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Panel: The International Criminal Court: Contemporary Perspectives and Prospects for Ratification

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PANEL

The International Criminal Court: Contemporary Perspectives and Prospects for Ratification

Professor Ruti Teitel

PROF. TEITEL:^{*} Welcome to the International Criminal Court panel. This promises to be a very exciting discussion. We are very grateful to have the panelists who are participating here today. They are all extraordinary experts in international criminal law; and many of them actually played active roles in the drafting and deliberations over the Statute for the International Court.¹ I would like to introduce our speakers. We have Major William Lietzau, Deputy Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, Pentagon; Mr. Richard Dicker, Associate Counsel, Human Rights Watch (HRW) and Director of HRW's Campaign for an International Criminal Court; Dr. Roy Lee, former Director of the Codification Division, Office of Legal Affairs, United Nations, who was the Secretary to the Rome Consulate for the United Nations; Professor George Fletcher, Cardozo Professor of Jurisprudence, Columbia University School of Law and Professor Paul Dubinsky, New York Law School. We will begin with Dr. Lee who will give an overview of the proposal for the International Criminal Court, and discuss the Court's current status.

Dr. Roy Lee

DR. LEE: Thank you, very much. It is very kind of you to invite me to come to this gathering. Many thanks for organizing a symposium on this very important subject. As indicated, I will give

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¹ See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. No. A/CONF. 183/9, 37 I.L.M. 999 [hereinafter Rome Statute].

some general features of the International Criminal Court and identify some of the important achievements at this United Nations conference. I hope this will serve as a background for subsequent discussions.

Last July, the United Nations succeeded in adopting an international treaty for the establishment of the International Criminal Court. This was, indeed, a very important achievement. For many, it was considered as profound an achievement as the adoption of the United Nations Charter itself; indeed, U.N. Secretary General Kofi Annan himself heralded the agreement as a "giant step toward universal human rights."²

One might wonder why we need an international criminal court. There are three good reasons for you to consider. First, in this century we have witnessed the worst violence of mankind. In the past 50 years, more than 250 conflicts took place in which more than 86 million civilians — mostly women and children — died, and over 170 million people were stripped of their rights, their property and their honor.³ What did we do for them? Most of these victims have simply been forgotten. Only a few perpetrators have been brought to justice. Second, we have numerous rules and laws defining and forbidding war crimes, crimes against humanity and genocide, and conventions and protocols banning everything from poison gas to chemical weapons.⁴ But we do not have a system to enforce the law. For many

² *War Crime Court's Rules will Shield Dictators, says US*, LONDON TIMES, July 20, 1998 at 14 (quoting United Nations Secretary General Kofi Annan).

³ See generally Jennifer L. Balint, *An Empirical Study of Conflict, Conflict Victimization and Legal Redress*, in REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE 17-21 SEPTEMBER 1998, at 101 (Nouvelles Etudes Penales No. 14, Christopher C. Joyner, & M. Cherif Bassiouni, eds. 1998); see also Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 593 (1998); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 10 & n. 6 (1996).

⁴ See *Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30A, at 78, U.N. Doc. A/9030 (1973) [hereinafter *Principles of International Co-Operation*]; see also *Convention on the Prevention and Punishment of the Crime of Genocide*, Jan. 12, 1951, 78 U.N.T.S. 277, 1951 A.T.S. 2 [hereinafter *Genocide Convention*]; *Convention on the*

people, law without enforcement is but empty words. The ICC will give us a court to enforce the law. The third reason we need an international criminal court is that under existing international law, national courts should prosecute and punish international crimes committed within their territories and by their nationals,⁵ yet, this is not happening. How many violations have been prosecuted by national courts? In comparison to the record of violations, prosecutions are relatively few.⁶ In recent conflicts, the national courts concerned have been either unable or unwilling to prosecute the perpetrators.⁷ For these reasons, the establishment of an international criminal court is both needed and timely.

In the late 1940s, there were three big human rights projects before the United Nations General Assembly. The first one was to adopt a universal declaration to set out the fundamental human rights. This was accomplished in 1948.⁸ The second project was to adopt a legal instrument to prevent genocide. This was done a year later, in 1949.⁹ The third project was to create an International Criminal Court. There, the adoption was postponed until, finally, in July 1998, almost 50 years later, we concluded the Rome Statute establishing an

Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, G.A. Res. 48/65, U.N. GAOR, 48th Sess., Supp. No. 49, at 68, U.N. Doc. A/48/49 (1993).

⁵ See, e.g., Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations*, 3 VA. J. INT. L. 425 (1999); see also *Principles of International Co-Operation*, *supra* note 4 (stating that “[w]ar crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and if found guilty, punishment”); see also *Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity*, G.A. Res. 2840 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, at 444, U.N. Doc. A/8429 (1971) (stating that a “refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purpose and principles of the Charter of the United Nations and to generally recognized norms of international law”).

⁶ See Joyner, *supra* note 3, at 593.

⁷ See Douglas Cassel, *Why We Need the International Criminal Court*, CHRISTIAN CENTURY, May 12, 1999 at 532 (arguing that the International Criminal Court “will hear cases of genocide, war crimes and crimes against humanity that national governments are unable or unwilling to prosecute”).

⁸ See *Universal Declaration of Human Rights*, G.A. Res. 217 A (III) (1948).

⁹ See *Genocide Convention*, *supra* note 4.

international criminal court.¹⁰

You might wonder why it was so difficult to create an international criminal court. You do not have to look very far for the reasons. First, under existing criminal law systems, national courts enjoy priority of jurisdiction over crimes committed within their territories, by their nationals or against their nationals.¹¹ National courts usually insist on applying their own laws, trying criminals before their own courts and punishing criminals in their own jails. Few states would volunteer to compromise their national criminal law. As a result, there was really no room for an international criminal court. We spent a long time looking for an angle that would allow a place for an international criminal court without prejudice to national jurisdiction. We did not succeed until last July. The second reason is that crimes such as genocide, war crimes, crimes against humanity are highly political and involve sensitive issues. They are matters of great concerns to the military, politicians and decision-makers. The level of resistance is, therefore, very high.

Under the principle of “complimentarity,” this International Criminal Court will step in when national courts are unable or unwilling to prosecute and punish such crimes.¹² In other words, the

¹⁰ See Rome Statute, *supra* note 1, at Part 1, art. 1 (adopted July 17, 1998).

¹¹ See *id.* at preamble; see also Cassel, *supra* note 7.

¹² See *id.* at Preamble, par. 10; *id.* at art. 1; *id.* at art. 17(1)(a),(b); & *id.* at art. 18. Article 1 of the Rome Statute clearly states that the ICC “shall be complementary [sic] to national criminal jurisdictions.” *Id.* at art. 1. “Complimentarity” is a “concept . . . based on the view that the exercise of police power and penal law is a state prerogative and that therefore national courts should have primacy over the ICC.” Bartram S. Brown, *Primacy or Complimentarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT’L L. 383, 424 (1998). However, this “primacy” has certain limits as evidenced by the ways in which the Court may exercise jurisdiction.

The Court may exercise jurisdiction in one of three ways: first, via a referral by a State Party; second, via referral by the U.N. Security Council; and third, via an investigation initiated by the Prosecutor. See Rome Statute, *supra* note 1, at art. 13. Under the third method the Prosecutor for the ICC may of her own accord “initiate investigations.” See Rome Statute, *supra* note 1, at art. 15(1). Before a case can be initiated from a Prosecutor’s article 15(1) investigation, the Prosecutor must receive authorization from the Court’s Pre-Trial Chamber; the Pre-Trial Chamber then determines whether or not to send the issue on to the Court for a final determination “with regard to the jurisdiction and admissibility of a case.” See *id.* at art. 15(3), (4). When a case has been referred to the Court for a determination on admissibility pursuant to article 15, the

ICC will substitute, not supercede, national courts. This is important because it will encourage national courts to exercise their jurisdiction and to prosecute and punish criminals falling within their jurisdiction, since if they do not, the International Court will step in and fill the gap.

How strong is the support for the creation of an international criminal court? Well, the statute was adopted by 160 states, 50 states signed immediately and, today, we have close to 80 signatures.¹³ We need 60 states to ratify, in order to bring this instrument into force.¹⁴ Regrettably, several states were unable to accept this Statute, among them the United States, China and India.¹⁵

What are the crimes that will be covered by the Court? The Court will cover the most serious crimes, namely, genocide, crimes against humanity and war crimes.¹⁶ The Court will also have jurisdiction over crimes of aggression under the definition and conditions to be agreed upon.¹⁷

You might wonder whether this Court would violate any established international law principles since it will have jurisdiction

Court "shall" notify the States that "would normally exercise jurisdiction over the crimes;" the State in question can then choose to exercise its jurisdiction over the matter. *See id.* at art. 18(1), (2). Should the Prosecutor defer to a State, the investigation of the matter by the State remains open for review in the event of the State's "unwillingness or inability genuinely to carry out the investigation." *See id.* at art. 18(3).

¹³ *But see* Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22 (1999) (noting that at the conclusion of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC, the Rome Statute had been adopted by a nonrecord vote of 120 in favor, 7 against, and 21 abstentions).

¹⁴ *See id.* at 42.

¹⁵ *See* Jonathan I. Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 454 (1999) (observing that the United States voted against ratification and that the "identities of the other opposing states are not certain. There is little doubt, however, that they included China, Israel, Libya and Iraq.").

¹⁶ *See id.* (stating that "the illegality under international law of the gravest human rights violations of genocide, crimes against humanity, war crimes and the crime of aggression . . . will be reinforced as a result of the adoption and entry into force of [the Rome Statute]").

¹⁷ *See* Arsanjani, *supra* note 13, at 30 (indicating that Article 5(2) of the Rome Statute "incorporates the crime of aggression, but the court may exercise jurisdiction in that regard only after the crime has been defined and the conditions for such exercise have been agreed upon.").

over national forces of non-party States. My own answer to that question is, no. Under existing international law, the state in whose territory genocide, war crimes and crimes against humanity have been committed or whose nationals are victims of such crimes, is legally competent and obligated to investigate and prosecute persons accused of such crimes.¹⁸ Since a state already has a legal obligation to do so individually, states are not prevented from creating an international criminal court jointly for purposes of implementing this obligation. The Court's jurisdiction over nationals of non-party states does not therefore violate any principle of treaty law, and the Rome Statute has not created any entitlements or legal obligations that do not already exist under international law. Besides, the Rome Statute has not created any treaty obligations for non-party states. The cooperation of non-party states is purely voluntary.

I now wish to turn to the most important achievements of the Rome Statute. First, it has managed to maintain a very delicate balance between justice and peace. Under this principle, the Security Council will be able to refer situations to the International Criminal Court for it to investigate and prosecute.¹⁹ The Security Council will also be able to request the Court to withhold its proceedings in cases where the Security Council considers that it is necessary to pursue a certain peace arrangement.²⁰ A delicate balance is thus maintained, in my view, between the responsibilities of the Security Council for the maintenance of international peace and security on the one hand, and the objective of international justice pursued by the Court, on the other.

Secondly, the Rome Statute creates a true international, independent criminal prosecution system. Under this system, the prosecutor will be able to initiate investigations and prosecutions.²¹ However, at the same time, there exists in the Statute a series of checks and balances designed to make sure that the prosecutor will not abuse the rights entrusted to him or her, and to ensure that he or

¹⁸ See *id.* at 25 (explaining that “[t]he understanding of the majority of participating states was that states had a vital interest in remaining responsible and accountable for prosecuting violations of their laws”).

¹⁹ See Rome Statute, *supra* note 1, at Part 2, art. 13.

²⁰ See Rome Statute, *supra* note 1, at Part 2, art. 16.

²¹ See Rome Statute, *supra* note 1, at Part 2, art. 15.

she will be able to take the necessary action when there is sufficient evidence pointing in that direction.²² Adequate provisions and procedures are also embodied in the Statute to allow the accused individuals and the states concerned, whether or not they are parties to the Statute, to challenge and to intervene at all stages of the proceedings before the Court that may affect their interests.²³

The third important achievement is the creation of a truly international criminal law system. The system is based on criminal law principles extracted from national laws, and is further supported by more than seventy articles focusing on the procedural aspects of the system.²⁴ It is perhaps the best and most comprehensive one we have designed so far at the international level. This international criminal law system was the result of hard work contributed by hundreds of expert representatives over a period of several years. It therefore represents a successful harmonization of objectives and values long recognized under divergent national criminal law systems. The accused will therefore be entitled to have the best guarantees to justice and a fair trial known under existing international law.

This Statute is, of course, not perfect. We only had five weeks to wrap up a Statute containing 120 articles. You can imagine what that means. It was a daunting task. Imperfections are therefore unavoidable. A correction procedure is taking place to rectify certain typographical and stylistic errors. The Preparatory Commission has also begun its work and is progressing well. It is expected that the elements of crimes and the rules of procedure and evidence will be complete by next June. Efforts are also being made to address issues that were left open in the Rome Statute.

The important message I would like to leave with you is the following: it took us 50 years to create this International Criminal

²² See Rome Statute, *supra* note 1, at Part 3, arts. 42 – 54.

²³ See Rome Statute, *supra* note 1, at Part 2, art. 19.

²⁴ See I M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW* 8-9 (2d ed. 1999) “International criminal law is a relatively new discipline that consists of the penal and procedural aspects of international law and the international procedural aspects of national criminal law. The penal aspects of international law establish, through conventions, custom and general principles, international crimes, and identify elements of criminal responsibility and enforcement modalities. The penal aspects of international law have also increasingly dealt with procedural and enforcement modalities, which had traditionally fallen within the province of national criminal law.” *Id.*

Court. Imperfect as it is, the important thing is that we have done it. I think that it is timely and well justified to have such a criminal court. It will give us an enforcement system, which we needed and did not have. It will help us to enforce the law. We must continue our efforts and make sure that it will work and will be effective. This Court is, in my view, one of the most important achievements of this century. I hope you will follow the development in the Preparatory Commissions, which will lead us to the implementation of the Rome Statute. Thank you.

PROF. TEITEL: Thank you very much, Dr. Lee. It is a real pleasure to hear from the Secretary to the Rome Conference. Now, we will hear from Major Lietzau, who is Counsel to the Office of the Chairman of the Joint Chiefs of Staff and was part of the U.S. delegation at the Rome Conference.

Major William K. Lietzau, U.S.M.C.

MAJOR LIETZAU: First, I would like to thank you for inviting me here. It is always nice to get out of the Pentagon. I would like to note that I am one of the only U.S. officials that negotiated both the Ottawa Convention to ban landmines and the Rome Treaty to establish an International Criminal Court — two treaties that were widely and rapidly supported, but did not include the United States on the list of proponents. I mention this to encourage questions and discussion regarding the larger foreign policy concerns raised by this nascent pattern.

Recognizing the time constraints, there is really no way to grapple with all of the issues involved in such an important undertaking as the International Criminal Court. Therefore, what I intend to do is to proffer some ideas for an academic discussion — the kinds of things, I think, that need to be contemplated in determining what the U.S. posture toward this Court should be.

The United States' position is best summarized by the fact that, as Dr. Lee noted, we were one of seven states that voted against the treaty on the last day of the diplomatic conference. The United States called for the vote, which favored the treaty text by 120 to 7;

and I believe there were 21 abstentions.²⁵ The United States' position right now, for those not familiar with it, is that we will not sign the current treaty text in its present form, and there is no prospect we will sign this treaty in its present form in the future.²⁶ We have considered the posture of "benign neglect" of the possibly forthcoming International Criminal Court, and we have rejected that policy option. Well, where does this leave us? As Ambassador Scheffer — U.S. Ambassador at Large for War Crimes Issues, has stated several times (and as has been reflected by Secretary Madeline Albright) — we are optimistic that we will have the opportunity to work toward appropriate modifications or accommodations that we think could bring this treaty better in line with international law and a more appropriate role in international society.²⁷ Directly opposing the treaty is not anyone's ideal solution, since the U.S. has supported this undertaking in concept for years.

As I just mentioned, the United States has, in fact, consistently supported the concept of an International Criminal Court. For reasons given by Dr. Lee, anyone who surveys the last decade, sees a world situation where entire populations are sometimes terrorized and slaughtered by wayward military forces and, most frequently, by their own governments. The manifest nature of this fact is clear to anyone who has looked into R. J. Rummel's work or that of John Norton Moore or others who have identified how frequently people die by the hand of their own governments.²⁸ The United States has been at the forefront of efforts to establish the Tribunal for the former Yugoslavia and the Tribunal handling the crimes that took place in Rwanda, with the goal of bringing to justice those who have been involved in the

²⁵ See Arsanjani, *supra* note 13.

²⁶ See UN: *US Appeals in Committee for Support of Other Nations to Resolve Problems of Criminal Court Statute*, M2 PRESSWIRE, Oct. 22, 1999, available in 1999 WL 24364055.

²⁷ See UN: *Preparatory Commission for International Criminal Court begins First Session*, M2 PRESSWIRE, Feb. 17, 1999, available in 1999 WL 12605515.

²⁸ See, e.g., RUDOLPH J. RUMMEL, *CHINA'S BLOODY CENTURY: GENOCIDE AND MASS MURDER SINCE 1900* (1991); RUDOLPH J. RUMMEL, *DEATH BY GOVERNMENT* (1994); RUDOLPH J. RUMMEL, *POWER KILLS: DEMOCRACY AS A METHOD OF NONVIOLENCE* (1997); JOHN NORTON MOORE, *LAW AND CIVIL WAR IN THE MODERN WORLD* (1974); JOHN NORTON MOORE, *STRUGGLE FOR PEACE IN CENTRAL AMERICA: AND THE DETERIORATION OF THE GLOBAL DETERRENT SYSTEM* (1987).

most heinous violations of international law.²⁹ That humanitarian posture alone does not, however, lead to the conclusion that we should similarly join the International Criminal Court, as admirable as the motives behind it may be. Similarly, the United States is at the forefront in de-mining around the world — getting rid of the land mines that are in the ground.³⁰ But that fact does not militate in favor of signing the Ottawa Convention.³¹

So why is the United States not joining so many nations who have expressed their approval of the International Criminal Court Statute? The answer, I believe, is found in two types of concerns. One is a process-based concern and another is a concern with respect to the substance of the treaty itself. With respect to process, you just heard Dr. Lee describe the situation in which he spent five weeks in Rome with the goal of accomplishing as much as could be accomplished in those five weeks. I think, in fact, it is an incredible testament to many like Dr. Lee that a statute has resulted from such a short negotiation. I remember, anecdotally, one delegate departing Rome early — his particular issue having been addressed. As he left, he opined that there would not be a treaty resulting from the negotiation, and that he would therefore be seeing us in Rome the following summer. Of course, he was wrong, and I will always regret not having taken him up on the wager he had offered.

One negative consequence of the rapid success in negotiation was the mechanism used for drafting. It was a very short time to accomplish a lot, and the negotiation resulted in what was literally, a middle-of-the-night, take-it-or-leave-it package, put together by the chairman of the committee of the whole and particular members of his bureau. The text included significant provisions that had not been seen before as drafted, and countries had less than twenty-four hours to decide whether they would accept the package or not. Some articles in that take-it-or-leave-it package had never been negotiated on the open floor at all. And obviously, last-minute deals are a

²⁹ See *The Long Arm of International Law*, CHI. TRIB., July 11, 1999, at 16.

³⁰ See Barbara Amiel, *Lloyd Axworthy: A Profile in Stubbornness*, MACLEAN'S, Jan. 18, 1999, at 11.

³¹ Ottawa Process: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Jan. 1998, 36 I.L.M. 1507.

necessary part of treaty negotiations, but should they occur to such an extent and with regard to such fundamental, substantive portions of a treaty as in this case? Is such a drafting mechanism appropriate in a treaty creating as important an institution and one with such extensive coercive authority as this one?

This leads us to another kind of process-based concern; that is the departure from consensus-based treaty making. If we look at the major treaties in the international humanitarian law arena, we find that they are adopted, for the most part, with a consensus-based negotiating dynamic. Moreover, the UN General Assembly, which sponsored this treaty, has long been biased in favor of consensus resolutions. Though some treaties are not consensus-based in their negotiation, they are not usually treaties as significant as the one we see here. This is a trend that should cause concern. One may find indicators of this emerging pattern in the “fast-track” process of the Ottawa Convention negotiations. Ottawa represents the fastest entry into force of any major treaty, and it is being touted as such — a big success.³² Indeed, there is that positive aspect to Ottawa, it came into being very quickly; but at what cost? That text was finalized only after the U.S. pulled out of negotiations when it became clear there was no prospect for consensus agreement and the text would be voted through. Is that the right mechanism to use? How does the voting model of treaty-making impact the stature of a superpower like the U.S.? I merely offer this as a question right now, but it involves ramifications that need to be considered as we find our place in the emerging world order.

We should carefully consider whether a delay is so offensive that we want to push something through without consensus — a consensus that captures the fundamental tenets of reciprocity and consent that have so long served as a foundation for international law. I believe we need to think very carefully before we move into a process where a majority of countries can vote something through and make it international law, especially, in this case where it claims authority over nonparty nationals. As a member of the Indian Parliament said at the beginning of this General Assembly session in

³² UN: *Negotiations on Convention to Prohibit Use of Nuclear Weapons Called for in Disarmament Committee Text*, M2 PRESSWIRE, Oct. 26, 1999.

response to a characterization of the International Criminal Court Statute as “an expression of global people power,” “[i]n countries which contain two-thirds of the world’s population, the negotiations on the International Criminal Court did not raise a ripple; world public opinion was not engaged.”³³ The fact that such significant states failed to vote in favor of this treaty should give us pause to question whether major international law principles should be developed using a “fast-track” approach.³⁴

Though there are other areas of concern in this regard, due to time constraints, I will move quickly to substance. The biggest concern for the United States and others is that this treaty is too easily used as a tool for political manipulation and potential abuse — with politically-motivated charges that can be oriented toward a particular foreign policy. The Statute provides a diminished role for the Security Council compared to that found in current international structures. The Court stands on its own authority, essentially outside of the purview of the Security Council, and it creates a jurisdictional regime that claims authority over nonparty nationals. This jurisdictional regime, detailed in Article 12, causes the greatest concern for the United States.³⁵ We cannot get into a debate right now about the legal rubric that presumably predicates this regime, but at the very least, its pedigree is questionable. More importantly, one must question whether, as a policy matter, it is a good idea. Taking it to its logical extreme, we should be concerned by the notion that a majority of states can simply establish international law by majority vote and then create a jurisdictional regime that can enforce that law, all without consent of other states.

The results of failing to adequately address these concerns, both substantive and procedural, can be seen in a number of ironies, or perhaps “perversities,” incorporated into the Statute. For example, the jurisdictional regime would allow the Court to have jurisdiction over a

³³ U.N. General Assembly 53d Sess., U.N. Doc. A/53/PV.13, Sept. 24, 1998 [General Debate] (statement of Atal Behari).

³⁴ As of March 2000, India had yet to become a signatory to the Rome Statute. See *Rome Statute of the International Criminal Court: Ratification Status* (visited March 25, 2000) <<http://www.un.org/law/icc/statute/status.htm>>.

³⁵ See Arsanjani, *supra* note 13, at 26 (discussing Article 12, which deals with the jurisdiction of the court, and the United States’ opposition to it).

state that was not party to the Convention, so long as the territory where the alleged offense took place, consented or was itself party to the Convention.³⁶ Yet, Article 11 of the Treaty describes a temporal jurisdictional provision that arguably shields a state party's nationals from the Court's jurisdiction in ways not available to nonparty nationals.³⁷ Article 11 limits the Court's exercise of jurisdiction for states that join after entry-into-force to only those crimes committed after entry-into-force for that state. Obviously, no such limitation can exist for nonparty nationals. Imprecisely worded, one might question whether a state's *individual* nationals are exempted prior to entry-into-force, but shielding individuals was clearly the intent of the drafters.

Likewise, because of the extraordinary way deals were cut in the last hours of the negotiation, Article 124 creates a seven-year war crimes opt-out for states parties.³⁸ This was given to the French to coax them away from other permanent members of the UN Security Council. Again, imprecisely worded, one could question whether the provision really shields *individuals*, but I can assure you that such was the intent of those who negotiated this provision. Again, no such jurisdictional limitation is available to non-party nationals. Therefore, a state that becomes party to the treaty can opt out of war crimes and actually limit the court's jurisdiction over its own citizens while nationals of non-party states are subject to the entirety of the court's subject matter jurisdiction. Some have described this as an inducement to join the treaty. At best it is a thoughtless error; at worst it is an unabashed attempt to further isolate the United States in the final hours of the negotiation by drawing away one or more permanent members of the Security Council. Regardless of the motivation, it illustrates an unprincipled characteristic of the jurisdictional regime.

Article 121, the amendment provision, presents the clearest example of a jurisdictional anomaly, since its language is unambiguously oriented toward individuals as opposed to states.³⁹ Under paragraph five of that article, amendments to the list of crimes

³⁶ *See id.*

³⁷ *See* Rome Statute, *supra* note 1, at Part 2, art. 11.

³⁸ *See* Rome Statute, *supra* note 1, at Part 13, art. 124.

³⁹ *See* Rome Statute, *supra* note 1, at Part 13, art. 121.

within the subject matter jurisdiction of the Court are not applicable against nationals of states parties that fail to ratify the amendment.⁴⁰ Therefore, states that join the treaty have the ability to shield their citizens from jurisdiction over all crimes not currently in the Statute. There is no similar limitation, however, to the list of crimes that is potentially available for application against non-party nationals. Therefore, in theory, United States citizens could be made subject to the jurisdiction of the Court for any number of currently unknown future offenses, even if the U.S. were not party to the treaty, whereas states parties could effectively shield their nationals.

Beside highlighting the unprincipled nature of the jurisdictional regime, this last example provides a good illustration of the unfortunate technical consequences of this last-minute package approach to treaty making. With substantial portions of the treaty still unwritten on the last night of the five-week conference, the drafting committee was obviously unable to complete its work of rationalizing various constituent texts. Dozens of technical/administrative errors were discovered and corrected *after* the vote on the Statute's text and after many had already signed the treaty. These corrections had (or have) varying degrees of substantive effect. In the case of Article 121, paragraph 5, the version initially distributed describes the amendment procedure for substantive offenses as applying to "Article 5" amendments. At the time the deal was cut on this provision, the working drafts of the pertinent portions of the Statute listed all crimes in Article 5. That article was subsequently parsed into Articles 5, 6, 7, and 8, with Article 5 only referring to the broad categories of crimes, but Article 121 was never concomitantly adjusted.⁴¹ The drafters of Article 121 clearly did not intend for it to only preclude jurisdiction over a new category of crimes, and a change will likely appear in the next version of the treaty.⁴²

⁴⁰ See *id.* "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." *Id.*

⁴¹ See, e.g., David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 20-21 (1999) (discussing Article 121's shared jurisdiction with Article 12, claiming it is due to a lack of adjustment to Article 12).

⁴² This prediction was in fact accurate, as evidenced in current versions of the

In an attempt to achieve some form of balance, drafters of the International Criminal Court's jurisdictional regime combined features that, at one extreme, would create an inherently strong, uninhibited court capable of trying all crimes without regard to any opt-outs or other exceptions, and, at the other extreme, would completely satisfy the sovereignty concerns of all states. The mix that came out of Rome, however, viewed from the most critical or negative perspective, is arguably the worst of both worlds. Consider, for instance, the hypothetical of peacekeepers becoming involved in an internal armed conflict. The peacekeepers would be vulnerable to prosecution by the ICC if the state or territory where the alleged offense took place consented.⁴³ Yet, the perpetrator of the most heinous internal humanitarian tragedies within that country would not be subject to ICC jurisdiction without Security Council referral.⁴⁴ Here, we have a Court that potentially threatens peacekeepers and the foreign policy of the states that provide them, yet it does not have jurisdiction over the crimes that we agree have wrought the most tragic humanitarian disasters in the last several decades.

Allow me to only briefly mention some other problems with the treaty. There is a no-reservations clause — something the U.S. Senate has consistently opposed; the crime of transferring citizens into

treaty. See, e.g., *Rome Statute of the International Criminal Court Adopted at Rome on 17 July 1998 – Note by the Secretariat*, U.N. Doc No. PCNICC/1999/INF/3 (1999) (Third Session of the Preparatory Commission of the International Criminal Court).

⁴³ Interestingly, this hypothetical has in some respects, come true. See Steven Lee Myers, *Kosovo Inquiry Confirms U.S. Fears of War Crimes Court*, N.Y. TIMES, Jan. 3, 2000, at A6. "Officials of the [International Criminal Tribunal for the former Yugoslavia] . . . completed an internal report in late December that was a legal analysis of the possibility that the NATO allies had committed war crimes during their 78-day campaign against Yugoslavia." *Id.* Quoting Diane F. Orentlicher from American University, the Times reported that, "The United States has been . . . afraid of how an international criminal court will act with regard to American soldiers . . . and now it turns out . . . that the international tribunal for Yugoslavia has that jurisdiction." *Id.* Although Carla Del Ponte, the chief prosecutor for the ICTY, stated that there was very little possibility that either America or NATO would be charged with any war crimes, neither the Pentagon nor the White House seem to dispute the tribunal's jurisdiction over the matter. *Id.*

⁴⁴ See Jelena Pejic, *The Tribunal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841, 858-59 (1997) (articulating the fear that "this mechanism" subjects the ICC to the "political considerations of the Security Council, thereby undermining its independence, effectiveness and credibility").

occupied territories provides fertile ground for political manipulation; and the Statute paves the way for the potential crime of aggression — a state offense that, again, can be easily abused for political purposes.⁴⁵ As I am almost out of time, I will leave discussion of these issues for questions.

I would, however, like to give you a thumbnail's sketch of the way ahead for the immediate future. The U.S. is preparing to engage other delegations at the first preparatory commission meetings next week. The primary purpose of those meetings will be negotiating the elements of crimes and the rules of evidence and procedure — the nuts and bolts of criminal law under this Statute. In these matters, we are not simply considering the rights of states vis-à-vis other states, but the balance between *individual* rights and the interests of justice. In this regard, the United States is going the extra mile to stay engaged in this process. This is done with the hope that before this Treaty comes into force, we can secure some modifications or accommodations that will allow us to join the Court and participate in seeing it fulfill the most noble purposes for which it was conceived. Thank you.

PROF. TEITEL: Thank you very much Major Lietzau. I am sure that there will be time in the Q & A to address some of the interesting points of controversy here. Let me turn now to Professor George Fletcher, Cardozo Professor of Jurisprudence at Columbia University School of Law. He has written on topics such as criminal law, legal philosophy, torts and, most recently, *With Justice for Some; Victims' Rights in Criminal Trials* as well as *Basic Concepts of Criminal Law*.⁴⁶ I welcome my friend and colleague, George Fletcher to address some of the points raised by the International Criminal Court.

⁴⁵ *But see* Philippe J. Sands, *The Future of International Adjudication*, 14 CONN. J. INT'L L. 1, 8 (1999) (arguing that the United States' fear of aggression is misplaced because "it is clear from the Statute that the definition of aggression has not been settled and jurisdiction on this head will not apply until there is a definition of aggression established by amendment of the Statute").

⁴⁶ GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995); GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* (1998).

Professor George Fletcher

PROF. FLETCHER: Thank you. It is a pleasure for me to be here this afternoon to address some of the difficult questions raised by the Rome Statute. I want to begin by saying that, I think, that the basic idea of the International Criminal Court is very sound. It is one that I strongly support. I imagine that everyone here on the Panel supports the idea. I dissent, as well from the official United States' policy which seems to be preoccupied with the jurisdictional question, that is, with American military forces being charged with war crimes or crimes against humanity when they are engaged in the missions on the territory of member states. It strikes me as unfortunate that the United States has directed its critical focus to that question, which reveals a fundamental distrust of the political reliability of the other countries who will participate in creating this Court and of the judges who will be serving on the Court.

I have other concerns that I want to stress and I wanted to voice these concerns in the hope of contributing to a process that will lead to improvements in the Statute. These are improvements that deeply concern me, not as an international lawyer, but as a criminal lawyer. If you read the Statute carefully, from the point of view of a criminal lawyer, you cannot but be very seriously disappointed by the sloppiness of the drafting, by the conceptual confusion, and by the inability to think through basic questions. I am going to be precise, and hope that you will bear with me as I talk about the specific provisions in the Statute.

First, one of the most fundamental problems that is going to arise in the administration of the Statute will be the very simple fact that the Statute is written in six official languages.⁴⁷ Lecturing on the Rome Statute recently in Spain, I based my analysis on the Spanish version of the Statute and I quickly discovered that there were fundamental differences between the Spanish version and the English version, and we are talking about two languages that are close neighbors. I expect that there will be substantial disparities with the French version and Russian versions as well. And I am willing to bet

⁴⁷ See Rome Statute, *supra* note 1. Besides English, the Statute is printed in Arabic, Chinese, French, Russian, and Spanish.

that working through the official Arabic and the Chinese translations of the Statute, we would find substantial conceptual variances. It is very difficult to find conceptual common ground among legal systems that are as diverse as these six are. Even as between the Spanish and the English versions, I had the feeling that there was little attention paid to the problem of one-to-one mapping between one set of provisions and the other set of provisions. In certain areas, the Spanish and English texts are totally different. We have to keep in mind there will be 18 judges on the Court and these 18 judges will represent diverse countries, diverse legal systems, and presumably use different official versions of the Statute.⁴⁸ The risks of misunderstanding are overwhelming.

There is a basic conceptual problem in the structure of the Statute that, I think, accounts for many difficulties that I am going to talk about today. This Court differs fundamentally from other courts that have a distinctive relationship to a legislative body. Typically, a legislative body defines the offenses and then a court applies and enforces the defined offenses. This Statute is different in the sense that the Statute also defines the offenses that the Court has a capacity to enforce so that Article 5 of the Statute tells us that the jurisdiction of the Court shall be limited to very specific crimes.⁴⁹ We have heard those mentioned already — crimes of genocide, crimes against humanity, war crimes and, possibly, crimes of aggression, which have not yet been defined. The “jurisdiction” is also used in other senses in the statute, but I just want to highlight the fact that, according to Article 5, the “jurisdiction” of the Court is limited to the most serious

⁴⁸ See Rome Statute, *supra* note 1, at art. 36.

⁴⁹ *Id.* Rome Statute, *supra* note 1, at art. 5. The statute delineates the jurisdiction of the Court as follows:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- a) The crime of genocide;
- b) Crimes against humanity;
- c) War crimes;
- d) The crime of aggression.”

Id.

crimes of concern to the international community and it has jurisdiction, in accordance with this Statute, only with respect to the three crimes mentioned.⁵⁰ The usage of the term “jurisdiction” in Article 5 will, as we shall see, raise some serious problems.

Before turning to these complexities of “jurisdiction,” I wish to address a fundamental problem, that is whether the purpose of the International Criminal Court is to prevent the causation of harm or whether it is designed to punish bad acts in and of themselves. That is a fundamental question in the theory of criminal law. The preliminary question in all systems of criminal law is whether the focus of the jurisdictional and prosecutorial powers should be preventing harm or punishing evil as an end in itself. The difference between these two purposes can be captured in the words: prospective and retrospective. Is the purpose of the Court to look backward to the commission of the crime and to apply sanctions in order to do justice or should the Court use its power, prospectively, to deter the occurrence of crimes within its jurisdiction? Most advocates of the ICC argue in the language not of retributive punishment but of prevention and deterrence. Yet the Preamble to the Statute clearly favors the imposition of punishment as an imperative of justice. Note the following language from the Preamble:

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level

⁵⁰ *Id.*; see also Rome Statute, *supra* note 1, at arts. 6 – 8 (defining crimes enumerated in Article 5).

and by enhancing international cooperation, . . .⁵¹

This language suggests that the purpose of the ICC is almost exclusively to punish offenders justly in order to avoid the impunity of offenders and to vindicate the status of the victims. There is no reference or no suggestion that the purpose of the Court is preventive or that the purpose of the Court is to intervene early in the genesis of potential war crimes in order to prevent their commission in the future. Of course, domestic criminal jurisdiction does that. We have inchoate crimes like incitement, possession offenses, attempts, conspiracy and all of these are designed to permit the Court to intervene and then restrain the individual before harm occurs.⁵²

This conclusion provides an important perspective on interpreting the specific crimes within the “jurisdiction” of the court. Let us look first at the provision on Genocide. Article 6 contains a portion of the original genocide convention, but only a portion of it.⁵³ This is the way it reads in English (one of the six official languages of the Treaty):

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

⁵¹ Rome Statute, *supra* note 1, at Preamble.

⁵² See MODEL PENAL CODE §§ 5.01 – 5.07 (Official Draft & Revised Comment, Amer. Law Inst. 1985). In the introduction to Article 5, the drafters of the Model Penal Code set out the purposes of inchoate crimes: (1) to have legal basis to intervene in a commission of a crime; (2) to have safeguards to deal with actors who are disposed of committing a crime; and (3) to not exculpate an actor who fails to reach his or her desired result. Article 5 covers Criminal Attempt, § 5.01; Criminal Solicitation, § 5.02; Criminal Conspiracy, § 5.03; Incapacity, Irresponsibility or Imunity of Party to Solicitation or Conspiracy, § 5.04; Grading of Criminal Attempt, Solicitation and Conspiracy, § 5.05; and Possessing Instruments of Crime, § 5.06.

⁵³ Compare Genocide Convention, *supra* note 4, at art. 2 with Rome Statute, *supra* note 1, Part 2, art. 6.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.⁵⁴

Now what do these provisions mean? We can understand the reference to “killing.” That is the prototypical way of committing genocide. But what is “causing serious mental or bodily harm?” I suppose that could qualify in the popular understanding of genocide, provided that mental or bodily harm were likely to lead to the extinction of the particular group. But the criteria are already beginning to get disturbingly vague because all that is required under Article 6 is an intention to bring about the destruction of the group “in whole or in part.”⁵⁵ Would it be enough to subject one person to “serious mental or physical harm” with a view toward causing the death of that person? One would not think so, but the language of the statute seems at least to imply that aggression against two people constitutes inflicting harm on the “members of the group.”

Part (c) enters into even vaguer territory by suggesting that infliction of harsh conditions of life is enough to constitute genocide. But let us pass on to parts (d) and (e), which reveal the enormous sweep of the crime of genocide. Part (d) tells us that genocide is committed when there is any campaign to reduce the rate of pregnancy in order to curtail population growth. Somehow, one feels that the drafters cannot be serious about this. They have some paradigm of evil in mind, but they are not telling us precisely what it is. Part (e) is more disturbing, for this section does not require even physical or mental harm or a reduction in population. The evil addressed by banning the forcible transfer of children from one group to another is cultural and not genocidal. I think that what the drafters have in mind is something like the taking of Aborigine children in

⁵⁴ Rome Statute, *supra* note 1, Part 2, art. 6.

⁵⁵ *Id.*

Australia and forcing them to grow up in White homes so that they assimilate into a different culture. Significantly, the crime is committed by the very act of transferring the children to the homes where they are supposed to grow up. In other words, the crime is committed at the early stage of preparation — prior to the cultural assimilation or the infliction of any other harm.

The very nature of genocide as a crime is that it is inchoate. All five of these provisions represent early stages in a course of action that could lead to the extinction of the “group” in the long run. According to the statute, then, the Nazis committed genocide the first time they approached a Jew with the “final solution” in mind.⁵⁶ The first time the Israeli government took Sephardi children and placed them in Ashkenasi homes for the purpose of assimilation, the government committed genocide.⁵⁷ This reading of the statute, which is indeed faithful to the words on the page, verges on the absurd. This is not what ordinary people mean when they talk about genocide, and it is hard to believe that the drafters would have deviated so far from the ordinary, lay understanding of the crime. Furthermore, the way the provision on genocide is drafted, the focus of the crime is placed on the earliest possible stages of commission, thus violating our interpretive premise that the purpose of sanctions under the ICC treaty is not to anticipate and prevent harm but to punish harm that has already occurred.

Genocide, as we will recall, is one of four crimes now recognized under Article 5 as constituting the “jurisdiction” of the ICC.⁵⁸ Let us explore some of the problems raised by this conception of jurisdiction. Article 25, section 3 provides:

In accordance with this Statute, a person shall be

⁵⁶ See Rome Statute, *supra* note 1; see also Jennifer Rosenberg, *Holocaust Directory* (visited Feb. 4, 1999) <<http://holocaust.about.com/education/holocaust/library/weekly/aa081997.htm>>. “Endlösung: ‘Final Solution’ (German) – The Nazi’s program to kill every Jew in Europe.” *Id.*

⁵⁷ See Yossi Klein Halevi, *I’m Sorry*, THE JERUSALEM REPORT, Oct. 30, 1997, at 24 (quoting Israel Labor leader Ehud Barak, who asked forgiveness for his predecessor’s treatment of Sephardi immigrants).

⁵⁸ See Rome Statute, *supra* note 1, at Part 2, art. 5(1)(a) – (d). Under the statute the Court has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. *Id.*

criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person
 (a) Commits such a crime . . .⁵⁹

This means that you are liable for genocide, war crimes, crimes against humanity, or the crime of aggression if you commit that crime. That is perfectly reasonable. But let us read on. A person is also “responsible and liable for punishment for a crime within the jurisdiction of the Court” if he or she “(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted.”⁶⁰ Let us recall there are now only four crimes “within the jurisdiction of the Court” under Article 5: Genocide, War Crimes, Crimes Against Humanity, and Aggression.⁶¹ This means that if a government official orders someone to transfer children from one group to another for the purpose of national assimilation, and the recipient of the order makes an effort to effectuate the transfer, the government official becomes guilty of genocide. I trust that this result is sufficient to raise some concerns about the drafting of the statute.

But there are more anomalies created by Article 25, section 3, which provides for various other forms of participating in an offense, all of which render the actor liable for the offense in chief.⁶² Article 25, section 3(e) is enough to send shivers down the back of anyone concerned about issues of legality. Any person is guilty of genocide if he or she “directly and publicly incites others to commit genocide.”⁶³ In other words, writing or speaking in favor of population transfer renders the speaker liable for the heinous crime of genocide. The encroachment on civil liberties and freedom of speech implicated by these provisions is not one we would tolerate lightly under American law. To say that this kind of intrusive legislation should be imposed internationally, without regard for countervailing values, reveals a system of norms that has lost its connection to common sense and traditional legal concerns.

How should these defects in the ICC statute be rectified? The

⁵⁹ Rome Statute, *supra* note 1, at Part 3, art. 25(3)(a).

⁶⁰ Rome Statute, *supra* note 1, at Part 3, art. 25(3)(b).

⁶¹ Rome Statute, *supra* note 1, at Part 2, art. 5(1)(a) – (d).

⁶² Rome Statute, *supra* note 1, at Part 3, art. 25.

⁶³ Rome Statute, *supra* note 1, at Part 3, art. 25(3)(e).

remedy lies, I believe, in paying much closer attention to the definition of substantive offenses and carrying out the policy decision in the Preamble that the purpose of the Court is not to prevent harm but to punish criminals for crimes previously committed. If the genocide statute were limited to punishing crimes already completed, most of the provisions in the present Article 6 would become irrelevant.

Yet the fact is, that at least in the modern political world, genocide has never been successful. The Nazis tried. The Turks are accused of trying against the Armenians, but the intended victims survived. Genocide, therefore, has the inherent quality of being a crime of attempt, an inchoate offense, in which punishable evil is perceived prior to the successful completion of the crime.

It seems very clear that the ICC statute is conflicted at its core about whether its fundamental purpose is, as stated in the Preamble, to express identification with victims and avoid the impunity of offenders.⁶⁴ The structure of genocide suggests that the purpose of the ICC is also to intervene before the occurrence of catastrophic harm in order to avoid greater harm in the future. It is not clear to me why the Statute is so conflicted on this fundamental question. I think it may be because the international community itself is confused about why it is punishing war criminals. Is it punishing war criminals simply because justice requires the execution of people like Eichmann and the Nuremberg defendants? Or is the purpose, as one often hears from human rights advocates, to deploy criminal sanctions for the sake of a safer world?⁶⁵ To use the terms introduced earlier, should the primary focus of the ICC proceedings be retrospective or prospective?

I offer these comments in the hope that these issues can be resolved in such a way that will lead to the improvement of the statute so that, in fact, the International Criminal Court can come into being and that it can serve a legitimate and just function. Thank you.

⁶⁴ Rome Statute, *supra* note 1, at Preamble.

⁶⁵ See David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529, 531 (1999) (discussing power of the court to punish individuals who evaded justice in national courts). See generally Ruti Teitel, *The Universal and the Particular in International Criminal Justice*, 30 COLUM. HUM. RTS. L. REV. 285 (1999) (stating that the international adjudication of human rights violations reflects the human right's regime's goal to construct human rights as universal).

PROF. TEITEL: I would like to introduce Richard Dicker who is Associate Counsel of Human Rights Watch, Director of HRW's campaign for an International Criminal Court and who was intimately involved in the process at Rome.

Richard Dicker, Esq.

MR. DICKER: First, let me say it is good to be at a law school discussing these issues because the kind of discussion/debate that we are having this evening needs to take place in law schools all around the country. Thanks for the opportunity to come and participate. I want to note, before starting, Roy Lee's role as the Director of Codification Division at the Office of Legal Affairs for the United Nations. He helped three years' of preparatory committee meetings by providing essential services that enabled those preparatory meetings to function. At the Rome Diplomatic Conference, as head of the conference Secretariat, he made the impossible possible. In terms of Bill Leitzau, while I strongly disagree with his position, he is an unusually thoughtful guy. Lastly, I want to acknowledge the presence in the room tonight of several people involved in the Coalition for the International Criminal Court which has been the convening entity for hundreds of non-governmental organizations around the world.

The conclusion of the Treaty establishing the International Criminal Court was a historic achievement. Completed after four years of complex negotiations, the Treaty embodies a delicate balance between divergent political interests and a synthesis of the world's legal traditions. The Court's creation was driven by a diverse coalition of states, north and south, a like-minded group of states that included, among many others, Canada, Germany, the Nordics, Argentina, South Africa Samoa, Hungary and the Republic of Korea.⁶⁶ This very diverse group of states that wanted an effective and independent International Criminal Court. For example, in Rome

⁶⁶ See Richard Dicker, *Issues Facing the International Criminal Court's Preparatory Commission*, 32 CORNELL INT'L L.J. 471, 471 (1999) (discussing support for the Court and issues facing the Preparatory Commission); see also M. Cherif Bassioni, *Observations Concerning the 1997-98 Preparatory Committee's Work*, 25 DENV. J. INT'L L. & POL'Y 397 (1997).

we saw the active participation of many African states.⁶⁷ The breadth of support for the Court provides a strong starting point for establishing an effective International Criminal Court.

The success of establishing the International Criminal Court will be judged, of course, neither by the complexities of its constituent instrument nor by the negotiating skill that made it possible, but by its ability to make a difference in the real world. The International Criminal Court is mandated to hold accountable those who are accused of four core crimes.⁶⁸ I believe its purpose is providing justice for victims and deterring the commission of these crimes in the twenty-first century. The ICC will also help to extend the rule of law so that those who commit genocide or crimes against humanity are seen not only as doing atrocious deeds, but criminal acts. The Court has enormous potential to change the human rights landscape in the twenty-first Century.

There are many important provisions of the statute and I cannot discuss all of them. Roy Lee touched on a number of them. Let me quickly flag the important advances made in codifying crimes of sexual violence and the protections in the statute for victims and witnesses, particularly victims, who, all too often, happen to be women and children. There is a very good basis for an effective victim and witness unit. The statute authorizes an innovative role for victim participation in the proceedings before the Court.⁶⁹

I am going to focus on two critical aspects of the statute: the exercise of the Court's jurisdiction and the International Criminal Court's relationship to national legal systems. First, jurisdiction. The provisions here lie at the heart of the Treaty and they were the most controversial elements of the package approved in the final hours of the Rome Conference. The negotiators agreed on a regime of automatic jurisdiction, which means that a state party, once it ratifies the Treaty, accepts the Court's jurisdiction over the crimes within its

⁶⁷ See Paul J. Magnarella, *A Court for War Crimes in Africa*, THE INDEPENDENT, May 8, 1999, available in 1999 WL 11578842 (indicating that 19 African states are signatories to the International Criminal Court Statute).

⁶⁸ See Rome Statute, *supra* note 1, at Part 2, art. 5(1). See also Michael Bachrach, *The Rome Statute Explained*, N.Y.B.A. INT'L L. PRACTICUM, Spring 1999, at 37 (discussing the subject matter jurisdiction of the court).

⁶⁹ See Rome Statute, *supra* note 1, at Part 6, art. 65(3).

jurisdiction.⁷⁰ There is only one exception to this: the opt-out provision in Article 124 which allows the state to opt-out of the Court's jurisdiction over war crimes committed on its territories or by its nationals for a non-renewable period of seven years.⁷¹

The most controversial and problematic aspect of the treaty is contained in Article 12. Article 12 governs the preconditions that must exist before the Court can have jurisdiction.⁷² This provision provides that in cases, other than referrals by the Security Council, the International Criminal Court will only be able to act where the state on whose territory the crimes were committed, or the state of nationality of the accused, had ratified the Treaty.⁷³ This more limited jurisdictional reach represents a concession that was made at the last moment. It was made in large part, I believe, to placate the United States. It is a significant limitation because the state of nationality of the accused is often the same as the state on whose territory the crime was committed. Think of Pol Pot's crimes in Cambodia and Idi Amin's deeds in Uganda. In the absence of the Security Council's referral of the situation in those countries to the Court, Cambodia and Uganda would have to have ratified the treaty for the Court to exercise jurisdiction over the responsible individuals.

This is a significant, but not a fatal, limitation. First, referrals by the Security Council will have the unique consequence of binding all member states of the United Nations, whether or not they are States Parties of the Statute. Second, under the Article 12 regime, the

⁷⁰ See Rome Statute, *supra* note 1, at Part 2, art. 12(1). See also Scheffer, *supra* note 65, at 532-33; Bachrach, *supra* note 68, at 37.

⁷¹ See Rome Statute, *supra* note 1, at Part 13, art. 124; see also Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 370 (1999) (stating that the opt-out provision is an incentive for states to promptly join the Criminal Court because: (1) states that are reluctant to join the ICC can maintain jurisdiction; and (2) the opt-out provision may not always be available to joining states).

⁷² See Rome Statute, *supra* note 1, at Part 2, art. 12; see also Diane F. Orentlicher, *Politics by Other Means: The Law of the International Criminal Court*, 32 CORNELL INT'L L.J. 489, 490 (1999) (indicating that the United States objects to Article 12 because it believes that it violates international law in subjecting non-party states to the jurisdiction of the Court).

⁷³ See Rome Statute, *supra* note 1, at Part 2, art. 12; see also Scheffer, *supra* note 41, at 18 (1999) (concluding that Article 12 gives the Criminal Court jurisdiction over "anyone anywhere in the world").

Court will more likely have jurisdiction in cases where there is an international conflict where the state of nationality and territory are not the same. Third and most importantly, the effect of this limitation will be minimized to a great extent by universal ratification of the Treaty. Beyond the 60 ratifications necessary for the Treaty to enter into force, the closer the international community gets to universal ratification, the greater the likelihood that the state of nationality of the accused or the territorial state will be a state party.

If you look at the 75 state signatories, I believe that nearly a third of those are African states.⁷⁴ I think this reflects the fact that many states that have recently made transitions from dictatorship and human-rights-abusing regimes see an effective International Criminal Court as providing protection against would-be violators.

Since the Rome conference, you have heard U.S. officials say that Article 12, the jurisdiction provision, contravenes international law.⁷⁵ The argument — as I understand it — is that by exercising jurisdiction over nationals of non-state parties the Treaty overreaches. The claim that the treaty overreaches because it supposedly binds states that have not ratified, is a distortion. First, the International Criminal Court does not bind non-state parties; it does not impose any obligation on non-state parties to the Court. Part 9 of the Statute, which deals with state cooperation, specifically obliges only state parties to cooperate, and a clear distinction is drawn between these two categories.⁷⁶ In addition, and I think more tellingly, many treaties, such as the Hijacking or Antiterrorism Conventions, provide for states other than the state of nationality of the accused to exercise jurisdiction over persons accused of committing the crime.⁷⁷ These

⁷⁴ Since February 11, 1999, the date of this Symposium, the number of signatories has increased to 93, and African states now account for approximately one fifth of all signatories. See CICC International Criminal Court Home Page, *Rome Statute Signature and Ratification Chart* (visited Feb. 10, 2000) <<http://www.igc.apc.org/icc/rome/html/ratify.html>>.

⁷⁵ See Dicker, *supra* note 66, at 474.

⁷⁶ Rome Statute, *supra* note 1, at Part 9.

⁷⁷ See, e.g., Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 UST 1641; Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 564; New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 UST 1975.

treaties, like the International Criminal Court Statute, do not require the state of nationality of the accused to be a party. The United States is a party to many of these treaties and has exercised jurisdiction over non-U.S. nationals in U.S. District Court on the basis of these treaties.⁷⁸ This is a cornerstone of U.S. policy in combating terrorism. Can you imagine the United States Department of Justice's reaction to the claim by Libya that United States courts had no jurisdiction over a Libyan national accused of hijacking an American aircraft because Libya was not a party to that particular convention? That's the objection we are hearing from the United States about Article 12.

Let me talk briefly about complementarity. This is an underlying principle of the Court. The U.S. delegation sought and obtained many points fleshing out complementarity that are now codified in the statute. U.S. negotiators said this was necessary to provide real assurance to policymakers in Washington, D.C. that the Court could not be used to advance a political agenda. The Treaty provides that the International Criminal Court will only act where national systems are unable or unwilling to do so.⁷⁹ There are some very stringent standards that define "unwilling." "Unwillingness" covers situations where the national authorities undertake decisions with the intent to shield a person from criminal responsibility.⁸⁰ In addition, where there has been a delay which is inconsistent with intent to bring the person to justice, and where the proceedings were not conducted independently or were conducted in a manner that was not consistent with an intent to bring the person to justice.⁸¹ This is an extremely high standard. It is not satisfied simply by citing an instance of a sloppy or an inefficient prosecutorial effort. This is an especially heavy burden of proof given that the national authorities,

⁷⁸ See Alien's Action for Tort [referred to as the Alien Tort Claims Act], 28 U.S.C. § 1350 (1999). "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* See also treaties listed *supra* note 77.

⁷⁹ See Rome Statute, *supra* note 1, at Part 2, art. 17(1)(a).

⁸⁰ Rome Statute, *supra* note 1, at Part 2, art. 17(2)(a); see also Jamison G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State*, 50 CASE W. RES. L. REV. 127, 171 (1999).

⁸¹ Rome Statute, *supra* note 1, at Part 2, art. 17(2)(b) – (c); see also White, *supra* note 80, at 171.

not the International Criminal Court prosecutor, will possess the relevant information about the steps taken on the national level.

In addition to these high thresholds, there are several distinct opportunities for a state or the accused to challenge the admissibility of the case before the Court. This is another area in which the United States delegation won major concessions. First, states (state parties or non-state parties) can initiate a preliminary challenge when the International Criminal Court prosecutor announces the intention to investigate a situation that has been first referred to the Court.⁸² The Treaty requires the prosecutor to notify all states that would “normally exercise jurisdiction” of his or her intention to proceed.⁸³ Any state, whether a party or nonparty, may then inform the court that it is dealing with the situation domestically and the prosecutor will defer to that investigation.⁸⁴ There is a second procedure. If the parties seek to, they can attempt to block a prosecution by challenging the admissibility of a particular case.⁸⁵ Then the prosecutor bears the burden to prove the “unwillingness” to proceed on the national level.⁸⁶ My point is that there are significant safeguards in this Statute that address the legitimate and real concerns of the United States Department of Defense. These safeguards will minimize the risks of politically motivated prosecution, directed against Americans or anyone else. This is not foolproof. But perfect judicial mechanisms are difficult to find on the national or international level. The benefits in human rights enforcement that will come from this Court and to the best interests of U.S. foreign policy will be immeasurable. Thank you.

PROF. TEITEL: Thanks, Richard. Our final speaker is my

⁸² Rome Statute, *supra* note 1, at Part 2, art. 18; *see also* Panel Discussion, *Association of American Law Schools Panel on International Criminal Court*, 36 AM. CRIM. L. REV. 223, 246 (1999).

⁸³ Rome Statute, *supra* note 1, at Part 2, art. 18(1).

⁸⁴ Rome Statute, *supra* note 1, at Part 2, art. 18(2).

⁸⁵ *See id.* at § 7. If a challenge is made the Prosecutor must suspend the investigation until the Pre-Trial Chamber determines its validity. *Id.* at art. 19(7).

⁸⁶ *See* Rome Statute, *supra* note 1, at Part 2, art. 19(10). “If the Court has decided that a case is inadmissible under article 17 [the “unwillingness” section], the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible . . .” *Id.*

colleague Professor Dubinsky. He has been a Fellow at the Council on Foreign Relations and has a specialization in European Community Law but, primarily, for purposes of this Panel, he has been an advocate for a continuing role for national courts in policing human rights abuses, including war crimes.

Professor Paul Dubinsky

PROF. DUBINSKY: Thank you, Ruti. I approach this debate as someone who follows the development of international institutions and, in particular, the relationship between our existing international courts and the new international tribunals we have created during the past decades. With that in mind, I am going to put forward some not terribly profound, but hopefully useful remarks to put this debate into perspective.

This is not the first international court we have created. We have seen this before, from the International Court of Justice in the Hague, the European Court of Justice in Luxembourg, to the new WTO dispute resolution panels. We should draw on those examples to recognize that there are certain things that international courts do well and other things less well.

If we look at the International Criminal Court, putting the specifics of the Statute aside for the moment, what is it likely to do well and what is it likely to do poorly? What it might do very well is provide clarity and uniform interpretation to international human rights and humanitarian law. We have an existing system where war crimes or torture violations are prosecuted civilly or criminally in national courts all around the world and there is often great disuniformity and lack of clarity in those decisions. The ICC could develop expertise in applying international criminal laws to specific sets of facts. Existing national courts could then use the new court's precedents and accord them a certain force of persuasion, if not strict precedential value. A more uniform interpretation is greatly needed, I might add, in certain basic areas such as defining command control responsibility or even the substantive violations themselves, such as what constitutes genocide and torture.

What else might the International Criminal Court be really

good at? Perhaps at resolving immunity issues, such as those at issue in the *Pinochet* case.⁸⁷ British Courts have been struggling for two months in that case trying to figure out how to deal with diplomatic immunity, sovereign immunity and head-of-state immunity. An international criminal court created under the auspices of the United Nations would be able to adjudicate those immunity issues in an international forum that would be able, to some degree, to avoid a confrontation of one state (Chile) against another (the U.K.) over whether the latter failed to honor the former's immunity and rights as a sovereign government.

Finally, the International Criminal Court may best be suited to prosecute "big fish" — the notorious criminals and human rights abusers of the century. Try such major figures in an even-handed, unpoliticized manner. Moreover the tribunal that sits in judgment of an individual accused of a crime against humanity should ideally be one suited to speak for all of humanity. An international criminal court representing a broad section of the world is perhaps most appropriate for such a task.

What are international courts not terribly good at? First, they are not well suited to processing a large volume of cases. In public discourse and in this room, one hears the claim that the International Criminal Court is going to eliminate the sort of bloodshed we have witnessed this century or that it will somehow address large numbers of war. I doubt that. My belief is that our existing national court systems will be the primary tribunals to enforce rights and to police international human rights violations well into the 21st century. The discussions surrounding the International Criminal Court would go further if this likelihood were acknowledged. The question we should be asking is what could the International Criminal Court add to our

⁸⁷ See *U.K. House of Lords: In re Pinochet*, 38 I.L.M. 430, 432-33 (1999). Pinochet was the Head of State of Chile from 1973 until 1990. *Id.* at 432. It was alleged that he committed "various crimes against humanity" throughout that period. *Id.* While he was in England receiving medical treatment, Spain issued international warrants for his arrest to face trial for such crimes. *Id.* These warrants were quashed by the Divisional Court of the Queen's Bench Division so that they may determine whether he maintained official immunity only throughout his tenure or whether it extends beyond. *Id.* The House of Lords held that with respect to the torture allegation, Pinochet was without immunity for acts occurring after the U.K. had ratified and implemented the Torture Convention. *Id.*

existing system of national and regional tribunals for exposing and punishing human rights violations. The ICC is not going to have the budget to handle any more than a very small fraction of its potential cases. That, again, is my view as to why it can contribute most by carefully interpreting the relevant treatise and analyzing case law from a variety of jurisdictions.

Second, national authorities will continue to be needed to gather evidence, to arrest suspects, and to imprison those convicted. In fact, the International Criminal Court statute has whole sections on just where convicted persons are to be incarcerated.⁸⁸ Finally, the Statute takes a schizophrenic position with respect to national courts. Despite repeated references to complementarity, there is no consistent vision of how the International Criminal Court should relate to national courts. My view is that, for the foreseeable future, national courts will continue to be the primary tribunals for victims to obtain some sort of compensation, reparation and restitution.

A key fault of the Statute is that it is too ambitious. Yet in one key area it is not ambitious enough; its meager provisions on what the Court can do to collect assets are inadequate.⁸⁹ A number of defendants will have stolen substantial assets from victims, or embezzled them from the governments they represented. What can the Court do about this problem? It is not going to be able to process large numbers of claims for restitution. National courts will do that. Perhaps the International Criminal Court statute should contain a provision that the Court's criminal convictions should be, in some sense, *res judicata* in national civil suits so that, many facts would not need to be retried in civil proceedings in national courts.

It is sometimes overlooked that in the last ten years, maybe even longer than that, there has been a steady increase in the involvement of national courts in adjudicating crimes against humanity, war crimes and similar grave violations of international human rights. What we have discovered from the *Marcos* case for

⁸⁸ See Rome Statute, *supra* note 1, at Part 10, arts. 103 – 04 & 106.

⁸⁹ Rome Statute, *supra* note 1, at Part 6, art. 75 (providing that the Court shall establish principles “relating to reparations to, or in respect of victims, including restitution, compensation, and rehabilitation.”). *Id.* at § 2.

instance,⁹⁰ is that at the end of the day there can be a huge amount of assets and many competing claims for those assets — government claims, victims' claims and other third-party claims. In the *Marcos* litigation, for example, a class of human rights victims obtained a large judgment against the Marcos estate, only to encounter difficulty collecting on the judgment because of the competing claims of the Philippine government.⁹¹ The International Criminal Court could be of use in potentially resolving which of those competing claims takes priority, a function well suited to an international tribunal, particularly with respect to competing government claims. As the Statute is currently written, it makes no attempt for the Court to serve this function.

To conclude, let me just say one final word about what you might call the deal-breaker issues that the other panelists have been talking about. If you keep in mind what the International Criminal Court is likely to do best and what it is likely to do less well, that may help resolve some of those issues. My own view is that the proposal that members of the Security Council would have a veto on which prosecutions may go forward is not going to work. It undercuts what the International Criminal Court is most likely to do best, that is to offer a neutral forum for justice in which everybody's ox can be gored. That is what the International Criminal Court is supposed to do. A veto drastically undercuts its ability to perform that central role effectively.

Let me also address what, I think, has gotten us off track, and that is worrying about the procedural aspects of who will refer what case and who will restrain an overzealous prosecutor. There is actually a substantive disagreement or a substantive problem that underlies this issue. Our experience with national courts and international courts is that sometimes they sort of go off on their own. The real worry is that we are not sure what this prosecutor or this court down the road will think is a war crime or will think — as

⁹⁰ See *Hilao v. Estate of Marcos*, 103 F.3d 762 (9th Cir. 1996) (involving 10,000 class action plaintiffs who suffered torture, execution, and family disappearances during Ferdinand Marcos's tenure as president of the Philippines). See also *In re Estate of Marcos*, 978 F.2d 493 (9th Cir. 1992) (wrongful death action brought by a Philippine citizen against the daughter of Ferdinand Marcos).

⁹¹ See *Hilao*, 103 F.3d 762.

Professor Fletcher aptly pointed out — constitutes genocide. We ought to address our attention to tightening those definitions, providing rules of interpretation, and ways of constraining the Court and prosecutor rather than focus on a Security Council veto, which is a sledgehammer approach in my view.

My final point is that we should view this Court as a work-in-progress. This is the first time around. Our first experience with it will not be perfect. We should get it started and fully anticipate returning to this Treaty ten years hence. Thanks.

PROF. TEITEL: Okay. Now, I would like to take a couple of questions from the audience and allow the Panel an opportunity to respond to those questions and, perhaps, take in some of each other's comments.

THE AUDIENCE: I have worked in field missions for the United Nations for a number of years. My question concerns Professor Fletcher's comments about genocide and the definition in the International Criminal Court Statute. It seems to me that sections (d) and (e) are definitions that are verbatim from the Genocide Convention. This is also true for incitement, as included in the other paragraph. However, conspiracy, et cetera, is not included in the Genocide Convention, therefore, the Genocide Convention's definition seems more restrictive in terms of what can constitute genocide. How can a Treaty that has been in effect as long as the Genocide Convention not represent some kind of legitimate definition for genocide?

The second question, if I may, is to the Major, with regard to the existence of consensus on the Statute. Although, there are not settled definitions to a lot of these crimes, there is a certain level of consensus in terms of what constitutes customary international law, crimes against humanity, war crimes based both on customary law and treaty law and, also, genocide based on the Treaty so how can this not represent some important level of consensus? Those are my two questions.

PROF. FLETCHER: Well, I don't know how the world has somehow ignored these defects in the original Genocide Treaty.⁹² I found the comments of my fellow panelists interesting on this point,

⁹² Genocide Convention, *supra* note 4.

and that is, I think, the issue of legalism and legality, the absence of precise definitions is not at the forefront of the crusade, we are not terribly concerned about this question. However, I think, there is a conflict between a shared understanding of who an international war criminal is. We all sort of have images of who these criminals are; people who are causing substantial amounts of harm, that are, actually, engaged in killing and raping, all sorts of terrible things. That is the sort of paradigm that motivates the Court.

Then, there is something that I can only call a "propaganda" function. The propaganda function means that we have included things in the Treaty like cultural genocide, offences that will probably not be enforced, however, they were included because there is a substantial propaganda function involved in including them. It may be that some prosecutor will come along some day and choose to enforce them, this is a risk that we have learned to appreciate. Therefore when these provisions enter into an international agreement as propaganda, there is an enormous risk involved that some day they will come home and roost, that they will, actually, be applied. I think, that is a very serious danger that we ignore amidst the general enthusiasm for the campaign to get the "Big Fish," as it was said.

DR. LEE: Just two points on the last question. I thought that Professor Fletcher's comments are very helpful particularly from the substantive point of view. One of my concerns, during the Rome conference, was the absence of criminal lawyers on the various delegations. To my knowledge there were very few delegations that, actually, had criminal lawyers on their delegation.

Some of the points just mentioned will, I think, be addressed during the Preparatory Commission, particularly, in connection with the elements of crimes. I have seen some of the first drafts and they do address some of the issues but not all of them will be covered. In this regard I do want to mention that this is a characteristic of international negotiations. In Rome, 185 states were invited and 160 took part till the end. Each delegation represents its own criminal system and its own criminal law. Each held to its heart its own cultural, political and historical values. States all wanted their values represented and reflected in the Statute. Clearly, this is not possible. You are not just drafting for yourself. You need to make a lot of compromises in order to come to agreement. The result is a mixture

that is not always satisfactory and within which there are imperfections.

The examples Professor Fletcher gave are typical of international negotiations. I think, that is a problem fundamental to all international legislation. How to maintain concordance amongst the language versions is really a challenging problem. We will have to find a way to deal with that. We should however remember that United Nations negotiations and instruments cannot only be in one language and need to be conducted in the common working languages. Six languages are not bad and it could be considerably worse for an institution of 185 States, particularly in comparison with an institution such as the European Union, which uses as many languages as it has members. Given that, the Rome Statute is a multilateral instrument and a product of multi-state negotiation, it is inevitable that the texts are not perfect from any particular language or linguistic standpoint. Thank you.

MAJOR LIETZAU: I would like to begin by saying, I could not agree more with Professor Fletcher and Dr. Lee regarding the definitions of crimes. First, with respect to the Genocide Convention, I admit that the difficulty derives from the Convention itself. Here, we see one of the problems associated with the task before us, and it relates to your issue regarding consensus. Certainly, there was agreement regarding at least the verbiage associated with genocide, some of the crimes against humanity, and some of the war crimes. However, there was not clear agreement on all the substantive aspects of the crimes found in the Rome Treaty. There were probably similar differences of opinion when the Genocide Convention was negotiated 50 years ago.

The many perspectives animating a multilateral treaty negotiation make very improbable the notion that all views will be accommodated perfectly. The very nature of negotiation within time constraints demands that it be an exercise in compromise. Ambiguous wording serves to facilitate that compromise, allowing each party that has a concern over a particular issue to interpret terminology in the way that benefits their side. That is how agreement was reached in the Genocide Convention and many of the other treaties that served as antecedents to the offenses we find in the Statute. Newer offenses were negotiated the same way in Rome.

Consensus provides a good basis for the legality of some aspects of the International Criminal Court. However, the jurisdictional regime, as it applies to non-party states, is not benefited by a consensus foundation, and I would obviously differ with Professor Fletcher regarding the import of that fact and whether it is merely an issue of trusting judges. The very same well-meaning people that negotiated this text and allowed these illogical anomalies to occur are the kind of people who may become judges. As a nation, we put checks and balances not only into the internal workings of our judicial system, but also into the very structure of the government that gives authority to the judiciary. The proposed ICC is an autonomous court. All of the complementarity characteristics and all of the prosecutorial guidelines that Richard Dicker spoke about involve checks and balances *internal* to the Court. Differences of opinion are ultimately decided by those eighteen judges.

I think, the answer to your question on consensus is partly found in the comments by Professor Dubinsky when he listed the things that this Court would be "good at." I am not so certain those are the kinds of things we want the Court to be good at, that is, filling in the gaps as to what genocide means or what purposes we intend to serve by punishing people. What does torture mean? What does command responsibility mean? These are issues that were negotiated in international conventions. There was no exact eye-to-eye agreement on every concept, so negotiators found ambiguous wording that accommodated their negotiating concerns but failed to provide the kind of rigor characteristic of criminal law. Consensus regarding verbiage to be used in one context may not be consensus for its use in another.

Lastly, I agree wholeheartedly with Dr. Lee that, in fact, there were not many criminal lawyers at this negotiation. In these kinds of things, it seems to me, though I readily admit my neophyte status, that we normally have subject matter experts negotiate the substance of a treaty, assisted by several international lawyers who focus on the contractual arrangements. Here, the subject-matter experts should have been criminal lawyers, but international lawyers were frequently asked to fill both rolls — taking on the roll of subject-matter expert as well. There were few people you could talk to with criminal expertise, and one was sometimes tempted to ask, "when was the last

time you were in a courtroom and made that kind of an argument to a judge?" Thank you.

PROF. TEITEL: Since we are running short on time, I will collect questions from the audience and let our panelists comment on some or all of them.

THE AUDIENCE: I would like to make two brief comments. First, with respect to what appears to be an unprecedented fear of international jurists. International courts have performed their role responsibly and properly, and the judges have certainly not come under fire for any breaches of duty. And second, I attended the Rome convention, and as I remember it, there was no midnight push to vote.

THE AUDIENCE: What are the criteria the United Nations takes into account when deciding whether or not to follow a consensus approach to negotiations for international treaties and when to follow with another approach?

THE AUDIENCE: For Dr. Lee. I was wondering if you could speak a little bit about if there was a debate regarding the death penalty in Rome and how it was resolved, if it was, what, basically, the Rome Conference decided about what would happen to convicted criminals.

THE AUDIENCE: My question deals with the issue of legality, that is, couldn't the Court expand, if it was concerned with the causation of crime, couldn't it expand its list of crimes by looking at, for instance, the issue of hate speech or things that could cause genocide to happen and create a much more narrowly tailored statute that could deal with that so that victim's or even perpetrator's rights could be protected as far as the due process is concerned? My concern is that some of what has been said today sounded a lot like throwing the baby out with the bath water.

PROF. TEITEL: Thank you. Paul?

PROF. DUBINSKY: I just have a brief response to the question regarding our faith in international jurists. I speak as somebody who has spent a number of years studying the European Union and generally likes much of what the European Court of Justice has done. Nonetheless, if we are honest about it, there have been periods of time when that European Court has been quite activist in its interpretation of the treaty's texts to the extent that some prominent

scholars publicly asked if it had “gone wild.”⁹³ Whether you like the European Court of Justice’s rulings or not, I think we must deal honestly with fears that similar things could happen with the International Criminal Court. Supporters of the International Criminal Court must do something more than simply reassure skeptics by saying that the judges and prosecutor will be conservative and reasonable people and so forth. That is not meeting a reasonable fear at its source.

PROF. TEITEL: Okay. George —

PROF. FLETCHER: Well, I am very intrigued by this question that the gentleman posed about hate speech. I think that was a wonderful question, actually, because it dramatizes, for me, the fundamental problem. As I see it human rights advocates want to do good in the world and this is the source of a great deal of evil. The purpose of doing good implies intervening to prevent harm before it occurs and, I think, that is basically, inconsistent with the philosophy of criminal punishment as outlined in the Preamble to the Court, which stresses punishment as act of retributive justice.⁹⁴ There is no good to be expected from retributive punishment (avoiding impunity of offenders) except the abstract value of doing justice, as was done in Nuremberg and was done in the Eichmann case and was done, to some extent, in the Yugoslav Tribunal and the Rwanda Tribunal. The claim that you can actually deter people from committing the crimes within the jurisdiction of the ICC strikes me as an extremely dangerous proposition that has, absolutely, no factual foundation.

I am intrigued by the question of hate speech because it is entirely possible that conduct would be punished under this present Statute that would be constitutionally protected in the United States. Suppose that you have an Internet site that advocates the killing of some group covered by the Genocide Convention. The people who have set up that Internet site would be engaged in speech that is

⁹³ See Mauro Cappelletti, *Is the European Court of Justice “Running Wild”?*, 12 EUROPEAN L. REV. 3 (1987); HJALTE RUSMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICY (1986).

⁹⁴ See Rome Statute, *supra* note 1, at Preamble. “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.” *Id.*

protected by the United States Constitution.⁹⁵ Yet the site would violate Article 25, section 3(e) of the ICC Statute.⁹⁶ This would be a difficult situation. There is no way that the United States can endorse an international tribunal that would punish conduct constitutionally protected in the United States. The only way that we avoid problems of this sort is to set our sights lower and to say that an international criminal court should only punish in cases where there are real victims, where crimes have been committed and punishing is a requirement of doing justice.

PROF. TEITEL: Doctor Lee?

DR. LEE: Yes. Thank you. I agree with what Professor Fletcher just said. But, the work of the Preparatory Commission will show that the focus is going to be on past acts rather than on what he referred to as prevention. In criminal law at the national level, we have moved from punishment to crime prevention, just as we are talking about preventive diplomacy over the use of force in international relations. Insofar as international criminal law is concerned, its focus is still punishment; we have not gone much further than that. Philosophically, it is very interesting to talk about crime prevention. The international system is still behind national developments in criminal law. This does not mean that we should not focus on crime prevention. The creation of the ICC will certainly have, I hope, a deterrent effect.

Now, regarding the question of the death penalty, that turned out to be far more difficult than we anticipated because there was a group of states insistent that death penalty must be included in the Statute. But the relevant United Nations conventions have already excluded the death penalty.⁹⁷ I should also mention that there was another group of countries that felt life imprisonment should also be

⁹⁵ See U.S. CONST. amend. I. See also *ACLU v. Reno*, 521 U.S. 844 (1997) (holding the First Amendment protects speech on the Internet to the same extent as it does print media).

⁹⁶ In accordance with the statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: ... (e) In respect to the crime of genocide, directly and publicly incites others to commit genocide." Rome Statute, *supra* note 1, at Part 3, art. 25(3)(e).

⁹⁷ See Press Release, *UN Diplomatic Conference Concludes in Rome With Decision to Establish Permanent International Criminal Court*, July 17, 1998 (visited Feb. 11, 2000) <<http://www.un.org/icc>>.

excluded on the ground of cruelty. Under their national system, life imprisonment is not permitted.⁹⁸ Here is a profound dilemma. We were dealing with the most serious crimes and yet two of the most serious penalties — death penalty and life imprisonment — must be excluded at the insistence of most representatives. How do you reconcile these positions? In the end, both the death penalty and life imprisonment were excluded from the Statute. To meet the objections of certain states, the President of the Conference made a statement to the effect that the inclusion and non-inclusion of the death penalty was not intended to have any affect on national policy in that regard. It still posed an extremely difficult problem for countries such as Trinidad and Tobago. It was amongst the first countries to initiate the creation of this International Criminal Court. But, under its national law, the death penalty was necessary and indispensable.⁹⁹ At the end, in spite of the President's statement, Trinidad and Tobago did not sign the Statute in Rome, as much as it strongly supported the Court. Singapore is another example. The non-inclusion of the death penalty was contrary to its national policy.¹⁰⁰

I also wanted to say a few words about the Rome process and the question of consensus, which are very important points raised during our discussion here. The conference created numerous groups for informal consultations on all the major topics. At one point, we had more than ten groups meeting almost simultaneously and on a continuous basis. It was very difficult to find sufficient rooms and interpreters to accommodate those meetings. But, nevertheless

⁹⁸ See William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 480 (1997) (explaining that Yugoslav, Norwegian, Spanish, and Portuguese delegates view the death penalty and life imprisonment as cruel and unusual punishment and contrary to human rights).

⁹⁹ See Jeanne Moore, *World Briefing*, N.Y. TIMES, July 29, 1999, at A6 (explaining that Trinidad and Tobago "ignored Britain's pleas to eliminate the death penalty and have moved to withdraw from international protocols on capital punishment."). See also Leslie Cosimir, *Sand, Sun - & Siege: Rising Tide of Violence Hits Isles of Caribbean*, N.Y. DAILY NEWS, Jul. 18, 1999, at 24. Due to the high rate of violent crime, citizens of Trinidad and Tobago feel that the death penalty is inherently necessary. *Id.*

¹⁰⁰ See Michael J. Dennis, *Current Developments: The Fifty-fourth Session of the U.N. Commission on Human Rights*, 93 AM. J. INT'L L. 246, 248 (1999). "Fifty-one countries signed a statement circulated by Singapore, affirming that retention of the death penalty was a matter of sovereign decision making." *Id.*

extensive informal consultations were carried out. No state was excluded from such processes. Of course, some consultations were organized by the delegations themselves, and not all representatives were invited to those group meetings. To my knowledge, all the major states participated actively in all those meetings and they were not excluded, unless they did not belong to the groups holding the meetings. Of course, the real question is whether a delegation was able to convince the other delegations that its viewpoints should be taken into account. This question of ability to persuade should not be confused with questions concerning the openness and non-exclusiveness of the negotiation.

Let me just give you one example on the question of jurisdiction to illustrate how compromise was necessary and was made. As you probably know, 76 percent of the states that spoke on the question were in favor of, what is called, the "Korean Formula," which would allow the Court to have jurisdiction when one or more of the following states were parties to the Statute: the state on whose territory the crime was committed, the state of nationality of the accused, the custodian state or the state of which the victim is a national.¹⁰¹ This is one extreme supported by 76 percent of the conference participating states. On the other extreme, you have four to six states supporting the "consent" principle according to which the Court can only exercise its jurisdiction over those states that have given their specific consent.¹⁰² In between these two extremes, you have the rest of the states favoring something in between.¹⁰³ At the

¹⁰¹ See Craig Turner, *U.S. a Loner at Talks on Criminal Court*, L.A. TIMES, Jun. 18, 1998 at A8 (reporting that more than fifty western democracies favor broad jurisdiction of the international criminal court).

¹⁰² See Craig Turner, *Disagreements Threaten Global Criminal Court*, L.A. TIMES, Jul. 14, 1998 at A17. See also *Annan Faults U.S. and 9 Other Lands in Debate on Court*, N.Y. TIMES, Jul. 14, 1998 at A7. The United States and India, among others, opposed giving the International Criminal Court jurisdiction for those countries that did not sign the treaty, unless there is specific consent by that state. *Id.* See generally, *Background Information: Trigger Mechanism and the Exercise of the Court's Jurisdiction* (May 1998) (visited Feb. 11, 2000) <<http://www.un.org/icc>> [hereinafter *Trigger Mechanism*].

¹⁰³ See Turner, *supra* note 101 (noting that a compromise proposal was being discussed, which attempted to work with the Security Council, but not allowing a single state, on its own, to halt a case or investigation). See also *Trigger Mechanism*, *supra* note 102.

end, the proposal from the Bureau was a compromise and was formulated in consultation with the coordinators who led those informal consultations. The compromise was that the Court would have jurisdiction when two of the following states are parties to the Statute: the territorial state and the state of nationality of the accused.¹⁰⁴ Here, my point is not about whether the compromise is good or bad. My point is that compromise was essential when there were divergent positions. Here is a very good example of how compromises were made. Thank you.

MAJOR LIETZAU: With regard to the comments addressing judges and the vote process, I will briefly respond to both issues.

Fear of judges: I do not want to be misinterpreted, there is no fear of judges, individually. We, of course, assume all judges will perform as admirably as the international judges people have cited in whatever few tribunals we have had as examples. We are not talking about individual personalities or lack of integrity, but instead we are concerned about the best structure for government. In Philadelphia, over 200 years ago, some people got together and talked about how best to govern, how best to incorporate checks and balances into the structure of government. These were not intended to be specific criticisms of the personalities that would later fill the roles, but they were based on a general understanding of human nature. I think that many would agree with the basic premise that courts tend to arrogate power to themselves. Another maxim is that power corrupts. To guard against this, we created a structure of checks and balances that insure judges are ultimately accountable to the citizenry whom they judge, and that they play the role intended for them.

This topic came up during negotiations when addressing the issue of specificity commented upon by Professor Fletcher. American legal culture sees a judge's role very differently than do many others. The U.S. fought very hard to get the kind of logic and specificity that Professor Fletcher spoke about injected into the Statute. Significant concern was caused by the fact that many countries not only disagreed with us as to what the answers to certain questions of law should be, but that they also did not care to debate or to resolve those questions. They thought issues regarding elements of crimes and various

¹⁰⁴ See Rome Statute, *supra* note 1, at Part 2, arts. 12-14.

principles of criminal law were more appropriately resolved by judges than by states. That is, judges would essentially serve as legislators and would decide those issues that states parties had not been able to agree upon. That concept of a judiciary, coupled with basic checks and balances to which we, as Americans, are accustomed, is what underlies U.S. concerns with respect to judges. I'll move more quickly through the other issues.

Late-night-package: yes — it was a late-night-package, and, yes — the entire United States delegation woke up early, raced to the room and started pouring through the document wondering what was going to be in it. There were deals struck late into the evening. I would also differ slightly with Dr. Lee with respect to the 76 percent figure as supporting the Korean Formula. We kept careful records of the interventions, but our numbers reflected much less support for the Korean Proposal than 76 percent. (I suspect we are again dealing with a lack of specificity — this time regarding what was meant by certain interventions.)

Lastly, I feel I have to answer the question about consensus versus the vote approach. I cannot speak as to what the United States' policy is with respect to what kind of voting we need in various treaties. I do think it is important to realize that this is a dilemma, and as Dr. Lee has pointed out, it would be impossible to achieve consensus on every detail of everything in every Treaty. A vote appears to take care of that problem; on the other hand, one would question compromises where the number of states in favor of a norm embodies the measure of acceptability. With respect to the issues we are dealing with here, I think we have a very different kind of treaty. If there were any treaty regarding which an argument militating in favor of consensus would be appropriate, it would be in this one. We are not just addressing the relationships between states; we are talking about criminal culpability for individual citizens. In other treaties, when there is no consensus, a state simply does not join the treaty, and the requirement or norm in question does not apply to that state. This is a fundamental principle of international law codified in the Vienna Convention on Treaties.¹⁰⁵ However, with respect to the norms being

¹⁰⁵ See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 34-38, 1155 U.N.T.S. 331, 341. See also Scheffer, *supra* note 40, at 18 (1999) (illustrating that a

established here, we are bandying about terms like “universality.” When criminal culpability is associated with the use of such terms, a consensus procedure is appropriate.

PROF. TEITEL: I have allowed Richard the final word here and then we can adjourn for more discussion over refreshments.

MR. DICKER: Let me make several points. The first involves complementarity. Complementarity puts this Court’s jurisdiction in a secondary position. There isn’t a primacy of jurisdiction, and the notion of concurrent jurisdiction is quite different under this complementarity regime. Professor Dubinsky raised an interesting question in terms of what needs to take place domestically for states to bring their national laws into harmony with the Statute. One contribution a number of states need to make is funding experts to assist states that are looking for advice and guidance to amend or adopt national legislation in a way that will make their ratification of the Treaty effective. This is a big challenge.

Secondly, in terms of process, I just want to bring in some perspective here in the sense that having participated in the preparation for the Rome phase for three years, everyone knew that this was going to be a midnight deal, struck at the last moment and that the nub of the issue was going to be Article 12 or jurisdiction in combination with whether or not there was to be an *ex officio* prosecutor. Everyone went into the Rome Conference knowing that if the Statute were completed, it was going to be a past-midnight deal and, indeed, it was, and we all knew what the big issues were so there was, really, no surprise, in terms of the process aspect of how it ended. I do want to say that some of the last-minute nature of the process (such as Bill was highlighting) had to do with the effort of a number of states to really extend themselves to the United States government in an effort to twist the arm of the U.S., or conversely, to mitigate the level of discomfort that the United States might have. So, I think, that is another reason why things went on, and on, and on without our receiving a final text until 2:00 o’clock in the morning of the last day.

I think that there are some interesting issues we did not get to discuss and I want to just flag one of them for you. That is, what is

state that has signed a treaty, abides by that treaty, and cannot simply choose to opt out of specific requirements).

going to be the relationship between this International Criminal Court and, hopefully, more active vigorous national courts, like the courts in France or Switzerland or Sweden that filed cases against General Pinochet? Hopefully, we are seeing something of an international revival of national court activism and we want to see that and it raises some interesting questions in terms of an emerging system of international justice composed of different elements and how they all play together.

PROF. TEITEL: Thanks Richard. Let me thank all of our panelists and our audience for what has been a very thoughtful discussion of a topical subject at an auspicious time.