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Into Uncharted Waters

The International Criminal Court

Michael N. Schmitt and Major Peter J. Richards, U.S. Air Force

FROM 15 JUNE TO 17 JULY 1998, DELEGATES from most countries of the world gathered in Rome to finish drafting a statute for an International Criminal Court (ICC).[1] In the final vote on the resulting Rome Statute, 120 states favored adoption, twenty-one abstained, and seven—China, Iraq, Israel, Libya, Qatar, Yemen, and the United States—voted against the treaty.[2] The statute will come into force upon ratification by sixty states.[3]

The ICC may well reconfigure in profound ways the matrix of international responses to aggression, genocide, war crimes, and crimes against humanity. It is the culmination of many decades of effort on the part of international lawyers and statesmen to create a permanent judicial organ to handle such offenses. Proponents portray it as offering "the promise of universal justice";[4] opponents levy a number of charges against the court, including excessive jurisdiction. The United States, an early supporter, refused to sign the treaty in its present form out of concern over its potential impact on U.S. military operations and personnel.[5]

Notwithstanding American opposition, it appears almost certain that the requisite number of states will eventually ratify the treaty. Therefore, it behooves U.S. military authorities and policy makers to

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develop a clearer understanding of the court and its powers. This article offers a primer on the court for policy makers, commanders, and others outside the international law community. After briefly addressing the historical developments that led to the Rome Conference, it examines the statute in some detail, focusing particular attention on the scope and reach of its authority. Analysis then turns to a consideration of the objections of the United States, in an effort to explain why it has joined such a strange group of bedfellows in an opposition that has not played well on the international stage. The disapproval of a nation with the moral standing and military, economic, and diplomatic power of the United States warrants serious consideration.

The Genesis of the Court

In the wake of the Nuremberg and Tokyo tribunals convened at the end of the Second World War, the United Nations General Assembly gave its International Law Commission (ILC) a project of far-reaching ambition and unprecedented scope—to examine the possibility of establishing a permanent international criminal tribunal.[6] By the early 1950s, the commission, generally charged with the task of codifying international law, had produced two draft statutes. However, the bipolar tensions of the Cold War made further work on the court impracticable.

The idea of a permanent international criminal tribunal was revived in 1989, when the UN delegation from Trinidad and Tobago proposed an international judicial mechanism for addressing criminal activities associated with drug trafficking. The International Law Commission resumed its labors on a draft statute, submitting its product to the General Assembly in 1994.[7] Meanwhile, the UN had established ad hoc international war crimes tribunals, informally known as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), to adjudicate cases arising out of recent hostilities in the former Yugoslavia and Rwanda. The United States has played a major role in the implementation and operation of these temporary bodies.

In 1996, the General Assembly initiated preliminary negotiations on a permanent body, by establishing the Preparatory Committee (PrepCom) on the Establishment of an International Criminal

Court. The PrepCom, with the participation of approximately ninety UN member states and numerous nongovernmental organizations (NGOs), met periodically over more than two years. Its amended draft statute, based on the ILC draft, was submitted to the General Assembly on 3 April 1998.[8] This document was the raw material out of which the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference) forged the present statute.[9]

When the conference set to work on 15 June 1998, it was obvious that much remained to be done.[10] Given the five-week period that the conference allowed itself to produce a workable instrument, there was virtually no prospect that every issue would be resolved in systematic fashion.[11] As Ambassador David Scheffer, who led the U.S. delegation, later remarked, "So many issues of fundamental importance remained open in April 1998 that we could only approach Rome with 'cautious optimism.'"[12]

Delegations to the conference tended to cluster around common themes and positions; three basic groupings eventually emerged.[13] The largest and probably most influential, the so-called "like-minded group," was "composed of middle powers and developing countries, a number of which had directly suffered from some of the crimes described in the draft statute."[14] This group generally advocated a robust ICC. The permanent members of the Security Council (known as the P-5) represented a second group. For the most part, these delegations lobbied for an important role for the council in the establishment and operations of the court, and they opposed any mention of nuclear weapons in the statute. Interestingly, this group splintered just before the conference began, with the notable "defection" of the United Kingdom to the like-minded states. Finally, a third group of states, among them India, Mexico, and Egypt, insisted on including nuclear weapons in the catalogue of weapons prohibited by the statute, while opposing any significant role for the Security Council.[15]

Until the last days of the conference, major differences separated the delegations. Disagreements focused on jurisdictional issues, definitions of crimes, the role of the Security Council, and referrals to the court.[16] What happened next is a matter of varying interpretation. David Scheffer describes the perspective of the American delegation on the final hours before the adoption of the Rome Statute:

> The process launched in the final forty-eight hours of the Rome Conference minimized the chances that these proposals and amendments to the text that the U.S. delegation had submitted in good faith could be seriously considered by delegations. The treaty text was subjected to a mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the like-minded group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 A.M. on the final day of the conference, July 17. Even portions of the statute that had been adopted by the Committee of the Whole were rewritten. This "take it or leave it" text for a permanent institution of law was not subjected to the rigorous review of the Drafting Committee or the Committee of the Whole and was rushed to adoption hours later on the evening of July 17 without debate.
>
> Thus, on the final day of the conference, delegates were presented with issues and provisions in the treaty text that were highly objectionable to some of us. Some provisions had never once been openly considered. No one had time to undertake a rigorous line-by-line review of the final text.[17]

Scheffer's comments closely parallel statements of explanation registered by the Israeli and Singaporean delegations upon entering their votes.[18]

By contrast, Phillippe Kirsch and John Holmes, members of the Canadian delegation, explain the eleventh-hour flurry of activity in terms of urgent necessity: "The bureau was faced with two alternatives: to propose a final package for possible adoption by the conference, or to report to the plenary that an agreement was not possible and begin preparations for a second session."[19] At length, it was decided "to attempt a package deal."[20] That the "package deal"—a patching-together of numerous sections of the draft statute, without debate—was put together in the middle of the night in the waning hours of the conference testifies to the zeal of ICC proponents to produce a statute. Whether such maneuvers constitute a principled method for treaty construction is another question. In any event, the result was one the United States was unwilling to accept.

The Rome Statute

The Rome Statute contains thirteen parts. Part 2, "Jurisdiction, Admissibility and Applicable Law," has engendered the greatest controversy. The following sections of the article address the salient issues raised by Part 2, including the offenses to which the statute applies, and summarize various other aspects of the court.

The Crimes. Article 5 limits the court's "subject matter jurisdiction" (the crimes that the court is empowered to address) to the "most serious crimes of concern to the international community as a whole." Which crimes rise to this level and merit embodiment in the statute was a source of significant disagreement.[21] Interestingly, the delegates in these politically charged negotiations often perceived the desirability of including particular crimes as a function of the conference's ultimate choice of requirements for bringing a case before the court. As a rule, the tighter the limits on the court's ability to hear cases without the acquiescence of affected states, the broader the scope of crimes that states were prepared to allow the court to try.[22]

The draft list of crimes forwarded to the Rome Conference by the PrepCom consisted of genocide, aggression, war crimes, and crimes against humanity. Also considered by the PrepCom were crimes against UN and associated personnel, terrorism, and drug trafficking;[23] the draft contained optional articles addressing these offenses, but they were discussed only in generalities during PrepCom proceedings.[24] At the Rome Conference, inclusion of the latter two drew criticism from some delegations, because of the difficulty of investigating drug trafficking and terrorism, as well as the need to grant certain witnesses and informants immunity if offenders were to be successfully prosecuted. In light of these practicalities, it was agreed that these offenses were best left to national judicial systems. A conference resolution, however, recommended that the question of adding terrorism and drug trafficking to the court's jurisdiction be reopened at a review conference to be held seven years after the statute comes into force, in anticipation of their ultimate inclusion.[25] Efforts to include other optional offenses suggested in the PrepCom draft, such as "widespread, severe damage to the natural environment," proved more successful.[26]

The negotiations to craft the court's subject-matter jurisdiction reveal divergent approaches to the task. The United States, for instance, sought "specific and properly defined war crimes" consistent with those already existing in customary international law.[27] Customary norms, like the prohibition on directly targeting civilians or civilian objects, are those evidenced by both consistent and widespread state practice and *opinio juris vel necessitatis,* a conviction that a practice is legally obligatory.[28] The opposite approach was illustrated by the work of certain influential NGOs, such as Human Rights

> *The establishment of the Court is . . . a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.*
>
> *Kofi Annan*
> *Secretary-General of the United Nations*

Watch, which did not perceive the conference's mandate as "directed at the codification of crimes that have attained the status of customary international law"; to them, "trying to mold the court's statute around a consensus as to the current state of customary international law is both unnecessary and counterproductive."[29] Instead, in their view, the statute should seek to push the envelope of humanitarian law.

In the end, the Rome Conference included four categories of crimes, all of them well recognized, in a broad sense, in customary international law: genocide, crimes against humanity, war crimes, and aggression.[30] However, the specific offenses set forth in each category are, at least arguably, not all contained in that body of law. Still, as a general matter, the United States finds the court's subject-matter jurisdiction acceptable. The one exception is the crime of aggression; as discussed below, the court will not exercise jurisdiction over that offense until the statute has been amended to define "aggression" and the conditions under which jurisdiction over it may be exercised by the court.

Before turning to the crimes themselves, it is useful to understand their direct applicability to various states and individuals. Interestingly, the ILC and PrepCom draft statutes contained "opt out" provisions that would have allowed states, when ratifying the treaty, to

exempt themselves (and their nationals) from the court's jurisdiction as to certain categories of crimes.[31] Supporters of this position, which included the United States, argued the importance of allowing states to observe how the statute would function before they bound themselves. The proviso did not appear in the final Rome Conference version of the statute; instead, and as a compromise, governments may claim a seven-year exemption from the court's jurisdiction over war crimes committed by its nationals or on its territory.[32] The court has no jurisdiction over offenses occurring before the treaty comes into effect or, for states that become parties after that date, over offenses occurring before the date of ratification—when the court bases its jurisdiction on that state's status as a party.[33]

International Criminal Court proponents, such as Kenneth Roth, executive director of Human Rights Watch, declared the compromise an "ingenious" incentive to join the court.[34] Critics replied that this "transitional provision" could have the perverse effect of immunizing rampant war criminals from party states while exposing to war-crimes prosecutions peacekeepers from countries that are nonparties.[35] David Scheffer cites an additional problem:

> Under the treaty's final terms, nonparty states would be subjected to the jurisdiction of the court not only under Article 12 in the commencement of investigations, but also under Article 121(5), the amendments clause. In its present form, which could not possibly have been contemplated by the delegates, the amendment process for the addition of new crimes to the jurisdiction of the court or revisions to the definitions of existing crimes in the treaty will entail an extraordinary and unacceptable consequence. After the states parties decide to add a new crime or change the definition of an existing crime, any state that is a party to the treaty can decide to immunize its nationals from prosecution for the new or amended crime. Nationals of nonparties, however, are subject to potential prosecution. For a criminal court, this is an indefensible overreach of jurisdiction.[36]

Beyond the issue of state acceptance of the crimes set forth, the scope of the statute is extensive. First and most importantly, it adopts (in Article 28) the principle of "command responsibility," which had previously been recognized in such noted war crimes

trials as Yamashita and subsequently by the International Criminal Tribunal for the Former Yugoslavia, in the Celebici case.[37] By this principle, a commander or superior is criminally responsible for crimes "committed by forces under his or her effective command and control . . . as a result of his or her failure to exercise control properly over such forces." However, commanders must have known, or should have known given their positions, that forces under their command were committing or about to commit the offenses. Further, they must then fail to take "all necessary and reasonable measures within his or her power" to prevent the offenses (or if one has already been committed, to refer the case to appropriate authorities for investigation and prosecution).

On the other side of the coin, the statute rejects any defense on the basis of "superior orders." By this principle, an accused may not rely on the fact that he or she was ordered to commit a violation unless the order was not manifestly unlawful or the accused was under a valid legal obligation (obedience to orders excepted) to comply with it.[38] An order to commit genocide or crimes against humanity is manifestly unlawful.

The statute also dismisses the possibility of avoiding prosecution based on one's position in government. In particular, Article 27 emphasizes that "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official" does not render an offender immune from prosecution; nor does the holding of any official position justify a reduction in sentence. Persons who "order, solicit or induce" an offense or "aid, abet or otherwise assist in its commission" may also be held criminally responsible (Article 25[3]); further, as in U.S. law, attempts are punishable as if the actual offense had been completed (Article 25[3][f]). For the crime of genocide, anyone who "directly and publicly incites others" is liable to prosecution. In all cases, under Article 26, the accused must have been at least eighteen years old at the time of the offense.

Genocide. The statute's definition of genocide, found in Article 6, follows nearly verbatim that of Article 2 of the Genocide Convention.[39] The crime includes killing, causing serious bodily or mental harm, imposing destructive conditions of life, and preventing birth or forcibly transporting children, where such acts are committed "with intent to destroy, in whole or in part, a national, ethnical,

racial or religious group." It may occur either during armed conflict or in time of peace. Recent examples include crimes committed in the former Yugoslavia and in Rwanda.[40] Genocide was the only crime considered during the Rome Conference that evoked no particular controversy.

One potential pitfall resides in the inclusion of acts that cause "serious mental harm" to members of the protected groups. When in 1988 the United States ratified the 1948 Genocide Convention, it entered an understanding that the meaning of "mental harm" was limited to "permanent impairment of mental faculties through drugs, torture or similar techniques."[41] Whether this interpretation will be incorporated into the elements of the offense (discussed below) or reflected in the jurisprudence of the court remains to be seen.

Crimes against Humanity. The second category of offenses, set forth in Article 7, is that of crimes against humanity. They are defined as specified acts against any civilian population as part of a widespread or systematic attack. The list of such acts includes murder; extermination; enslavement; deportation or forcible population transfers; imprisonment or severe deprivation of liberty in violation of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or other forms of sexual violence comparably grave; persecution of a group on political, racial, national, ethnic, cultural, religious, gender, or other impermissible grounds in connection with any act criminalized by the statute; enforced disappearance; apartheid; and other inhumane acts that intentionally cause great suffering or otherwise seriously affect the victim's physical or mental health.[42] The definition requires that anyone charged have knowledge of the attack.

The Rome Statute defines crimes against humanity in much greater detail than do earlier formulations, such as those used at Nuremberg or Tokyo after World War II or even the tribunals for Yugoslavia and Rwanda.[43] This is unsurprising, considering that it is the product of discussions among 160 states and many inter- and nongovernmental organizations. Specificity became necessary to assuage the concerns of so many delegations.

A key issue was whether crimes against humanity should be limited to international armed conflict, that is, armed conflict between two or more states.[44] The distinction is critical; the hostilities in Rwanda, for instance, did not amount to international armed

conflict, and only certain periods of the conflict in the former Yugoslavia would qualify by this standard.[45] The United States and other delegations argued successfully for extension of crimes against humanity to "acts in internal armed conflicts and acts in the absence of armed conflict."[46] As a result, the threshold for Article 7 is simply that the offenses occur "as part of a widespread or systematic attack," whether or not in furtherance of "State or organizational policy." The reference to "organizational" policy has the effect of reaching crimes against humanity committed by terrorist, insurgent, or other such groups. Of course, even acts that are not widespread or systematic—hence not "crimes against humanity"—may still qualify as "war crimes."

Article 7 includes certain acts that had not as such previously fallen within the purview of the international tribunals.[47] For instance, neither the statute of the ICTY nor that of the ICTR mentions enforced disappearance or apartheid.[48] Similarly, the only sexual offense previously cited was rape.[49] The identification of forced pregnancy as a crime against humanity generated significant controversy. According to the statute's definition, the offense occurs where women are unlawfully confined and forcibly impregnated, "with the intent of affecting the ethnic composition" of a population. Arab League nations, as well as the Vatican, opposed including the offense, on the grounds that protecting women against being impregnated against their will implied a right to terminate the pregnancy through abortion.[50] Actually, the prohibition was never meant to create such a right, only to recognize the offense as especially serious and thereby affirm agreements that had been reached at the Fourth World Conference on Women in Beijing in 1996.[51] The statute specifically provides that its definitions "shall not in any way be interpreted as affecting national laws relating to pregnancy." Thus, the Rome Statute does not create a right to abortion illegal under the domestic laws of states where the victim is located.

Article 7 also stretches "persecution" beyond the "political, racial and religious grounds" of the ICTY and ICTR statutes. The Rome Statute defines persecution as "the intentional and severe deprivation of fundamental rights contrary to international law." Until the ICTY and ICTR, there was no such offense of "persecution" as such in international law, although other instruments prohibited certain acts that

might fall within its scope. Just what would be an indictable example of gender persecution remains unclear.

Finally, the statute defines crimes against humanity as including "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Obviously, much is left to discretion here. The NGO Human

> *The Rome treaty will become the single most effective brake on international and regional peacekeeping in the 21st century. [The] fundamental flaws in the Rome treaty mean that the United States will not sign the present text of the treaty, nor is there any prospect of signing the existing text in the future.*
>
> *David Scheffer*
> *U.S. Ambassador at Large for War Crimes Issues*

Rights Watch has commended "this important and controversial generic category," because it "gives the Court the flexibility to cover other crimes against humanity that may emerge over time, not contemplated in the statute."[52] Of course, discretion is in itself neutral; if it is useful for addressing humanitarian concerns, it is equally susceptible to overreaching and politicization.

War Crimes. Article 8, the lengthiest listing of offenses in the statute, sets forth acts that constitute war crimes. It includes crimes specific to international and noninternational armed conflicts, but it sets aside "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[53] The article also gives the court war-crimes jurisdiction "in particular when [the offenses are] committed as a part of a plan or policy or as part of a large-scale commission of such crimes." This phrase represents a compromise: there were delegations that suggested the court should limit itself to widespread crimes, and others that argued for jurisdiction over even individual and isolated offenses. The final phraseology is somewhat ambiguous, but it implies a preference for the former approach, allowing the court discretion to choose cases it feels significant enough to merit attention by an

international tribunal and to leave "routine" offenses to domestic tribunals.[54]

The issue of which offenses to include as war crimes brought much debate. Confining the category, as certain delegations wished, to crimes already recognized in customary international law would mean limiting it to violations of such basic instruments as the four Geneva Conventions of 1949 and the 1907 Hague Convention IV, with its annexed regulations. Others who took a more expansive approach sought in particular to fold in Additional Protocols I and II to the Geneva Conventions. This was particularly objectionable to nations that had not ratified those instruments, most notably the United States.[55] The compromise that emerged makes no direct references to the Additional Protocols but clearly draws heavily from them.

Article 8 divides war crimes into four categories. The first consists of "grave breaches of the Geneva Conventions of 12 August 1949." Grave breaches of these four conventions, which have been ratified by 188 states, are certain violations of particular gravity occurring during international armed conflict. Every party to the conventions is obligated to search for persons alleged to have committed or ordered such an offense; if it finds them it may try them, regardless of nationality, or hand them over to another state for prosecution. Cited as grave breaches in the ICC statute are: willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury; extensive, wanton, and unlawful destruction or appropriation of property; compelling prisoners or other protected persons (for instance, civilians) to serve in an enemy's military forces; depriving prisoners of war of fair trial; unlawful deportation or confinement; and taking hostages.

A second category of war crimes is "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law." Twenty-six separate violations are included—an attempt at a case-specific, detailed rendering of the basic rules of the law of armed conflict:

> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the

medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.[56]

Several of these offenses are especially noteworthy—for instance, the crime of inflicting "widespread, long-term and severe damage to the natural environment" where such damage violates the principle of proportionality (that is, where the collateral damage and incidental injury to be reasonably anticipated outweighs the military advantage that results). It derives from the two Additional Protocol I articles that prohibit such damage but fail to account for the military advantage accruing.[57]

The war crimes section also draws from Additional Protocols I and II, as well as the Convention on the Rights of the Child, in setting the minimum age of children participating in a conflict at fifteen.[58] This issue of child soldiers is a divisive one in law of armed conflict circles, with many individuals, NGOs, and countries arguing for raising the minimum age to eighteen. There seemed no point in raising the age in the statute, however, because of the opposition it would have generated. The war-crimes age limit applies only in international armed conflict, but there is a similar restriction elsewhere in the article for noninternational settings.

As with crimes against humanity, gender-based offenses are highlighted in the war crimes section (Article 8), including the controversial matter of forced pregnancy. Because Article 8 recapitulates these offenses, perpetrators can be tried even if the act was not "part of a widespread and systematic attack."

By the statute, attacking UN or humanitarian personnel involved in peacekeeping or humanitarian missions is a war crime in both international and noninternational armed conflict. Although no stand-alone article protecting UN forces appears, as certain states advocated, folding the prohibition into the international and noninternational passages of the war crimes section indicates the seriousness with which the issue was regarded at Rome. The provisions enhance the enforceability of the relatively new UN Safety Convention, which extends protection to UN and associated personnel who do not qualify as combatants.[59] The ICC statute focuses on combatant status by addressing peacekeepers or humanitarian workers who are "entitled to the protection given to civilians or civilian objects." (When UN troops purposefully engage in actual combat, they benefit from other protective instruments, such as the Geneva Conventions or Additional Protocol I.) Particularly significant is the mention of humanitarian workers. Of course, such workers have always benefited from the protection afforded civilians, but the decision to include them specifically in the statute highlights the gravity of attacks on them.

Prohibitions on specific weapons proved contentious at the conference. The three agreed on for mention in the statute—poison, gases, and bullets that flatten or expand—had been subjects of long-standing and widely accepted laws of armed conflict.[60] A majority of states supported in addition a prohibition on the use of nuclear weapons, but it was opposed by the nuclear powers, without whose support the statute was doomed; thus the nuclear-weapons restriction was rejected. Indeed, the statute fails to mention a number of weapons currently prohibited in treaty law, notably in the Conventional Weapons Convention (nondetectable fragments, mines, booby traps, incendiaries, and blinding lasers) or the Ottawa Treaty (antipersonnel mines).[61] The statute did, however, leave open the prospect that further weapons could be covered, upon the three conditions that they "cause superfluous injury or unnecessary suffering or . . . are indiscriminate," are the subject of a "comprehensive

prohibition," and are included in an annex to the statute duly added as an amendment or by a review conference. (Amendments are not allowed until seven years after the statute comes into force, when the first review conference will occur.)

Finally, court proponents consider the express provision of court jurisdiction over the use of human shields (which has long been prohibited) to be a positive development, in light of the frequency of this offense over the past decade.[62] The same is true of the prohibition on "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives." The statute provision, based on 1907 Hague Convention IV, the 1954 Cultural Property Convention, and Additional Protocol I, expands their protection to educational institutions.[63]

The other two categories of war crimes address acts occurring in noninternational conflict. The first of these adopts Common Article 3 to the four 1949 Geneva Conventions.[64] Those conventions, which primarily address international armed conflict, all contain an identical Article 3 setting forth minimum standards of conduct "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." These standards, incorporated directly into Article 8 of the ICC statute, allow the court jurisdiction when any of the following are committed against "persons taking no part in the hostilities [that is, civilians], including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause":

> (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (iii) Taking of hostages;
>
> (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.[65]

The fourth category of war crimes mirrors the typology adopted for offenses during international armed conflict: "other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law." The following acts are covered, a list heavily reliant on that of Additional Protocol II to the Geneva Conventions:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

Whereas an offense violating Common Article 3 of the Geneva Conventions need only occur in noninternational armed conflict, it must take place during a "protracted armed conflict between governmental authorities and organized armed groups or between such groups" if the ICC is to enjoy jurisdiction. The higher standard reflects concern on the part of some states over international involvement in their internal affairs; the fourth category of war crimes is more invasive than the others, and the threshold level of violence is accordingly greater. This state-centered approach is reflected in the statute's stricture that nothing in Article 8 applicable to noninternational armed conflict affects "the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."

Aggression. Aggression is a particularly sensitive topic, because only officials at the highest levels of government can commit the crime. Conference negotiations foundered on a definition of it. Interestingly, and perhaps reflective of uneasiness regarding the offense, the Nuremberg Tribunal convicted a number of German leaders of "planning, preparing, initiating and waging" aggressive war, but none were convicted on that charge alone.[66] Similarly, a 1974 General Assembly resolution intended to define aggression has proved less than definitive.[67]

The Security Council's competence also proved problematic. Under the UN Charter, the Council is the sole body authorized to determine when a state's acts amount to aggression and to fashion an appropriate response. There was concern at Rome that autonomous

ICC adjudication would infringe on this exclusive prerogative by, inevitably, operating under a different understanding of the concept.[68] Moreover, it would be empowered to second-guess the Security Council—for instance, by acquitting an individual responsible for events the Council had labeled aggression.

Nonetheless, the conference decided that the crime should be included. Article 5 recognizes the offense as justiciable under the Rome Statute—stipulating, however, that such jurisdiction may not be exercised until the crime and the conditions in which jurisdiction over it may be exercised have been suitably defined.[69] The article requires also that the definition parties may agree upon must "be consistent with the relevant provisions of the Charter of the United Nations." The United States argued unsuccessfully that "the failure to reach a consensus definition should have required its removal from the final text";[70] however, the matter will not be addressed until the statute's seven-year waiting period for amendment has elapsed.

Elements of Crimes. To a prosecutor, crimes consist of "elements," facts that must be satisfactorily proved if a conviction is to be secured. Virtually all American jurisdictions define criminal offenses in terms of elements. In contrast, the statute of the tribunal for the former Yugoslavia contains no such elaboration; as a result, that court itself has had to develop elements during trials. For instance, the ICTY, reviewing international humanitarian and human-rights law precedents, determined that the war crime of torture breaks down into five elements:

> (i) the infliction, by act or omission, of severe pain or suffering, whether physical or mental;
>
> (ii) the act or omission must be intentional;
>
> (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating, or coercing the victim or a third person;
>
> (iv) it must be linked to an armed conflict;
>
> (v) at least one of the perpetrators must be a public official or act in a non-private capacity.[71]

In the PrepCom negotiations and at the Rome Conference, the United States proposed the identification of elements and argued their importance. Its concern focused on the principle *nullum crimen sine lege*—an act is not a crime if there is no law against it. The United States contended that the statute did not sufficiently define the crimes it made subject to its jurisdiction and thus would not put suspects on notice in a realistic way. Moreover, the absence of elements would in effect invite judicial activism on the part of the ICC, which would find itself free to enumerate offenses as it saw fit. The conference rejected the proposal to identify elements, on the grounds that such an attempt would have been interminable. Indeed, it seemed to some that the crimes were in fact already adequately defined and that any attempt to fashion elements would only delay the entry into force of the statute.

Nonetheless, the conference charged a postconference Preparatory Commission to develop elements by 30 June 2000.[72] (The United States, though not a signatory to the statute, is actively participating in the development of elements: after all, it may someday join the regime. In any case, because the agreed-upon definitions will have enormous impact on the understanding of the law of armed conflict, the United States is well advised to take part in shaping them.) By Article 9, a two-thirds majority of the members of an assembly of "states parties" will be necessary to make elements binding and effective.

Structure of the Court. The International Criminal Court is organized as set forth in Part 4 of the statute. There will be four organs: the presidency; an appeals division, trial division, and pretrial division; the office of the prosecutor; and the registry. The president, assisted by a first and second vice president, is to be responsible for administering the court, except the prosecutor's office. The registry will handle all nonjudicial aspects of the court's administration. The office of the prosecutor, which is independent, will receive referrals regarding possible offenses, examine them, conduct investigations, and try cases. The three "divisions," of course, will conduct the various proceedings.

The International Criminal Court will have eighteen judges, each serving for a single period of nine years. To avoid having the entire judiciary turn over at the same time, six of the first eighteen will

serve for three years (and may be reelected), six for six years, and six for nine years. The statute provides that nine judges must have a criminal law background and that five must be experienced in international law. All are to be elected by the states that are party to the statute, on a two-thirds vote. No two judges may be from the same state, and heed must be paid in their selection to equitable geographical representation, gender, and balance as to the natures of the legal systems from which they come.[73] States also select the chief prosecutor, on a majority vote, whereas the president, vice presidents, and registrar are elected by the judges.

Bringing Cases to Court. Undoubtedly, the most contentious issue at the Rome Conference was how cases would be brought before the court. Indeed, the refusal of the United States to sign the statute was based in great part over concern that American citizens could be hauled before it unfairly.

Complementarity. Some degree of limitation on the court's power to hear cases arises from the principle of complementarity—that is, as the preamble to the ICC statute provides, the "International Criminal Court established under this statute shall be complementary to national criminal jurisdictions." Under Article 17, when a state has jurisdiction over an offense, perhaps because it was committed on that state's territory or by one of its nationals, it enjoys investigative and prosecutorial precedence over the ICC, unless the state is unwilling or unable to investigate and prosecute. Similarly, the ICC generally may not prosecute an individual who has already been tried in a national court.

Determinations by states not to prosecute will be "preempted" only due to "unwillingness or inability of the State genuinely to prosecute." The statute construes "unwillingness" as demonstrated by attempts to "shield the person involved from criminal responsibility," unjustified delay, or an overall lack of the independence or impartiality that would reflect a true intent to do justice. Inasmuch as it is the ICC that makes such findings—and is thereby the final authority on the effectiveness and integrity of national criminal judicial processes—the court possesses a degree of supranational judicial-review power. Concerns have resulted that "the ICC will also become an unavoidable participant in the national legal process, . . . [as] it will set precedents regarding what it considers 'effective' and 'ineffective'

domestic criminal trials."[74] This, it is said, will indirectly force states "to adopt those precedents or risk having cases called up before the international court," thus eroding their sovereignty.[75] Proponents of the court reply that such trade-offs are of the very essence of international law and policy; Benjamin Ferencz has argued that "outmoded traditions of state sovereignty must not derail the forward movement" to greater international peace and order.[76]

Referring Cases. Related jurisdictional issues at the conference centered on the locus of authority for referral to the court. The right of states that are parties to the statute to refer cases for investigation to the ICC's prosecutor received near-universal endorsement. In addition, the court's prosecutor may initiate cases *proprio motu* (on his or her own), and a situation may be referred (Article 13) by the United Nations Security Council under Chapter VII—dealing with threats to the peace, breaches of the peace, or acts of aggression—of the UN Charter. Conversely, Article 16 empowers the Council to adopt a renewable resolution under Chapter VII prohibiting ICC investigation or prosecution of a matter for a year.

The United States was particularly interested in maintaining a strong role for the Security Council. Other delegations, however, expressed fears that so much authority for referrals and deferrals might be given the Security Council that the court's independence would be eviscerated.[77] Certain delegations also saw a lack of accountability in allowing *proprio motu* power to an independent prosecutor.[78]

Preconditions to Jurisdiction. The Rome Statute (Article 12) lists several preconditions for the exercise of its jurisdiction. By becoming parties to the statute, states are deemed to have accepted the jurisdiction of the court. In cases other than those referred by the Security Council, Article 13(b) allows the court to exercise jurisdiction whenever the offense occurred on the territory of a state-party or the accused is a national of a state-party. A state that is not a party to the statute may accept "the exercise of jurisdiction of the court" with respect to an offense committed on its territory or by its citizens.

These jurisdictional preconditions represent a compromise. The proposals ranged from universal jurisdiction over all enumerated offenses to requiring the ICC to obtain consent from the state of the suspect's nationality. The latter represented the view of the United States, which particularly objected to the court's exercising authority over nationals of states not party to the statute. The overwhelming

majority of states, however, found such a requirement an undue restriction on the court's powers; they feared that many international criminals would escape justice if state-of-nationality consent were a precondition to trial.

Procedure. Part 5 of the Rome Statute governs investigation and prosecution. The prosecutor must first make three determinations: whether the information at hand provides a reasonable basis to believe that a crime over which the ICC has jurisdiction has been committed; whether the court must defer to a national judiciary; and whether the offense is sufficiently grave to be heard. A decision not to proceed on any of these bases is reviewable by the pretrial chamber. If the prosecutor does proceed, certain rights accrue to subjects of the investigation—for instance, not to incriminate themselves, not to be coerced, and to be free from arbitrary arrest or detention.

During the investigative period, the pretrial chamber, consisting of either one or three judges (depending on the issue being handled) of the pretrial division, performs important functions. It may, among other things, issue judicial summons and arrest warrants, give orders necessary to allow an accused to prepare a defense, or provide for the protection and privacy of witnesses or victims. The chamber may even authorize an investigation in a state, and without that state's cooperation or acquiescence. Perhaps most importantly, the pretrial chamber must hold a hearing to "confirm the charges" on which the prosecutor intends to try the accused. Only if the chamber finds "sufficient evidence to establish substantial grounds to believe the person committed" the crimes may the trial proceed. Additionally, states involved and persons accused may make specific challenges to jurisdiction or admissibility to the pretrial chamber;[79] its decisions may be taken to the appeals chamber. Once the charges have been confirmed, challenges are presented before the trial chamber.

The trial, which must be conducted without "undue delay," is held before a chamber consisting of three judges from the trial division. Trials may not be conducted in absentia, and they must be public, unless a closed session is necessary to protect a victim or witness or to safeguard confidential or sensitive information. The accused enjoys a presumption of innocence, which the prosecutor can rebut only by producing evidence that convinces the chamber of the accused's guilt "beyond a reasonable doubt." The accused is entitled to

the assistance of a defense counsel (free of charge if he or she cannot afford one), must have adequate time and facilities to prepare a defense, may examine hostile witnesses, has the right to remain silent, and must be given any evidence in the prosecution's possession tending to suggest innocence, mitigate conduct, or affect the credibility of prosecution evidence. Rules of procedure and evidence remain to be drafted by the Preparatory Committee (which is also developing elements of offenses).

A separate sentencing hearing may be held to hear evidence bearing on the appropriate punishment of an accused who has been convicted. Sentences may not exceed thirty years, unless "justified by the extreme gravity of the crime and the individual circumstances of the convicted person, in which case life imprisonment is authorized." (The place of imprisonment is still undetermined.) The court may also impose a fine, order the forfeiture of any related ill-gotten

> *"Would such long-term problems be more effectively averted by active American involvement in the construction and implementation of the court, or should the nation continue to distance itself from the court and its doings?"*

gains, or direct the convicted individual to make restitution. Capital punishment is not allowed under the statute.

Either side may appeal an acquittal, conviction, or sentence on the basis of procedural error, errors of fact, or errors of law. The accused may also appeal on "any other ground that affects the fairness or reliability of the proceedings or decision." Five judges assigned to the appeals division hear appeals.

The issue of sensitive national-security information potentially affects all stages of the proceedings; Articles 72 and 93.4 of the statute address the issue, citing a number of ways to handle such evidence, such as redactions, summaries, and *in camera* and *ex parte* proceedings.[80] The state generally has the last say as to whether disclosure of information in its possession affects its security. Nevertheless, if the court determines that the information or document "is relevant and necessary for the establishment of the guilt or innocence of the accused" and that the state involved is not complying with its obligations under the statute to cooperate, it may refer the matter to the assembly of parties (or Security Council, if the matter was referred

by that body), drawing whatever inferences are appropriate from the circumstances as to the fact at issue.

Finally, Part 9 of the Rome Statute outlines the mechanics of "international cooperation and judicial assistance." For instance, states that are parties must comply with a request by the court to provide information as to the identification and whereabouts of individuals or information; deliver individuals, evidence, or documents into the custody of the court; execute searches and seizures; and protect victims and witnesses. It is not outside of the realm of possibility that military authorities might be called upon to carry out directives of the court. The details for implementing such requests remain unspecified (they will, presumably, be developed as the court develops and evolves).[81] Article 98.2 does, however, prohibit the court from proceeding "with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of the sending State is required to surrender a person of that state to the court, unless the court can first obtain the cooperation of the sending State for the giving of consent for the surrender." This language, which represents a U.S. victory at the conference, allows the negotiation of status-of-forces agreements that forbid states to surrender members of deployed American forces to the court without U.S. consent.

U.S. Positions on the International Criminal Court

Some who condemn the American vote against the court point to the strange alignment with the world's dictatorships and enemies of human rights as evidence that the United States is trying, shamelessly and quixotically, "to preclude any possibility of the court's prosecuting an American."[82] Such critics say that other nations maintain a higher "vision of equal justice for all."[83] In this view, the United States is myopically focusing on its own interests, at the expense of international justice and human rights. Taken to the extreme, the reasoning seems to be that a vote against the court is equivalent to a vote in favor of genocide and international crime.

The historical record contradicts such suggestions. Clinton administration officials have repeatedly emphasized that the United States has a "compelling interest in the establishment of a permanent international criminal court." [84] Support for a permanent

international criminal court has been the consistent U.S. position, and it remains so even in the wake of the Rome Conference.[85] American reluctance to sign resulted from certain of the particularities of the statute as adopted, not an objection to its existence.[86]

Core Concerns. The administration's opposition centers primarily on the jurisdictional issues discussed above. In the eyes of the United States, the provisions that allow the court to reach citizens of nonsignatory states collectively represent a radical development in the law of treaties.[87] It is a fundamental principle of international treaty law that only states party to a treaty are bound by its terms;[88] nonetheless, Article 12 of the Rome Statute effectively extends the jurisdiction of the International Criminal Court to nationals of all states.

ICC proponents reply that there are, on the contrary, precedents for jurisdiction without the consent of the state of nationality: for instance, the concept of universal jurisdiction over genocide, as well as certain crimes against humanity and war crimes, is an established principle of customary international law. This response seems compelling, but it neglects the fact that universal jurisdiction attaches only to offenses that are binding on all states as customary international law; arguably, not all the offenses listed in the ICC statute rise to this level. Furthermore, the universality of jurisdiction as to a particular offense must itself be customary international law.[89] Thus, the proponents' contention bears only on jurisdiction without state consent in the abstract; it does not address universality of jurisdiction over specific offenses enumerated in the ICC statute. Also, it does not envision the possibility that the jurisprudence of the court may cause the understanding of such offenses to shift over time; as David Scheffer argues, "The crimes within the court's jurisdiction . . . go beyond those arguably covered by universal jurisdiction, and court decisions or future amendments could effectively create 'new' and unacceptable crimes."[90] In addition, new offenses will no doubt eventually be added, offenses that may or may not have the stature of established customary international law.

For the United States, this issue, rooted as it is in fundamental principles of the sources of law, extends beyond immediate national self-interest. To quote Scheffer once more:

Fundamental principles of treaty law still matter and we are loath to ignore them with respect to any state's obligations vis-à-vis a treaty regime. While certain conduct is prohibited under customary international law and might be the object of universal jurisdiction by a national court, the establishment of, and a state's participation in, an international criminal court are not derived from custom, but, rather, from the requirements of treaty law.[91]

Affirming that states declining to adhere to a treaty may nonetheless be bound by its terms may, it is feared, set a dangerous precedent. In the "post-Westphalian" international system, nation-states obligate themselves with respect to other states by means of treaties—indeed, the practice predates the 1648 Peace of Westphalia itself by centuries. If, however, nation-states can now be held accountable to treaties to which they never bound themselves, the state-centric, treaty-based international regime has shifted dramatically. Something new seems to have replaced the treaty as the mechanism for imposing obligations on states—at least when a critical mass of "like-minded states" agrees on a set of conditions to which it wishes to bind the rest of the world. This American concern was articulated, more bluntly, in testimony before the Senate Foreign Relations Committee: "In attempting to subject Americans to the jurisdiction of the ICC, the ICC states are in fact attempting to act as an international legislature, a power they do not have and a power that is fundamentally at odds with the guarantee of the sovereign equality of states memorialized in the United Nations Charter."[92]

Strict national self-interest leads to further concern. Opponents of the Rome Statute envision a scenario in which an American soldier on a peace operation is subjected to investigation or formal charges (for instance, "attacks against nonmilitary targets") because an operation he or she was involved in had inflicted civilian casualties.[93] The soldier's chain of command may share criminal liability, under the statute's command-responsibility principle. Such a contingency could occur even had the United States not ratified the ICC statute, if the state in which the acts occurred had either ratified or accepted the statute's jurisdiction in the particular case.[94]

This scenario seems unlikely, but the nation's extensive commitments abroad make its military forces particularly vulnerable in this regard. As David Scheffer argues,

> It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not recognize. No other country, not even our closest military allies, has anywhere near as many troops and military assets deployed globally as does the United States.[95]

Further, complementarity, by which the Rome Statute affords priority to national criminal court systems, provides only a partial remedy. According to Scheffer:

> Complementarity is not a complete answer, to the extent that it involves compelling states (particularly those not yet party to the treaty) to investigate the legality of humanitarian interventions or peacekeeping operations that they already regard as valid official actions to enforce international law. Even if the United States has conducted an investigation, again as a nonparty to the treaty, the court could decide there was no genuine investigation by a 2-to-1 vote and then launch its own investigation of U.S. citizens, notwithstanding that the U.S. government is not obligated to cooperate with the ICC because the U.S. has not ratified the treaty.[96]

Still another concern is the risk of politicization. American jurists foresee that the court may take directions unfavorable to U.S. interests, that it might become a political instrument in the hands of nations who wish to undermine the United States.[97] That the United States is the sole global superpower makes it a potential, and vulnerable, target for such manipulation. Surely the nation's uniqueness puts its interests in a different category than those of, say, a Norway or Belgium or Botswana, all signatories of the Rome Statute. Such nations have little to fear from ICC politicization in comparison to a nation burdened with the international commitments the United States bears.

Proponents of the court, citing statistics that put the number of deaths by genocide in the twentieth century at 170 million, respond that the ICC will simply not be interested in addressing the behavior of U.S. forces—barring, of course, egregious U.S. failure to act upon

clear violations of the statute.[98] If the court is to accumulate the respect and authority it needs to establish itself as an institution of abiding international importance, it will necessarily decline, in this view, any temptation to take political sides, especially against the United States. The United States, unmoved by this seemingly sensible retort, points to the long-term issues at stake: what seem quibbles at the outset could develop into intractable difficulties.

Would such long-term problems be more effectively averted by active American involvement in the construction and implementation of the court, or should the nation continue to distance itself from the court and its doings? The question generates hot contention.

Opponents of the present statute are unmoved by the "Why don't we just play along and mold the court in an American image?" approach. They consider the "egalitarian" structure of the Rome treaty's decision-making process—for instance in electing judges—a structural flaw. For them, a system in which the United States enjoys but a single vote does not account adequately for U.S. power and influence, let alone the greater burden the nation would bear in establishing and supporting the court.[99]

Discontent with the decision-making structure is also evident with regard to the statute's treatment of the United Nations Security Council. The U.S. delegation at Rome was resolved to secure a central role in the functioning of the court for the Council—in which the United States is a permanent member. To require all referrals to the court to be channeled through the Security Council would have made the U.S. veto there an insurance policy against politicization and activism in the ICC. Further, to include "aggression" as an offense under the statute without involving the Security Council would seem to weaken that body's authority in addressing state aggression.

Ultimately, U.S. efforts to craft a conspicuous role for the Council collapsed; all that is allowed the Security Council is nonexclusive referral/deferral power. In the eyes of some ICC critics, the statute stands on its head the centrality of the Security Council in matters affecting global peace and security.

Indeed, as John R. Bolton, former Assistant Secretary of State for International Organization Affairs, warned:

> This provision, of course, totally reverses the appropriate functioning of the Security Council. It seriously undercuts the role of the five

> permanent members of the Council, and radically dilutes their veto power. . . . In requiring an affirmative vote of the Council to stop the Prosecutor and the Court, the Statute slants the balance of authority from the Council to the ICC. Moreover, a veto by a Permanent Member of such a restraining Council resolution leaves the ICC completely unsupervised.
>
> For the United States, faced with the possibility of an overzealous or politically motivated Prosecutor, the protection afforded by our veto has been eliminated. In effect, the UN charter has been implicitly amended without being approved pursuant to Chapter XVIII of the UN Charter.[100]

Actually, U.S. negotiators did not object to allowing states-parties to send investigations to the court without Security Council approval. However, "Washington vehemently opposed an independent prosecutor out of fear he might start investigations on his own motion, subject only to court approval." Of course, objections based on marginalization of the Security Council in ICC affairs dovetail into those discussed earlier regarding the absence of an external supervisory mechanism.

Perhaps the essence of U.S. opposition was best distilled at the theoretical level by Bolton in testimony before the Senate in hearings: "The ICC's principal difficulty is that its components do not fit into a coherent 'constitutional' structure that clearly delineates how laws are made, adjudicated and enforced, subject to popular accountability and structured to protect liberty. Instead, the court and the Prosecutor are simply 'out there' in the international system, ready to start functioning when the Statute of Rome comes into effect."[101]

Reduced to basics, the U.S. objection to the Rome Statute is that it provides for no external mechanism of restraint—no constitutional framework of "checks and balances"—to limit the powers of the court and its prosecutor. Indeed, Article 119 of the Rome Statute directs that "any dispute concerning the judicial functions of the court shall be settled by the decision of the Court." In the end, the court is its own referee, producing in the United States unease as to the directions that a fully empowered permanent court could eventually take. At any rate, whether introducing a permanent ICC as a new variable in the international arena will produce the benefits promised by its proponents remains an unsettled issue.

Miscellaneous Concerns. Other American objections to the treaty arose, but it is possible to examine here only a few. For instance, Article 120 prohibits states from registering reservations upon ratification—an "all or nothing," "take it or leave it" clause. Given the "fast track" process by which the statute was pieced together—with approval secured only on the final day of the Rome Conference—it is not unlikely that even signatory states may later "discover" that parts are unacceptable and that they will be unable to ratify.

Questions have also been raised as to the legality of signing a treaty that would abandon rights, such as to trial by jury, that Americans enjoy under their constitution. Such a challenge has been made by constitutional scholar Jeremy Rabkin:

> Even if the procedures of the international court did meet American standards, the most serious objection would still remain. If we can offer up Americans to international tribunals for some matters (such as "war crimes"), why not for others (such as narcotics trafficking)? Could we transfer broad swaths of responsibility from our own courts to international bodies? Does it make no difference whether our law is enforced by judges appointed by our own president (and confirmed by our own Senate) or by international officials selected through international horse-trading who operate by some shifting international "consensus"?[102]

It is impossible here to address this complex issue adequately. In essence, the position of ICC proponents is that ample constitutional justification can be found, drawing upon precedents and analogies particularly in the realm of extradition law, for adherence to the Rome treaty.[103]

At a more foundational level, and despite U.S. support in principle for an international criminal court, some influential critics harbor anxiety about the nature and potential existence of the ICC. Those who are most skeptical lack confidence in the ultimate capacity of law and lawyers consistently to resolve complex issues of international security, diplomacy, and the use of force or to untangle fairly the competing claims to justice in the international sphere. In the view of these critics, court advocates have naive notions of "the appropriate roles of force, diplomacy, and power in the world."[104]

Parallel questions as to the court's likely effectiveness as a deterrent of international crime also exist.[105] In many of the world's hot spots, it is said, diplomacy, economic and political power, and military force must all be brought to bear; there are situations wherein criminal courts may be unhelpful or even harmful to the cause of justice and peace.[106] On this view, centralized "one size fits all" solutions do not for the foreseeable future hold much promise in the labyrinthine complexities of the international arena. Of course, the fact that the court is not a panacea, capable of eliminating all violations of human rights and humanitarian law by itself, is not a valid argument against creating it at all—so long as its net effect is to do some good.[107]

* * *

Clearly the International Criminal Court presents the prospect of significant and far-reaching consequences for the conduct of judicial and military affairs throughout the world. Despite the promise a permanent international court holds for fostering global order, this particular proposal has generated considerable controversy—indeed, the coauthors of this article disagree about its advisability.

That said, no change in the American attitude toward the ICC should be anticipated in the immediate future. The position of the current administration is, "We are not prepared to go forward with this treaty in its current form. We are simply not prepared to do so."[108] Perhaps this stance will change in the long term. However, whatever one's view of the issues, there can be no doubt that in terms of both practicalities and moral authority, the court would proceed on surer and steadier ground with U.S. support than without it.

Notes

1. Rome Statute for the International Criminal Court, UN Doc. A/Conf. 183/9, 17 July 1998, Annex II [hereafter Rome Statute], reprinted in *International Legal Materials* [hereafter ILM], vol. 37, 1998, p. 999, and M. Cherif Bassiouni, *The Statute of the International Court: A Documentary History* [hereafter *Documentary History*] (Ardsley, N.Y.: Transnational,1998), p. 39, available online at http://www.un.org/law/icc/texts/romefra.htm. Thirty-three intergovernmental organizations and a coalition of 236 nongovernmental organizations also participated in the conference but enjoyed no voting power.

2. Michael P. Scharf, "Results of the Rome Conference for an International Criminal Court," *ASIL Insight*, August 1999, available online at http://www.asil.org/insight23.htm.

Lists differ as to which countries voted against the statute, since the vote was taken without polling; this article adopts the list of the American Society of International Law. Other countries mentioned as having possibly voted "no" (each replacing one of those above) include Algeria, India, and Sri Lanka.

3. Article 126 of the Rome Statute stipulates that the International Criminal Court will come into full-fledged legal existence on the first day of the month after the sixtieth day following the date of deposit of the sixtieth instrument of ratification, acceptance, approval, or accession. As of 27 May 1999, three states had formally ratified the statute: San Marino, Senegal, and Trinidad and Tobago. For a listing of signatories and states parties, see http://www.un.org/law/icc/statute/status.htm.

4. Kofi Annan, "Advocating for an International Criminal Court," *Fordham International Law Journal*, vol. 21, 1997, p. 366.

5. In 1996 David Scheffer, who led the U.S. delegation, stated, "The ultimate weapon of international judicial intervention would be a permanent international criminal court. . . . Fortunately, for the past few years international lawyers and diplomats have been laboring over a draft statute for a permanent international court. . . .The ad hoc war crimes tribunals and the proposal for a permanent international criminal court are significant steps toward creating the capacity for international judicial intervention. In the civilized world's box of foreign policy tools, this will be a shiny new hammer to swing in the years ahead." David J. Scheffer, "International Judicial Intervention," *Foreign Policy*, Spring 1996, pp. 48–51. U.S. support for a permanent international criminal court was emphasized by President William Clinton on six occasions before the Rome Conference: "Remarks on the Opening of the Commemoration of '50 Years after Nuremberg: Human Rights and the Rule of Law,'" University of Connecticut, *Public Papers*, 1995, p. 1598; statements at the Army Conference Room in the Pentagon, *Weekly Compilation of Presidential Documents*, 29 January 1997, p. 119; statements before the fifty-second session of the United Nations General Assembly, ibid., 22 September 1997, p. 1389; remarks in honor of Human Rights Day, the Museum of Jewish Heritage, New York, ibid., 9 December 1997, p. 2003; statement at a White House briefing on Bosnia, ibid., 18 December 1997, p. 2074; and remarks to genocide survivors, assistance workers, and U.S. and Rwandan government officials, Kigali Airport, Kigali, Rwanda, ibid., 25 March 1998, p. 497.

The Pentagon was active in its opposition to the Rome Statute. See, e.g., Eric Schmitt, "Pentagon Battles Plans for International War Crimes Tribunal," *New York Times*, 14 April 1998. Following the Rome Conference, Congress prohibited the United States from becoming a party to any new international criminal tribunal (or giving legal effect to the jurisdiction of any such tribunal) except pursuant to legislation passed by Congress or a treaty to which the Senate had extended advice and consent pursuant to Article II, Section 2, Clause 2 of the Constitution. *Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999*, Public Law 105-277, 112 Stat. 2681 (1998), containing the *Foreign Affairs Reform and Restructuring Act of 1998*, sec. 2502.

6. In the abundance of literature spawned by the prospect of an ICC, frequent references are made to the notion that Nuremberg and Tokyo represent precedents for the ICC, the idea being that the court will operate as a kind of permanent Nuremberg Tribunal for the world. See, e.g., Benjamin B. Ferencz, "International Criminal Courts: The Legacy of Nuremberg," *Pace International Law Review*, vol. 10, 1998, p. 203: "The Nuremberg Tribunals were a precedent and a promise. As part of the universal determination to avoid the scourge of war, legal precedents were created that outlawed wars of aggression, war crimes and crimes against humanity." Some commentators have called this a false analogy, recalling that the post–World War II tribunals were convened pursuant to the unconditional surrender of the Axis powers and that the defeated peoples recognized and acquiesced in

them. See, e.g., "Is a U.N. International Criminal Court in the U.S. National Interest?" Senate Subcommittee on International Relations of the Committee on Foreign Relations, hearings (S. Hrg. 105, 724), 23 July 1998 [hereafter Senate Hearing], testimony of John R. Bolton, online at http://www.access.gpo.gov/congress/senate; Alfred P. Rubin, "Dayton, Bosnia and the Limits of Law," *National Interest*, Winter 1996–97, p. 46.

7. International Law Commission, *Draft Statute for an International Criminal Court*, UN GAOR, 49th sess., Supp no. 10, UN Doc. A/49/10, 1994 [hereafter ILC Draft], reprinted in Bassiouni, p. 657.

8. *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act*, UN Doc. A/Conf. 183/2/Add. 1, 1998 [hereafter PrepCom Draft], reprinted in *Documentary History*, p. 119. The PrepCom's complete final report is at the PrepCom Draft and online at http://www.un.org/icc.

9. For history and evolution of the court and the Preparatory Committee process, see Leila Sadat Wexler, "The Proposed Permanent International Criminal Court: An Appraisal," *Cornell International Law Journal*, vol. 29, 1996, p. 665; Benjamin Ferencz, *An International Criminal Court: A Step toward World Peace* (Dobbs Ferry, N.Y.: Oceana, 1980); James Crawford, "The ILC's Draft Statute for an International Criminal Tribunal," *American Journal of International Law*, vol. 88, 1994, p. 140; M. Cherif Bassiouni, "Historical Survey 1919–1998," in *Documentary History*, pp. 1–35; Howard Levie, "The History and Status of the International Criminal Court"; and Shabtai Rosenne, "Antecedents of the Rome Statute of the International Criminal Court Revisited," in *International Law across the Spectrum of Conflict*, ed. Michael N. Schmitt (forthcoming in 2000).

10. The complex, 167-page draft statute provided some indication of the task ahead. Brackets marked areas of disagreement: there were approximately fifteen hundred such areas. Needless to say, not every issue was resolved.

11. Philippe Kirsch and John T. Holmes describe the function and interplay of the various committees: "The plenary dealt with the organization of work, the delivery of policy statements of a general nature (which lasted four days) and the formal adoption of the statute at the end of the conference. The CW [Committee of the Whole] was responsible for the development of the statute, and the Drafting Committee was responsible for ensuring proper and consistent drafting throughout the statute in all languages. In general, issues once debated in the CW were referred to working groups or coordinators. The latter then reported the results of their work to the CW, and texts accepted by the CW were referred to the Drafting Committee. Texts refined by the committee had again to be approved by the CW. The final report was sent from the CW to the plenary, with a complete text, on the final day of the conference." Philippe Kirsch and John T. Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process," *American Journal of International Law*, vol. 93, 1999, p. 3. Kirsch, of Canada, served as chairman of the Committee of the Whole of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Holmes was another member of the Canadian delegation.

12. David J. Scheffer, "The United States and the International Criminal Court," *American Journal of International Law*, vol. 93, 1999, p. 14 [hereafter Scheffer, "United States"].

13. Kirsch and Holmes, p. 4.

14. Ibid.

15. In a somewhat different vein, Yale law professor Ruth Wedgwood has commented on the group dynamics at Rome, highlighting the politics of the various factions: "The timing of the Rome conference was inauspicious for the United States. Flush from their triumph at the Ottawa landmines conference (where they brushed aside American military needs in Korea), the caucus of 'like-minded' states demanded an unfettered court. Under Canadian and Norwegian leadership, the 'like-minded' group pried apart the unity of

traditional NATO allies. Making matters more complicated, the European Union had also hailed an independent court as the hallmark of its post-Bosnia try at a common foreign and security policy. The Germans, French, and even the British (citing the 'ethical dimension' of Tony Blair's foreign policy) went to Rome ready to abandon America in their race for European leadership. And nongovernmental organizations bluntly eschewed compromise, overlooking the need to reassure responsible military leaders." Ruth Wedgwood, "Fiddling in Rome: America and the International Criminal Court," *Foreign Affairs*, November–December 1998, pp. 20–1. A reply to Wedgwood is Kenneth Roth, "Roman Compromise," *Foreign Affairs*, March–April 1999, p. 163 ff.

16. Kirsch and Holmes explain: "The bureau was still faced with an enormous problem. No agreement existed on the fundamental questions as the conference commenced its final days. The CW chairman urged delegations, publicly and privately, to carry out consultations on the remaining problems with the assistance of coordinators. As the final week drew to a close, solutions were found to a number of sensitive issues, but the key problems in part 2 remained outstanding, despite pressure from the chaitman and the bureau, and lobbying by procourt states and even the Secretary-General of the United Nations." Kirsch and Holmes, p. 9.

17. Scheffer, "United States," p. 20.

18. Israel's explanation of its negative vote on the statute reads, in part: "The exigencies of lack of time and intense political and public pressure have obliged the conference to by-pass very basic sovereign prerogatives to which we are entitled in drafting international conventions, in favour of finishing the work and achieving a Statute on a come-what-may basis." Similarly, Singapore explains its abstention: "It always supported a strong Court; however, in the last hours, provisions were drafted which involved just a small group of countries. There was a strange fix for the question of jurisdiction which had appeared for the first time at the last minutes of the Conference." UN Press Release on concluding vote, L/ROM/22, 17 July 1999, online at http://www.un.org/icc/pressrel/lrom22.htm.

19. Kirsch and Holmes, p. 10. The bureau was the body of the conference tasked with managing the negotiating process. It consisted of representatives of Canada, Argentina, Romania, Lesotho, and Japan.

20. Ibid. Kirsch and Holmes explain that "contacts with delegations reflected a prevailing view that deferring the conclusion of the statute would be a serious mistake. Most delegations were very concerned that a second session would be just as likely to fail, ending hopes for the establishment of an international criminal court for many years, or that it could lead to an unacceptably weakened court."

21. In the end, the conference experienced considerable difficulty in reaching agreement on definitions of the four included categories. In fact, it never agreed on definitions for crimes of aggression, and it simply did not have time to negotiate mutually agreeable definitions of other crimes. For a discussion, see Mahnoush H. Arsanjani, "The Rome Statute of the International Criminal Court," *American Journal of International Law*, vol. 93, 1999, pp. 29–36.

22. "Delegations were prepared to consider the inclusion of a broad range of crimes, if the jurisdiction of the court was limited, for example, by requiring state consent on a case-by-case basis or by permitting states to opt in or opt out of certain crimes. Conversely, the possibility of automatic jurisdiction upon ratification, or of a system close to universal jurisdiction, provoked some delegations to argue for a limited range of crimes, narrower definitions and higher thresholds." Kirsch and Holmes, p. 5.

23. The Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/49/742, 1994, came into force on 15 January 1999; reprinted in Walter Sharp, ed., *UN*

Peace Operations [hereafter UN Safety Convention] (New York: American Heritage, 1995), p. 265.

24. PrepCom Draft, art. 5. The latter inclusion was particularly advocated by Caribbean delegations. Kirsch and Holmes, p. 4.

25. See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/Conf.183/9/Add., 1998 [hereafter Final Act], at Annex I, Resolution E; reprinted in *Documentary History*, pp. 104, 105. The date of the Review Conference is set in Article 123 of the Rome Statute.

26. PrepCom Draft, p. 122; Rome Statute, art. 8(2)(b)(iv). For a primer on environmental crimes during armed conflict, see Michael N. Schmitt, "Humanitarian Law and the Environment," *Denver Journal of International Law and Policy* (forthcoming in 2000).

27. "Throughout the process, we were determined to include only those war crimes that qualified as such under customary international law. This objective required intensive negotiations with other delegations, some of which wanted to stretch the list of war crimes into actions that, while reprehensible, were not customary international law at the end of the twentieth century." Scheffer, "United States," p. 14.

28. The statute of the International Court of Justice defines "custom" as "a general practice accepted by law." Statute of the International Court of Justice, 26 June 1977, art. 38(1)(b), 59 Stat. 1031, TS no. 933, 3 Bevans 1153, 1976 YB UN 1052. The restatement notes that custom "results from a general and consistent practice of states followed by them from a sense of legal obligation." *Restatement (Third), Foreign Relations Law of the United States*, § 102(2) (1987). See also *North Sea Continental Shelf Cases*, 1969 ICJ 3, 44 ("Not only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it"); *The Paquete Habana*, 175 US 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900); *The Case of the S.S. Lotus (Fr. v. Turk.)*, 1927 PCIJ (ser. A) no. 10(1927); *Asylum Case (Col. v. Peru)*, 1950 ICJ 266; and *Case Concerning Right of Passage over Indian Territory (Port. v. India)*, 1960 ICJ 6.

29. Helen Duffy et al., *Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court* (1998), p. 11.

30. Rome Statute, art. 5(1). That the statute was not designed to create new substantive law is apparent from the work of the Preparatory Committee. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. 1, UN GAOR, 51st sess., supp. no. 22, at UN Doc. A/51/22 (1996), p. 16.

31. ILC Draft, art. 22; PrepCom Draft, art. 9, options 1 and 2.

32. Rome Statute, art. 124.

33. *Jurisdiction ratione temporis*. Ibid., art. 11.

34. Kenneth Roth, "The Court the US Doesn't Want," *New York Review of Books*, 19 November 1998, p. 7.

35. Scheffer, "United States," p. 18. See also Ambassador Scheffer's comments before the Senate Committee on Foreign Relations: "Unfortunately, because of the extraordinary way the Court's jurisdiction was framed at the last moment, a country willing to commit war crimes could join the treaty and opt out of war crimes jurisdiction for 7 years, while a non-party state could deploy its soldiers abroad and be vulnerable to assertions of jurisdiction." Scheffer testimony, Senate Hearing.

36. Scheffer, "United States," p. 20.

37. General Gentaro Yamashita, who commanded Japanese troops in the Philippines during World War II, was tried by a U.S. military commission with having "unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high

crimes against people of the United States and its allies, particularly the Philippines." UN War Crimes Commission, *Reports of Trials of the War Criminals*, vol. 3, p. 3. Yamashita was convicted and, following an unsuccessful appeal to the U.S. Supreme Court (*Yamashita v. Styer*, 327 US 1 [1946]—argued primarily on the constitutionality and jurisdiction of the military commission), executed. For the Celebici case, *Prosecutor v. Delalic, Mucic, Delic, & Landzo (Celebici Camp Case)*, paras. 333–42, IT-96-21-T, 16 November 1998, http://www.un.org/icty/celebici/judgement/main.htm. Interestingly, the court found that the principle applied not only to military superiors but to civilians in positions of authority. Ibid., para. 363. On command responsibility generally, see Leslie C. Green, "War Crimes, Crimes against Humanity, and Command Responsibility," *Naval War College Review*, Spring 1997, p. 26, reprinted in *Essays on the Modern Law of War*, ed. Leslie C. Green, 2d ed. (Ardsley, N.Y.: Transnational, 1998), chap. 8; W. Hays Parks, "Command Responsibility for War Crimes," *Military Law Review*, vol. 62, 1973, p. 1.

38. See Rome Statute, art. 33.

39. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

40. The tribunals for both the former Yugoslavia and Rwanda are handling charges of genocide. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 4, UN Doc. S/25704, annex (1993), reprinted in 32 ILM 1192 (1993) [hereafter ICTY Stature]; International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens, art. 2, SC Res 955, annex [hereafter ICTR Statute], reprinted in 33 ILM 1602 (1994). As of 10 May 1999, there have been eight public indictments for genocide by the tribunal for Yugoslavia, but no trials have been completed. By contrast, the majority of the indictees before the Rwanda tribunal are charged with genocide; the tribunal for Rwanda has convicted one defendant of the crime, Jean-Paul Akayesu (case no. ICTR-96-4-I). On the Rwandan case, see Catherine Cissé, "The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda," *Yearbook of International Humanitarian Law*, 1998, p. 161.

41. The U.S. reservations may be found on the ICRC website at http://www.icrc.org/ (in the international humanitarian law database).

42. *Extermination:* "Intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of a part of the population" (Art. 7[2][b]). *Enslavement:* "Exercise of any or all of the powers of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children" (Art. 7[2][c]). *Deportation, population transfers:* "Forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law" (Art. 7[2][d]). *Torture:* "Intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions" [Art. 7[2][e]). *Forced pregnancy:* "The unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or cartying out other grave violations of international law" (Art. 7[2][f]). *Persecution:* "The intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity" (Art. 7[2][g]). *Disappearance:* "The arrest, derention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to

acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period" (Art. 7[2][i]). *Apartheid:* "Inhumane acts of a character similar [to the others in Article 7], committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime" (Art. 7[2][h]).

43. This includes definitions used at Nuremberg and Tokyo, and at the more recent UN-sponsored tribunals for the former Yugoslavia and Rwanda. On this point, see Darryl Robinson, "Defining 'Crimes against Humanity' at the Rome Conference," *American Journal of International Law*, vol. 93, 1999, p. 43. For a summary of the developments that led to the Rome Statute's definition of crimes against humanity, see Phyllis Hwang, "Defining Crimes against Humanity in the Rome Statute of the International Criminal Court," *Fordham International Law Journal*, vol. 22, 1998, p. 457. Hwang serves as counsel for the Taiwan Association for Human Rights, in Taipei.

44. On the notion of extending "war crimes" even into periods not of "armed conflict," see Steven R. Ratner, "Why Only War Crimes? De-linking Human Rights Offenses from Armed Conflict," *Hofstra Law and Policy Symposium*, vol. 3, 1999, p. 75.

45. In the Tadic case, the appeals chamber determined the conflict in Bosnia-Hercegovina to be of "mixed" character: at times it was noninternational armed conflict, at others international. *Prosecutor v. Dusko Tadic a/k/a "Dule,"* case no. IT-94-1, Appeals Chamber, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 72–5.

46. Scheffer, "United States," p. 14. See Hwang, pp. 479–86, for discussion of the application of this principle in the prosecution of Dusko Tadic before the International Criminal Tribunal for the former Yugoslavia: "The Tadic Decision on Jurisdiction established early on that a nexus between crimes against humanity and armed conflict, while required by the ICTY Statute, did not reflect contemporary international law." Hwang, p. 485.

47. Crimes against humanity are described in both the Rwanda and Yugoslavia statutes as including persecution on political, racial and religious grounds, murder, extermination, enslavement, deportation, imprisonment, torture, rape, and other inhumane acts. ICTY Statute, arts. 3, 5.

48. Such crimes do not appear in the Nuremberg Charter, the Tokyo Charter, or the Allied Control Council Law for Germany no. 10, in the corresponding sections in which crimes against humanity are listed. The seminal survey, containing all relevant documents, on the subject is M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht, Neth., and Boston: Martinus Nijhoff, 1992).

49. For a discussion of gender issues and the concerns of women's advocates at the Rome Conference, see Brook Sari Moshan, "Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity," *Fordham International Law Journal*, vol. 22, 1998, p. 154. Moshan concludes that "the Rome Statute is a partial victory for gender justice" (p. 182). On rape generally, see Theodor Meron, "Rape as a Crime under International Humanitarian Law," *American Journal of International Law*, vol. 87, 1993, p. 424.

50. See Moshan, p. 176. Significant opposition from Muslim states centered on the argument that pregnancy was merely the consequence of the crime of rape, already separately included in the statute. As part of a compromise, the original term "enforced pregnancy" was replaced with "forced pregnancy." Arsanjani, p. 31.

51. See Robinson, p. 53, citing UN Department of Public Information, *Platform for Action and the Beijing Declaration: Fourth World Conference on Women*, UN sales no. E.DPI/1766 (New York: 1996).

52. Human Rights Watch, "Summary of the Key Provisions of the ICC Statute," online at http://www.hrw.org/hrw/campaigns/icc/icc-statute.htm

53. Noninternational armed conflict takes "place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." Rome Statute, art. 8.2(f).

54. In the words of one commentator, "The court still has the authority to investigate individual criminal acts—a commendable solution." Marie-Claude Roberge, "The New International Criminal Court: A Preliminary Assessment," *International Review of the Red Cross*, December 1998, p. 674.

55. The 1977 Additional Protocols represent an effort to update the Geneva Conventions of 1949. They do not replace, but merely supplement, those instruments. Additional Protocol I applies to international armed conflict, Additional Protocol II to noninternational. Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, UN Doc. A/32/144, 16 ILM 1391 [hereafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, 8 June 1977, UN Doc. A/32/144, Annex II (1977), reprinted in 16 ILM 1442 (1977) [hereafter Additional Protocol II].

Although not a party to the Additional Protocol I, the Unired States considers many of its provisions (but not the environmental ones) to be declaratory of customary international law. For a delineation—nonofficial, but generally considered authoritative—of those viewed as declaratory, see Michael J. Matheson, "Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions," *American University Journal of International Law and Policy*, vol. 2, 1987, p. 419. See also U.S. Air Force Dept., Office of the Judge Advocate General, International and Operational Law Division, *Operations Law Deployment Deskbook*, tab 12; and comments by the then State Department Legal Advisor Abraham D. Sofaer in "Agora: The US Decision Not to Ratify Protocol I to rhe Geneva Conventions on the Protection of War Victims," *American Journal of International Law*, vol. 82, 1988, p. 784.

56. In the explanation of its negative vote, Israel expressed dismay over the insertion as an offense of an occupying power transferring its population into occupied territory. UN Press Release. Jeremy Rabkin, a Cornell University professor of government and an ICC opponent, commented that such an inclusion belies the statements of those who downplay the influence of politics on institutions like the ICC—it represents "a definition demanded and celebrated by Arab delegations as certification of Israeli war crimes." Jeremy Rabkin, "Courting Disaster," *The American Spectator*, October 1998, n.p., available online through Lexis-Nexis.

57. Additional Protocol I, arts. 35(3), 55. On criticism of law protecting the environment during armed conflict, see Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict," *Yale Journal of International Law*, vol. 22, 1997, p. 1, and "War and the Environment: Fault Lines in the Prescriptive Landscape," *Archiv des Völkerrechts*, vol. 37, 1999, pp. 25–67.

58. Additional Protocol I, art. 77; Additional Protocol II, art. 4; Convention on the Rights of the Child, art. 38, GA Resolution 44/25 (1989), reprinted in 30 ILM 1448 (1989).

59. The UN Safety Convention does nor apply to "a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies." UN Safety Convention, art. 2.2.

60. For example, see Instructions for the Government of Armies of the United States in the Field, General Orders no. 100 (Lieber Code), art. 70, reprinted in Dietrich Schindler and Jiri Toman, eds., *The Laws of Armed Conflicts* (Alphen ann den Rijn, Neth.: Sitjoff and Noordhoff, 1988), pp. 3, 13 (use of poison); "Declaration (IV, 2) Concerning Asphyxiating Gases, July 29, 1899," *American Journal of International Law*, vol. 1, supp. 1907, p. 155, reprinted in Schindler and Toman, eds., p. 105; Treaty relating to the Use of Submarines and Noxious Gases in Warfare (Washington Treaty), 6 February 1922, art. 5, *American Journal of International Law*, vol. 16, supp. 1922, p. 57, reprinted in Schindler and Toman, eds., pp. 877–8; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 UST 571, 14 ILM 49 (1975); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 ILM 800 (1993); Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (St. Petersburg Declaration), reprinted in *American Journal of International Law*, vol. 1, supp. 1907, p. 96, reprinted in Schindler and Toman, eds., p. 101.

61. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or Have Indiscriminate Effects, 10 October 1980, 19 ILM 1524 (1980), reprinted in Schindler and Toman, eds., p. 179; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997, 36 ILM 1507 (1997), reprinted in *International Review of the Red Cross*, September–October 1997, p. 563.

62. There is an obligation against it in Article 51.7 of Additional Protocol I; there has always, however, been concern that violators might consider themselves released from their obligations to take account of civilian casualties, even those used as shields (Art. 51.8). The ICC statute puts teeth in the oft-violated Additional Protocol prohibition. Human shields were used most notably during the Persian Gulf War of 1990–91, the conflict in Bosnia-Hercegovina (including captured members of UN forces), in Iraq when coalition forces appeared ready to strike due to Iraqi noncompliance with the post–DESERT STORM enforcement regime, and most recently to hinder Operation ALLIED FORCE air attacks in the Balkans.

63. Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, annexed Regulations, art. 27, 36 Stat. 2277, 205 Consolidated Treaty Series 277, reprinted in *The Laws and Customs of War*, p. 63; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 216, reprinted in Schindler and Toman, eds., p. 745; and Additional Protocol I, arts. 53, 85.4(d).

64. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 3, 6 UST 3114, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, art. 3, 6 UST 3217, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, art. 3, 6 UST 3316, 75 UNTS 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 3, 6 UST 3516, 75 UNTS 287.

65. Rome Statute, art. 8(c). Interestingly, the ICC version omits in subparagraph iv the phrase "by civilized peoples" following the word "indispensable."

66. The "Judgement of the Court" noted that "to initiate a war of aggression is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."

67. Definition of Aggression, GA Res. 3314 (XXIX), art. 1, UN GAOR, 29th sess., supp. no. 31, at 142, UN Doc. A/9631 (1975), 13 ILM 710 (1974). Today, there is a growing debate about the applicability of the term to information operations; see, among others,

Michael N. Schmitt, "Computer Network Attack and the Use of Force in International Law," *Columbia Journal of Transnational Law*, vol. 37, 1999, p. 885.

68. An approach advocated by the United States during Preparatory Committee proceedings required Security Council determination that an act amounted to aggression as a prerequisite to ICC jurisdiction. PrepCom Draft, option 3.

69. At one end of the spectrum, Libya, ultimately a nonsignatory to the treaty, argued that a definition of the crime of aggression should include confiscation of property and establishment of settlements in occupied territories. Obviously, such a policy would carry serious ramifications for the United States, which has continued to freeze Libyan assets, and for Israel, with its settlements in the West Bank. In its general statement on behalf of the Arab Group of States, Sudan averred, "It was regrettable that just reference [*sic*] to aggression was included, as aggression is the 'mother of all crimes.'" UN Press Release.

70. Scheffer, "United States," p. 21.

71. *Prosecutor v. Furundzija*, para. 162, case no. IT-95-17/1-T 10, 10 December 1998, available online at http://www.un.org/icty/furundzija/judgment/main.htm.

72. For a discussion of the U.S. proposal for elements and the current negotiations under way in the Preparatory Commission, see William K. Leitzau, "Checks and Balances and Elements of Proof: Structural Pillars for an International Criminal Court," *Cornell International Law Journal* (forthcoming in 1999).

73. There are different "families" of law. For instance, the Western world uses two major legal systems, common and civil law, based, respectively, on the English and the Romano-Germanic legal traditions. Today, most English-speaking nations fall into the former category, most European states into the latter.

74. Gary T. Dempsey, "Reasonable Doubt: The Case against the Proposed International Criminal Court," available online at http://www.cato.org/pubs/pas/pa-311.html.

75. Ibid. Sen. John Ashcroft, in a statement before the Senate Foreign Relations Committee, forcefully presented the issue: "We must never trade away American sovereignty and the Bill of Rights so that international bureaucrats can sit [in] judgment of the United States military and our criminal justice system." Statement of Senator John Ashcroft, in Senate Hearing.

76. See "Address at Rome Conference by Benjamin B. Ferencz, June 16, 1998," available online at http://www.un.org/icc/speeches/616ppc.htm. Another commentator has remarked that the important objectives represented by the Rome Statute and the establishment of the ICC "cannot be achieved without impinging upon the traditional criminal jurisdiction of States, but the values concerned are important enough to justify this intrusion." Bartram S. Brown, "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals," *Yale Journal of International Law*, vol. 23, 1998, pp. 434–5.

77. See, for instance, the statement by Iris Almeida, of the International Centre for Human Rights and Democratic Development, a Canadian NGO, given before the Rome Conference on 17 June 1998, available online at http://www.un.org/icc/speeches/617alm.htm. "The granting of such powers to an essentially political body is incompatible with the establishment of an effective judicial body." By contrast, the U.S. delegation insisted on a strong role for the Security Council in the referral of cases: "We determined that the critical role of the Security Council as a preliminary reviewer must be sustained when cases pertaining to the work of the Council (whether or not under Chapter VII authority) were at issue." Scheffer, "United States," p. 13.

Ruth Wedgwood has described the debate in terms of the political tensions between North and South: "Political tensions between North and South at the United Nations also complicated the bargaining. Developing countries feel a new jealousy of the Security

Council's exclusive authority over international security matters. The recent, failed attempt of middle-rank powers to expand the Council has exacerbated the mood. Together, these factors made it impossible for the United States to preserve an American veto over prosecution decisions by using the requirement of Council approval." Wedgwood, "Fiddling in Rome," p. 21.

78. The record of the Senate hearings on the ICC makes clear that the analogy to recent domestic experiences with the institution of an independent prosecutor was not lost on committee members; they give abundant evidence of a peculiar American sensitivity to the concept of a largely unaccountable and independent prosecutor.

79. Jurisdiction refers to the states involved and the court's power to consider an offense or try an individual. Admissibility concerns whether the matter is properly before the court. For instance, under the principle of complementarity, do domestic courts have priority?

80. Redactions are copies that mask "questionable" material. *In camera* hearings are closed, whereas in *ex parte* proceedings only the defense or prosecution is present.

81. It should be noted that such elements of vagueness and generality, to which we have alluded throughout this article, are frequently cited as strengths rather than weaknesses by ICC proponents. For instance, Judge Gabrielle Kirk McDonald of the ICTY stated before the PrepCom that "the Statute should be one of principle and not of detail. . . . A Statute which does not give the Court flexibility to address unforeseen issues or make changes to improve the administration of justice will in my view lead to an ineffective court." Judge Kirk McDonald urges that the International Permanent Court "must be effective" (press release of the ICTY Press and Information Office, 14 August 1997, CC/PIO/236-E, available online at http://www.un.org/icty/). She adds that the committee should "ensure that the Statute be a flexible document based on principles which may be developed by the Court as the circumstances require while still providing sufficient guidance to establish an international framework within which the Court can work." Of course, such assertions have not gone unchallenged, at least in the United States.

82. Roth, p. 1.

83. Ibid.

84. Scheffer, "United States," p. 12.

85. As David Scheffer noted: "We believe that these and other problems concerning the Rome treaty are solvable. The United States remains strongly committed to the achievement of international justice. We hope developments will unfold in the future so that the considerable support that the United States could bring to a properly constituted international criminal court can be realized." Ibid., pp. 21–2.

86. Ruth Wedgwood faults the administration's lack of a coherent, thorough-going policy vis-à-vis the prospective ICC as a chief reason for the final negative vote and the lost opportunity "to shape the court in America's image": "The administration failed to think through or effectively articulate its position on the court. Throughout the negotiations, wary of a skeptical Congress, the White House dithered. Though international meetings on the ICC began in 1994, the United States failed to set its bottom line—Would it back the court or not? Under what terms?—until the president's return from China in early July. Only then, four weeks into the five-week UN final conference in Rome, were cabinet debates resolved and instructions issued to the American negotiating team. But by then it was too late for American diplomats to convince frustrated friends and allies to accommodate new U.S. demands—a case study in how not to conduct multilateral diplomacy." Wedgwood, "Fiddling in Rome," p. 20.

87. "The ICC is designed as a treaty-based court with the unique power to prosecute and sentence individuals, but also to impose obligations of cooperation upon the contracting states. . . . Under Article 12, the ICC may exercise such jurisdiction over anyone anywhere

in the world, even in the absence of a referral by the Security Council, if either the state of the territory where the crime was committed or the state of nationality of the accused consents. Ironically, the treaty exposes nonparties in ways that parties are not exposed." Scheffer, "United States," p. 18.

88. See Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, arts. 34–38, 1155 UNTS 331.

89. For a discussion of such jurisdiction, see K. C. Randall, "Universal Jurisdiction under International Law," *Texas Law Review*, vol. 66, 1988, p. 785. But see the comments of Alfred P. Rubin in "The International Criminal Court: A Skeptical Analysis," in Michael N. Schmitt, ed., *International Law across the Spectrum of Conflict* (forthcoming in 2000), questioning the existence of a so-called "universal jurisdiction."

90. Scheffer, "United States," p. 18.

91. Ibid.

92. Lee A. Casey testimony, Senate Hearing. Casey's pointed emphasis on risks to Americans could obviously apply with equal force to the fighting forces of other nations, such as Israel.

93. Rome Statute, art. 8(2)(b)(ii).

94. Ruth Wedgwood has commented, "Though it may seem inconceivable that charges of genocide or crimes against humanity could apply to our attempts to restrain Saddam Hussein or to American nuclear deterrence, one should not underestimate the ingenuity of lawyers." Ruth Wedgwood, "The Pitfalls of Global Justice," *New York Times*, 10 June 1998, op-ed page.

95. Scheffer, "United States," p. 19.

96. Ibid.

97. See Wedgwood, "Fiddling in Rome," p. 20. "Some of Washington's concerns were serious and legitimate. American troops are deployed across the globe, and should not face the added danger of politically motivated prosecutions."

98. Michael P. Scharf testimony, Senate Hearing.

99. See, e.g., Rabkin, and Dempsey.

100. Rome Statute, arts. 72 and 93.4.

101. John R. Bolton testimony, in Senate Hearing.

102. Rabkin.

103. See Paul D. Marquardt, "Law without Borders: The Constitutionality of an International Criminal Court," *Columbia Journal of Transnational Law*, vol. 33, 1995, p. 73.

104. Bolton testimony, Senate Hearing.

105. Ibid. "Recent history is unfortunately rife with cases where strong military force or the threat of force failed to deter aggression or gross abuses of human rights. Why we should believe that bewigged judges in the Hague will prevent what cold steel has failed to prevent remains entirely unexplained."

106. For example, there have been suggestions that the ICTY's recent indictment of Yugoslavian leader Slobodan Milosevic complicated efforts to end hostilities on terms that ensured the well-being of the Kosovars.

107. The debate here parallels in many ways the "conflict of visions" outlined by Thomas Sowell: the advocates of an "unconstrained" vision of humanity and of relatively unlimited human potential contend against the proponents of a "constrained" view, in which tradeoffs and tragic choices are the stuff of imperfect and finite human existence. Thomas Sowell, *A Conflict of Visions* (New York: William Morrow, 1987).

108. Scheffer testimony, Senate Hearing. See also David J. Scheffer, "Statement on the International Criminal Court, Remarks before the 53rd Session of the United Nations General Assembly, in the Sixth Committee," USUN Press Release no. 179, 21 October 1998.