing Security Council

A second general concern about the Rome treaty is, indeed, its disregard for the existing security architecture of the United Nations. Writ large, it hints of a palace revolution against the competences assigned by the UN Charter itself. The Security Council is supposed to have pre-eminent authority in matters of international peace and security, within the UN system. Even the General Assembly must refrain from recommendations in the matter, when a crisis is actively upon the Council's agenda.¹⁷ There is, of course, the wish that the Council should follow international law, but even the International Court of Justice has declined to use its provisional powers when the Council has acted preclusively under Chapter VII of the Charter.¹⁸ The Council must often act in areas where international law is not clear or is undergoing change. The International Law Commission recommended in its 1994 draft statute that Security Council permission be obtained whenever the International Criminal Court proposes to act in matters on the Council docket.¹⁹ This deference to Council responsibility in matters of international peace and security was displaced by the so-called 'Singapore' proposal that the Council must act affirmatively in order to suspend an ICC investigation, even in the most delicate situations. The Rome Statute displaces the traditional power of the Security Council, requiring that a vote for suspension of ICC action be renewed every 12 months in the face of changing Council membership, even if an immediate criminal prosecution would complicate efforts for a ceasefire, and arguably forbids the Council from suspending the investigation of a matter for more

¹⁵ *Ibid.*, Art. 53(1)(c).

¹⁶ Cf. *Ibid.*, Art. 53(2)(c).

¹⁷ UN Charter, Article 12(1).

¹⁸ See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. U.S.)*, Provisional Measures, ICJ Reports (1992) 3, 114 (Orders of 14 April 1992).

¹⁹ 'Draft statute for an international criminal court, article 23(3),' in Report of the International Law Commission on the Work of Its Forty-Sixth Session (2 May–22 July 1994), UN Doc. A/49/10, at 85 ('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.').

than 24 months.²⁰ This can be seen as an arrogation of power with far wider implications. It is open to question whether the Rome treaty can constitutionally limit the Council's powers, including the Council's right to set the temporal duration of its own mandates. Article 103 of the UN Charter gives primacy to the Charter over any other treaty obligations, and the Council has exercised its plenary powers in the past to act decisively in many matters affecting international peace and security.

There is a continuing conversation in New York and national capitals about Security Council reform — how to make the Council more directly representative, especially since it intervenes in civil conflicts, without losing the Council's critical ability to act quickly. The debate on Security Council reform has stalled for the moment because of differences in view on how large the Council should become, the desirability of new permanent members, and which countries should assume regional leadership. But the desire to adjust Council structure ought not be mistaken for the view that it should be stripped of its primary role in peace enforcement and peacekeeping. The wish for an independent criminal court may have come at the expense of the Council's role in peace and security, and so grave a derogation may be too profound for a five-week conference to consider with proper reflection.

4 Using the Treaty to 'Develop' the Law

A third problem in Rome was the conflict between establishing broad jurisdiction and developing the law. The Zutphen text of January 1998²¹ and the working text of April 1998²² contained a number of proposals suitable for interesting academic seminars — for example, that use of any weapons system already subject to ban by a widely accepted treaty regime should now be deemed a crime, even for non-treaty parties, irrespective of whether the ban has been assimilated into customary law.²³ The application of this idea to anti-personnel landmines, blinding laser weapons, or chemical and biological weapons, may be attractive to some countries, but including it in a framework statute would have predictably narrowed the breadth of treaty membership. So, too, the option in the Zutphen text and the April 1998 text to criminalize the possession of nuclear weapons, despite the equivocal outcome of the *Nuclear Weapons* case in the International Court of Justice, would have kept the

²⁰ ICC Statute, *supra* note 1, 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.')

²¹ Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands (available at gopher://gopher.icc.apc.org:70/11/orgs/icc/undocs/zutphen/).

²² Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute for the International Criminal Court & Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court), UN Doc. A/CONF.183/2/Add.1 (14 April 1998).

²³ See Report of the Intersessional Meeting, *supra* note 21, at War Crimes (B)(o)(option 2)(ix); Report of the Preparatory Committee, *supra* note 22, at War Crimes (B)(o)(option 4)(ix).

existing nuclear powers outside the treaty framework.²⁴ The Rome conference properly avoided these alternatives.

But Rome's hurried circumstances, if not deliberate decision, brought some changes from current customary law that will make universal adherence far more difficult than was necessary. For example, in a text reportedly offered by Egypt and Syria, the Rome treaty varies from the language of the Fourth Geneva Convention concerning the transfer of population into occupied territories, proscribing any transfer 'directly or indirectly' of the occupying power's own population. Whether or not this represents a permissible gloss of the Fourth Geneva Convention, the change of the stated text from the Geneva Convention makes it difficult for Israel to ratify the Rome Statute while in the midst of a crucial peace process. It has allowed American critics to charge that the Rome treaty represents 'the politicization of what is masquerading as a purely legal process',²⁵ and will pose an obstacle to approval of the treaty in the United States.

5 Third Party Jurisdiction

Another issue that was inadequately analysed in Rome — and of central importance in evolving American attitudes towards the Court — is the question of taking jurisdiction over nationals of states that have not ratified the treaty. The issue of universal jurisdiction was not discussed at all in the plenary sessions, and was compromised in a way that left all sides unhappy. One argument in favour of allowing the prosecution of the nationals of non-treaty parties is that states often prosecute foreign nationals for matters that occur within their state territories (the principle of territoriality), or affect their citizens as victims (the principle of passive personality), or merely affect state interests (the principle of protective jurisdiction). The consent of the foreign national's state is not required. A broad criminal jurisdiction has certainly been exercised by the United States in the prosecution of extraterritorial conduct in the fields of narcotics, securities regulation and antitrust, among others. But there is arguably a difference between exercising jurisdiction as part of national criminal justice authority, and turning a defendant over to an international body in which his own state has chosen not to participate. All states claiming territorial integrity and political independence within the Westphalian system are bound to respect the domestic governance of other countries, including their legitimate exercise of public authority over criminal behaviour, limited by the jurisdictional rules of international law. But, one might argue, states are not obliged to participate in an international body. The genius behind the Rome Statute was to build a stable regime founded on state consent, rather than the peremptory authority of the Security Council. It may, then, seem in tension to prosecute third party nationals under that regime.

Admittedly, many recent international treaty regimes, including those directed at

²⁴ See Report of the Intersessional Meeting, *supra* note 21, at War Crimes (B)(o)(option 2)(vi); Report of the Preparatory Committee, *supra* note 22, at War Crimes (B)(o)(option 4)(vi).

²⁵ Bolton, 'Courting Danger: What's Wrong with the International Criminal Court', *The National Interest* (Winter 1998/99), at 60, 64 note 8.

terrorism, have used universal jurisdiction as a means of enforcement. Criminals involved in airplane hijacking,²⁶ airplane bombings,²⁷ and attacks on diplomats as internationally protected persons²⁸ can be tried in the courts of any treaty signatory, no matter the place of the offence or the nationality of the victim. The treaties against hostage-taking²⁹ and torture³⁰ also provide for universal jurisdiction, as the lawyers for General Augusto Pinochet have recently learned. But universal jurisdiction has generally been exercised among treaty parties and only for national courts.³¹ Use of universal jurisdiction in the operational law of war has also been measured. The 1949 Geneva Conventions employ it for grave breaches, but these four conventions are limited to the deliberate mistreatment of civilians, prisoners of war, the wounded and the shipwrecked. Many of the other limits on war stem from the Hague regulations, or are reflected in the laws and customs of war, and neither of these sources of law directly provides for universal jurisdiction. Protocol I to the Geneva Conventions defines as a grave breach any disproportionate use of force, or the use of force in environmentally objectionable ways,³² but the United States and a number of other countries have not yet ratified Protocol I. Thus, the universal jurisdiction created by Rome would mean something new, at least for American troops stationed abroad.

The lynchpin of the Rome treaty is supposed to be its foundation in consent. The proffered reason for creating a permanent criminal court by treaty, rather than through the exercise of the Security Council's Chapter VII powers, was that an institution of fundamental importance should have the solid grounding of direct state agreement. To be sure, states have consented to the United Nations Charter which empowers the Council, but it was felt (philosophically and politically) that a framework institution like the ICC should ground its legitimacy on the immediate consent of participating states. The exercise of third-party jurisdiction is in tension with that claim.

The halfway covenant reached in Rome on the exercise of third-party jurisdiction

²⁶ Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague 16 Dec. 1970, entered into force 14 October 1971, 22 UST 1641, TIAS No. 7192, 860 UNTS 105.

²⁷ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention), 23 Sept. 1971, 24 UST 564; TIAS No. 7570, 974 UNTS 177.

²⁸ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 14 Dec. 1973, 28 UST 1955, TIAS No. 8532, 1035 UNTS 167.

²⁹ International Convention against the Taking of Hostages, adopted 17 Dec. 1979, GA Res. 34/146, 34 UN GAOR Annex, UN Doc. A/34/819, at 5 (1979), TIAS No. 11081, reprinted in 74 *AJIL* (1980) 277.

³⁰ International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, GA Res. 39/46, UN GAOR, 39th Sess., Supp. No. 51, UN Doc. A/39/51 (1984), S. Treaty Doc. No. 100–20 (1988), 1465 UNTS 85, reprinted in 23 *ILM* (1984) 1027, as modified, 24 *ILM* (1985) 535.

³¹ Gerhard Hafner's example of the European Court of Human Rights is inapposite, for that court does not exercise criminal jurisdiction, and exercises its jurisdiction only among treaty parties. See Hafner, Boon, Rübesome and Huston, 'A Response to the American View as Presented by Ruth Wedgwood', this issue, at 117 note 51.

³² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 12 Dec. 1977, Art. 35, 1125 UNTS 3, reprinted in 16 *ILM* (1977) 1391.

has also been seen by some observers as inconsistent with the central purpose of the institution. A South Korean proposal would have allowed third-party jurisdiction with the consent of any of four states — where the conduct occurred, the state of the victim, the state of the offender, or the state of custody. In a decision taken just before the end of the Rome negotiations, the conference bureau chose half-a-loaf. For non-state parties, jurisdiction can be taken over a particular defendant if consent is given by the state of the place of conduct or the defendant's nationality, but not if consent is had only from the state of custody or of the victim.³³ The only exception is a matter referred by the Security Council.³⁴ In a genocide against his own citizens, a national leader will be insulated unless his country has become and remained a treaty party (not exercising the one-year right to exit) or the Security Council has acted against him. In war-torn countries slow to ratify the treaty, the problem is evident — a *genocidaire* leader will not agree to ad hoc jurisdiction for crimes committed against his own people. There will not be consent from the state where the offence occurred, or the state of nationality of the offender. Thus, the final text gives undue shelter to the very civil war conflicts that were the moral impetus for the negotiation of a Rome treaty. Instead, third-party jurisdiction is reserved for international wars, where the state in whose territory the offence occurred is likely to consent.

This is standing the treaty on its head, some critics have charged, since it will leave third-party nationals vulnerable only in one kind of conflict. The United States has felt keen worry over the issue of third-party jurisdiction for the period (perhaps indefinite) during which it remains outside the treaty, for fear that American troops deployed abroad in operations of peace enforcement, peacekeeping, rescue of nationals, freedom of navigation, and anti-terrorism may be the subject of a referral by an ill-intentioned state. Despite the considerable protections of complementarity³⁵ and a defence of superior orders unless an order was manifestly unlawful,³⁶ the worry is that much of the damage to the body politic is done once a defendant is within the toils of the law. There is an ongoing and principled debate about the appropriate occasions for the use of force abroad — the place of unilateral action, the limits of self-defence where there has not yet been an armed attack (for instance, is mere capability ever enough in the case of biological or chemical weapons, if there is an existing terrorist structure?), and what kind of evidence must be gathered or revealed to justify a claim of imminent danger and the choice of a target. The worry of the United States is that in an unpopular conflict, there is a real chance that an adversary or critic will choose to misuse the ICC to make its point.

³³ ICC Statute, *supra* note 1, Art. 12(2). Article 12(2) reads:

[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

³⁴ *Ibid.*, Arts. 12(2) and 13.

³⁵ *Ibid.*, Arts. 17, 18, and 20.

³⁶ *Ibid.*, Art. 33.

Some examples may be illustrative. The declaration of armed ‘technical vehicles’ as presumptively hostile under the rules of engagement of the Somalia peacekeeping operation, and the use of bubble protection zones in naval escort operations in the Tanker War in the Gulf, show that the limits of the law of self-defence have been subject to considerable re-examination and reflection in recent years. Even the NATO intervention in Kosovo, which has been widely heralded despite the absence of a Chapter VII resolution authorizing the use of force or any evident theory of self-defence, shows that the predicates for the use of force may change over time. Though the justice of a war, *jus ad bellum*, stands apart from the issue of *how* a war is fought, *jus in bello*, a realist understands that the scrutiny of methods is often far more searching in an unpopular conflict. The role of the United States in balance of power structures in Asia and Europe, and in support of transcontinental peacekeeping and peace enforcement operations, together with the deployment of 200,000 American troops abroad, may leave the United States in a unique position in regard to the Court. Certainly there remain good faith debates about the modern application of proportionality — for example, how much of a dual use electrical system can be destroyed to suppress radar and anti-aircraft systems, or whether there is a duty to use ‘smart’ weapons held in scarce supply when doing so may save civilian lives. The United States armed forces, including their leaders and planning staffs, take the duty of proportionality most seriously, but it should not surprise any observer that judgment of the issue by an unsympathetic audience may give pause.

6 Possible Solutions to Third-party Jurisdiction

One member of the United States delegation in Rome has suggested a compromise concerning Article 12, which may obviate US objections to third-party jurisdiction.³⁷ This would suspend third-party jurisdiction where the state is willing to assume responsibility for the conduct as official acts. To be sure, act of state is not a defence in violations of the law of war. But this proposal is an exception to jurisdiction, rather than a substantive defence, and would not exempt government personnel from national justice or other transnational fora. Since the Rome treaty forbids any amendments until the first review conference, and also forbids reservations, there is no simple medium through which to offer this possible clarification of the scope of Article 12, but one route is the issuance of a binding interpretive statement by the states parties participating in the post-Rome Preparatory Commission.

A second solution may lie in a close reading of Article 12(3). To permit a prosecution, a non-party state (of the place of the misconduct or offender’s nationality) must consent to jurisdiction ‘with respect to the crime in question’. The ‘crime in question’ can be read as a category of conduct, rather than as a specific incident. A putatively consenting state seeking to charge its opponent could face potential liability for its own nationals’ conduct in the same conflict in the alleged category of crime. Thus, the scenario of asymmetric liability feared by United States

³⁷ Meron, ‘The Court We Want’, *Washington Post*, 13 October 1998.

planners may not often come to pass. Again, a binding interpretive statement could provide the necessary clarification.³⁸

Third, it is also important to record the interpretation of Article 98, proffered by the conference bureau, to ensure that it is accepted by all states parties; namely, that both new and existing ‘status of forces’ agreements will be respected. These so-called ‘SOFA’ agreements, common to all the NATO countries, provide that any allegation of criminal offences committed abroad will be remitted to the troop-sending country for trial or surrender. This is the system also observed in practice by force commanders in UN peacekeeping operations. Respect for the SOFA agreements of non-state parties and states parties alike — calling exclusively upon the troop-sending country to handle any request for surrender to the ICC — was proffered in Rome as the common understanding of Article 98, and memorialization of that understanding in a binding interpretive statement in the Preparatory Commission will help to salve the concerns of countries with troops regularly deployed abroad.

Other important clarifications to bridge the gap can be achieved through the definition of the elements of offences in the work of the post-Rome Preparatory Commission. The idea of a ‘margin of appreciation’ in the detailed application of the law of war may be appropriate. The states parties should make clear that policy decisions on employment of force are not war crimes unless they are *manifestly* unlawful — i.e., a disagreement on the limits of proportionality would not be criminally actionable, even where the Court thinks a state got it wrong, unless the action lies outside the bounds of any conceivable judgment. This idea of good faith error has been used in United States constitutional law in the evolution of search and seizure standards, declining to impose liability in an area of changing law unless there was manifest bad faith, and it would provide a buffer for conscientious militaries under the Rome Statute. A ‘margin of appreciation’ can be achieved through the definition of criminal intent, protecting judgments that are made in subjective good faith. In addition, governments must be assured that to justify their military decisions they will not be practically required to disclose sensitive intelligence sources. One conference official has suggested that, when sensitive sources and methods underlying a targeting decision cannot be disclosed, the ICC should accept as sufficient an affidavit from senior responsible national officials attesting that the decision was based on the best available information indicating that the target was a military objective or that incidental damage would be reasonable. This is key in situations where, for example, an adversary may have misused the cover of a civilian facility for military operations.

A statement of prosecutorial priorities can also be of use, indicating that the ICC intends to concentrate on the deliberate mistreatment of civilians, and other protected persons. In addition, inviting the direct involvement of NATO and other military personnel in the ICC’s own work (even from countries that are not yet states parties),

³⁸ I welcome Gerhard Hafner’s agreement that ‘an interpretative declaration does not seem beyond reach, which aims at establishing a symmetric liability as far as Article 12(3) is concerned.’ See Hafner *et al.*, *supra* note 31, at text accompanying note 56.

through secondment, advisory councils, and rosters of expert witnesses, would help to build confidence in the ICC.

7 Amendments, Aggression and Other Cautions

The present posture of America is to continue working in the post-Rome Preparatory Commission on rules of procedure and elements of offences, in an effort to reach agreement with its friends in the ICC regime. But as a caution for the methodology of future multilateral conferences, and in an effort to sustain support for the ICC, it is necessary to note other features that are troublesome.

The treaty's provision on amendments is one matter. The Rome Statute bars amendments for seven years after its entry into force. Under Article 121(5),³⁹ an amendment to the treaty's scope of crimes will not apply to any state party that has voted against the amendment. However, no such originalism is expressly permitted to states that have not yet joined the ICC. Ironically, a third-party state may be subject to broader criminal jurisdiction than a state party. It has been argued that this provides an 'incentive' to join the treaty. But in truth, no state will join unless it feels confidence in the treaty regime, and for states that may take longer to summon the necessary domestic support — because of a divided party system or objective military commitments abroad — this asymmetric immunity for treaty parties will seem unfair and parochial. One may hope that an 'interpretive declaration' by the Preparatory Commission concerning Article 121(5) may also avoid this unproductive asymmetry.⁴⁰

The problem of amendments has particular force in the Rome treaty's handling of the crime of aggression. This was a crime charged at Nuremberg against Nazi Germany, and indeed American prosecutors argued that case. However, an accusation of aggression in less malign circumstances may be mustered for political ends and be sharply contested. The Federal Republic of Yugoslavia, for example, has charged that the use of NATO air power in Kosovo constitutes aggression despite its humanitarian objective, because there is no Security Council Resolution under Chapter VII of the UN Charter expressly authorizing NATO's use of force to restore international peace and security. Nigeria's military action in Liberia through the Economic Community of West African States was welcomed by the Security Council only *after* the intervention was far advanced. The deployment of regional peacekeeping forces in Africa, in circumstances that stray beyond Article 51 self-defence and

³⁹ Art. 121(5) states:

Any amendment to article 5 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, 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.

⁴⁰ Gerhard Hafner and his co-authors candidly acknowledge that such an asymmetry is 'paradoxical' and 'rightly causes political concerns'. See Hafner *et al.*, *supra* note 31, at Part 3.

lack *ex ante* Security Council authorization under Chapter VIII, Article 53, may excite a casual charge of aggression. A signal difficulty with defining aggression is that the classical accounts of the UN Charter and limits on the use of force, including the inherent right of self-defence and the scope of humanitarian intervention are, even now, undergoing change. Coalitions of interested states and individual states have acted to preserve international peace and security even without explicit prior authorization by the Security Council. Surely we do not wish to allow these issues to be mooted in the inappropriate forum of a criminal courtroom. One can credit the prosecutions of Nuremberg — recognizing the fascist war against Western democracies as clear aggression — without being sure in a drafting exercise how to protect all necessary actions to keep the peace, or wishing to leave this crucial question in suspension.

The category of aggression was included in the final Rome text in order to garner support from countries, especially in the South, that have felt vulnerable to their neighbours. But it was included as an empty category, without application, unless and until a review conference (to be held seven years after the treaty comes into force) should settle on a definition of the crime. The Rome parties' disinclination to 'confer broader powers' on the Security Council,⁴¹ justifies urgent concern that the Council should not lose its exclusive authority to determine whether an act constitutes aggression. Some in the conference bureau have suggested that no definition of aggression, or displacement of the role of the Council in allowing a complaint of aggression to go forward, will ever gain the support of seven-eighths of Rome treaty parties, and so the crime of aggression will not be within the Court's operative competence. Its inclusion in name only is said to be a gesture of good-will to interested countries, hallmarking the problem of aggression in the founding Statute as a mere hope for the future. But promising contradictory outcomes to both sides is a recipe for mutual disappointment, and, rather like the deferral of the Brcko arbitration decision within the Dayton Peace Accord, can be a time bomb within a treaty structure.

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. If Article 121(5) is misconstrued,⁴² any state that has remained outside the treaty structure may be without protection from an overbroad definition of aggression. Human rights advocates, as much as adherents of *realpolitik*, should find this to be a disturbing chance. It often takes armies — and in turn a supportive electorate, willing to mobilize its armed forces — in order to stop genocides. The loss of US Rangers in Somalia in October 1993 eroded US domestic support for peacekeeping exercises, and inhibited an appropriate response to the Rwanda genocide in 1994. Unfounded accusations of aggression in an international juridical forum may also contribute to an electorate's view that troops should be kept home. Clarification that the crime of

⁴¹ Cf. Hafner *et al.*, *supra* note 31, at Part 5.

⁴² This could be prevented by a binding interpretive statement in the Preparatory Commission, see text accompanying note 40, *supra*.

aggression can only be charged against treaty parties that have voted in favour of its definition, and not against dissenting states parties or non-state parties, would help to solve this dilemma.

8 Enforcement

The other problem of Rome is the relative lack of attention to enforcement. The experience of the International Criminal Tribunal for the former Yugoslavia is that compliance with Tribunal orders for the surrender of defendants and the production of evidence is hardly automatic. It requires political and economic sanctions, and even the intimation of authorized military action by supporting states, to assure that the Tribunal's judgments will be given due deference. It is, then, surprising that there was not more discussion in Rome of how the ICC could hope to enforce its orders. To be sure, states parties have a legal duty of cooperation with the International Criminal Court. But states often slack on this sort of duty, and rhetoric is a limited goad.

The problem of enforcing the ICC's orders on the ground draws the circle back to the Security Council. The ICC has not purported to have the licence to directly authorize the use of force by one state party against another in order to obtain the custody of a defendant. Multilateral authorization of the use of force against a non-cooperating state instead falls to the immediate decision of the Security Council, a Chapter VII responsibility of the sort the Council has discharged in enforcement actions in places such as Somalia and the former Yugoslavia. One might wish that there was more attention in Rome to the necessary convergence between the ICC and the Security Council for effective enforcement of the Court's orders. The Security Council's sustaining role in international criminal law is not illicit or wrongly political. Rather, the Council has the necessary labouring oar in transforming the Court's orders into effective sanction.

So, too, the role of the United States may be seen, in hindsight, to be important to the ICC's well-being. As the largest economy, a traditional strong supporter of the ad hoc tribunals, and as the only member of the Security Council able to mount and sustain transcontinental military operations with the necessary air transport, technical means of intelligence and logistics, the US is highly relevant to the future efficacy of the ICC. One may wish that the negotiation of final terms in Rome might have had a greater view of this problem.

9 Reservations, Amendments and All-or-nothing Treaties

Finally, one wonders, in the abstract as well as the particular, whether the current fashion of negotiating multilateral treaties that forbid any reservations, and allow treaty amendments only at infrequent intervals, is a wise strategy. This is particularly so where the procedure of a multilateral conference permits a majority vote on a single textual package, rather than requiring consensus decision. Countries should

undertake their treaty obligations with a serious mien, and this requires that the terms be such as they can live with. It is not enough to suggest that a treaty's terms are legally supportable;⁴³ they must also be workable for participating states. All-or-nothing packages will predictably make it harder to gain ratification in countries that would like nothing better than to be the treaty regime's strongest supporters.

⁴³ Hafner *et al.*, *supra* note 31, at Part 6.