

THE IRRESOLUTION OF ROME

RUTH WEDGWOOD*

I

INTRODUCTION—THE U.S. SIGNATURE AND ITS AFTERMATH

President Clinton's signature of the Rome treaty in the twilight of his Administration has punctuated the long impasse over American participation in the International Criminal Court (the "ICC").¹ Signing on December 31, 2000 (the last day possible for a signature without ratification), the President proclaimed his "strong support for international accountability" and for "bringing to justice perpetrators of genocide, war crimes, and crimes against humanity."² A "properly constituted and structured" criminal court, said the President, could "make a profound contribution in deterring egregious human rights abuses worldwide."³

The signing was unusual, for the President foreswore any intention of ratifying the treaty in the foreseeable future. He would not send the treaty to the Senate for advice and consent, nor recommend that his successor do so, until and unless "fundamental concerns" could be resolved. The United States preferred to "observe and assess the functioning of the Court, over time," said the President, advertent to the need to "protect U.S. officials from unfounded charges." This is a legal realist's vantage—a jurisdictional statute, the elements of crimes, and the specification of procedures do not suffice to show how a court will operate, what the culture of a prosecutor's office will be, or how a court will read its mission. Watching the court in action is a far more rigorous test.

But why sign at all, if ratification is purely hypothetical? With signature, said the President, the United States could better "influence the evolution of the Court," and, in particular, address the court's misplaced temptation to assert third-party jurisdiction "over personnel of states that have not" ratified. This, of course, was not an independent reason to eschew ratification. If a country is willing to accept direct responsibility for its nationals' actions (as a treaty party), it has no occasion to worry that there may be an alternative ave-

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* Professor of Law, Yale University; Senior Fellow, International Organizations and Law at the Council on Foreign Relations.

1. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9* (July 17, 1998) [hereinafter Rome Statute].

2. Statement on the Rome Treaty on the International Criminal Court, Dec. 31, 2000, 37(1) WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 4 (2001).

3. *Id.*

nue of liability. But the literary grace of the President's signing statement is not the point. Rather, the emphasis on third-party liability is a measure of U.S. anxiety that the court might ultimately choose to criminalize good faith debates in military doctrine. When and how to use force is hardly a settled matter in foreign policy or even in the law. The ICC is asked to interpret and apply norms that are not bright-line rules, including questions such as proportionality, and the nature of a military versus civilian target. These are hotly debated among responsible militaries, and must in practice be informed by military expertise and battlefield alternatives, as well as by political and ethical judgment. The United States has understandably feared that good faith operational questions could be precipitously removed from their usual place of debate in alliance headquarters and military manuals, and be recast in a courtroom's criminal rhetoric. Should one disable dual use electrical systems that support anti-aircraft as well as hospitals? Does an adversary's perfidy in misusing civilian sites to launch attacks then change the eligibility of those sites as targets? The standards for war-fighting are often more akin to open-textured principles, rather than self-executing rules—depending on acute judgments of facts and alternatives, in a fluid situation where lives are at stake and one hardly has time to “make a record” for litigation later. It is not surprising that the review of all battlefield decisions by civilians without military experience might worry a professional military operator, at least in countries where the military actually deploys on duty in combat missions.

The President's treaty signature may advance the international debate over the American request for a fair chance to watch the court in action. A unilateral diplomatic gesture can be risky, since there is no guarantee of reciprocity. But compromise in the ongoing Preparatory Commission (“PrepCom”) negotiations⁴ to launch the court has been stymied until now by the occasionally obdurate attitude of court absolutists, and as well by the concern that no one could tell whether any particular concession would actually induce U.S. signature to the ICC treaty. This made it especially hard to persuade major nations to meet U.S. concerns. With the unilateral gesture, the U.S. has placed its bet on grace and reciprocity—hoping that its concern about third-party liability will be seen as a reasonable position whose resolution will strengthen the court with American economic, diplomatic, and military assets.

Interestingly, the “concerns” framed in President Clinton's signing statement were not filed with the treaty depository as formal conditions, understandings, or reservations to the signing. The Rome treaty text forbids reservations,⁵ and U.N. lawyers have rejected at least one attempt to deposit a

4. The Preparatory Commission was established by a resolution of the Rome conference. See *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF. 183/10*, Annex I, Res. F (July 17, 1998)(conference resolution calling for PrepCom); see also Rome Statute, *supra* note 1, art. 112(2)(a) (“The Assembly [of States Parties] shall: (a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission.”).

5. See Rome Statute, *supra* note 1, art. 120.

signature with provisos resembling reservations. Yet a number of Rome signatories have indulged themselves with “interpretive declarations” filed with the depository upon ratification (including the French with seven and the Norwegians with three). The United States did not hedge its bets even to that degree. Certainly some tolerance for clarifying “declarations” may behoove a treaty process such as the ICC, for the final Rome text was finished in haste at the five-week diplomatic conference in 1998 and corrigenda and corrections have continued to be issued by the United Nations even two years after the treaty text was voted.⁶

To be sure, through signature, the United States has done more than potentially enhance its fund of good will. The United States also has subjected itself to certain international legal duties of good faith in not frustrating the ICC’s object and purpose.⁷ The articulate acknowledgement of this duty by the American Secretary of State at the outset of the new Republican Administration in the setting of a skeptical Senate hearing may serve to give America’s interlocutors a warmer appreciation that the court may benefit from a broad range of arms-length support in its work. The newly appointed Secretary of State-designate, General Colin L. Powell, appeared before the Senate Foreign Relations Committee on January 18, 2001, for his confirmation hearing, shortly after the treaty signature by the outgoing President. In a broad survey of his views on foreign policy, General Powell advised chairman Helms that he had reservations about the ICC treaty, and that no one should be “standing on . . . tippy-toes waiting for the Bush administration to ask for any movement toward ratification of the treaty.”⁸ But in the same breath, General Powell stated that “when you do sign a treaty, in legal terms you sort of bind yourself to the pur-

6. See Procès-Verbal of Rectification of the Original of the Statute, Nov. 10, 1998 (11 proposed corrections to statute text communicated to interested states by depository notification on Sept. 25, 1998, C.N. 502.1998.TREATIES-3, and adopted without objection, C.N.577.1998.TREATIES-8); Procès-Verbal of Rectification of the Original of the Statute, July 12, 1999 (22 proposed corrections to statute text communicated to interested states by depository notifications on May 19, 1999, and July 1, 1999, C.N.357.1999.TREATIES-14, and C.N.537.1999.TREATIES.16, and adopted without objection, C.N.577.1999.TREATIES); Procès-Verbal of Rectification of the Original of the Statute, Nov. 30, 1999 (two proposed corrections to French text and five proposed corrections to Spanish text communicated to interested states by depository notification on Oct. 15, 1999, C.N.781.1999-TREATIES-21, and adopted without objection); Procès-Verbal of Rectification of the Original of the Statute, May 8, 2000 (18 proposed corrections to French text and 57 proposed corrections to Spanish text communicated to interested states by depository notification on Mar. 24, 2000, C.N.177-2000.TREATIES-5, and adopted without objection).

In addition, after the conclusion of the Rome negotiations and before the formal process of corrigenda, the text of the Rome treaty was “reissued for technical reasons.” Compare Rome Statute, A/CONF.183/9 (July 17, 1998), with Rome Statute, A/CONF.183/9* (July 17, 1998)(“[r]eissued for technical reasons). The initial Rome text had at least one crucial error, for the seven-year transition provision insisted upon by France in Article 124—permitting an “opt-out” from war crimes jurisdiction—referred in cross reference to Article 5 rather than Article 8.

7. See Article 18 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27, at 289 (1969), 1155 U.N.T.S. 331, 336, reprinted in 8 I.L.M. 679, 686 (1969). Although the Vienna Convention has not been ratified by the United States, it generally reflects the customary law of treaties.

8. Confirmation Hearing of General Colin L. Powell to be Secretary of State, Senate Foreign Relations Committee, Jan. 17, 2001, available at <<http://www.un.int/usa/01pow 117.htm>>.

pose and objectives of the treaty.”⁹ Noting his concerns about the consistency of the treaty with expectations about constitutional rights in criminal trials, Powell stated plainly that “[t]he new administration will be opposed to the International Criminal Court.”¹⁰ But he again laid down a legal and political bright line about the duty of good faith. Addressing Senator George Allen of Virginia, General Powell said, “Take note of the fact, though, that once America signs a treaty such as this, we are in some ways expected not to defeat its purpose, intended purpose. And the expectation is that we would ultimately ratify it,” Powell went on, even though “I don’t think it likely you’ll see this administration send it up for ratification.”¹¹ In a world of diplomacy where strategic ambiguity is a studied art, General Powell’s views were strikingly constructive. Since that time, in the context of a discussion of the International Criminal Tribunal for the former Yugoslavia, State Department spokesman Richard Boucher has noted the Secretary is committed to “international justice for international crimes.”¹²

To be sure, Senator Jesse Helms, chairman of the Senate Foreign Relations Committee, publicly complained, upon news of the signature by President Clinton, that the action was a “blatant attempt by a lame-duck President to tie the hands of his successor.”¹³ Senator Helms argued that in the two years of negotiations in the ICC Preparatory Commission, the potential problem of third-party jurisdiction over American service personnel had not been solved. “Nothing—I repeat, nothing—has changed since then to justify U.S. signature. . . . This decision will not stand.”¹⁴

Shortly after the November presidential election, a group of former senior U.S. foreign policy officials from both parties, including former Defense Secretary Donald Rumsfeld, issued a letter also opposing any attempt to place American service personnel or political leaders under the jurisdiction of the ICC,¹⁵ and supporting the so-called American Servicemembers’ Protection Act.¹⁶ The letter, circulated by Senator Helms,¹⁷ complained that the “fear [of] interna-

9. *Id.*

10. *Id.*

11. *Id.*

12. Statement of Richard Boucher, State Department Briefing, Jan. 24, 2001, available in Fed. News Serv., Inc.

13. Press Release, United States Congress, Statement of Senator Jesse Helms (Dec. 31, 2000), available in eMediaMillWorks Inc. (formerly known as Federal Document Clearing House, Inc.).

14. *Id.*

15. See Letter of Lawrence Eagleburger, Brent Scowcroft, Caspar Weinberger, Zbigniew Brzezinski, R. James Woolsey, Jeane Kirkpatrick, Henry Kissinger, Donald Rumsfeld, Richard V. Allen, George Shultz, James A. Baker III, and Robert M. Gates, to House Majority Whip Congressman Tom DeLay, Nov. 29, 2000, available at <http://www.senate.gov/~foreign/2000/delay_letter.pdf>.

16. American Servicemembers’ Protection Act, Senate Bill S2726, Senate Committee on Foreign Relations, 106th Cong. 2d Sess. (June 14, 2000) (“A Bill To protect United States military personnel and other elected and appointed officials of the United States Government against criminal prosecution by an international criminal court to which the United States is not a party.”). *Accord* H.R. 4654, House International Relations Committee, 106th Cong. 2d Sess. (June 14, 2000).

17. Memorandum of Marc Thiessen, Press Spokesman, Nov. 30, 2000, available at <http://www.senate.gov/~foreign/press_template.cfm?rands_id=175489>.

tional criminal prosecution” might “chill decision-making within our government.” It could “limit the willingness of our national leadership to respond forcefully to acts of terrorism [and] aggression,” said the former officials, noting that the diplomatic efforts of the Clinton Administration had not resolved the problem of third-party jurisdiction. Though Mr. Rumsfeld was, of course, shortly thereafter selected by President Bush to head the Defense Department in the new administration, it is worth noting that the letter was followed by the Secretary of State’s enunciation of the duty of good faith, and that even these signatories anticipated further negotiation.¹⁸

Nonetheless, it would be a mistake on the part of Rome treaty supporters to suppose that the issue of third-party jurisdiction is put to rest. The American Servicemembers’ Protection Act, which would forbid all cooperation with the ICC, was tabled in mid-2000 after the Clinton Administration argued that it infringed the constitutional powers of the Presidency under Article II.¹⁹ But confidence that the United States will act as a quiet and friendly supporter of the ICC in the period until it may entertain ratification depends on the successful resolution of this needlessly nettlesome issue of third-party jurisdiction.

II

THE FAILED HISTORY OF COMPROMISE ON THIRD-PARTY JURISDICTION

In the attempt to advance constructive negotiations between the United States and its allies on the International Criminal Court, it may be well to analyze the labor that has gone before in seeking a compromise on the crucial issue of “third-party” jurisdiction. The PrepCom has supplemented the treaty with rules of procedure and evidence, as well as defining the elements of criminal offenses.²⁰ But the PrepCom is still at work, as of this writing, in crafting a so-called “relationship agreement” between the Court and the United Nations,²¹ as well as settling issues of financing. The negotiators have long since become familiars in the endless rounds of informal consultations, jousting in predictable ways on the terms that will govern proceedings under the treaty court.

18. *Id.* (“House passage of the American Servicemembers’ Protection Act can only strengthen the hand of U.S. negotiators as they seek to remedy the worst aspects of the treaty.”).

19. See Statement of Ambassador David Scheffer before the House International Relations Committee (July 26, 2000)(opposing the legislation as unconstitutional intrusion on authority of the Executive), available at <www.state.gov/www/policy_remarks/2000/000726_scheffer_service.html>, and Statement of Ruth Wedgwood before the Senate Foreign Relations Committee, June 14, 2000 (copy on file with author)(urging committee to delay action on the bill).

20. See *Report of the Preparatory Commission for the International Criminal Court, Addendum*, Finalized draft text of the Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000), and Finalized draft text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/ Add.2 (Nov. 2, 2000).

21. See Draft Relationship Agreement between the United Nations and the International Criminal Court, U.N. Doc. PCNICC/2000/WGICC-UN/L.1 (Aug. 9, 2000).

The many weeks of PrepComs since Rome, in six separate convocations,²² have not yet succeeded in overcoming the Achilles' heel of the treaty: the need for some assurance concerning third-party jurisdiction. In order to win the United States as a constant supporter, and gain the advantage of American diplomatic, military, and economic power to give teeth to the tribunals' orders, this issue must be resolved.²³ Despite its recent signature of the treaty, the United States will otherwise keep its distance from the court, out of fear that an ICC prosecutor could become a self-propelled auditor of American military operations.

The PrepCom discussions have brought some comforts to U.S. skeptics, for example, by preserving a more realistic definition of "proportionality" in military operations,²⁴ and clarifying treaty language on "transfer" of populations in a way designed to prevent the court's politicization in the Middle East peace process.²⁵ Yet there was no apparent progress on the key issue blocking Washington's support of the court. The United States has insisted that the court should function as a treaty organization founded on state consent, while respecting Security Council authority to refer any matters affecting international peace and security to the court's jurisdiction.²⁶ Some countries have instead supposed that the ICC and its Assembly of State Parties are entitled to mimic Security Council authority, unilaterally impleading the nationals of states that have declined to join the court.²⁷ Washington sees this as a usurpation of the Security Council's established position in international law and in the architec-

22. See G.A. Res. 53/105, 53d Sess., U.N. Doc. A/RES/53/105 (Dec. 8, 1998); G.A. Res. 54/105, 54th Sess., U.N. Doc. A/RES/54/105 (Dec. 9, 1999). The PrepCom will continue to meet in two sessions in 2001. See G.A. Res. 55/155, 55th Sess., U.N. Doc. A/RES/55/155 (Dec. 12, 2000).

23. The missing partnership of the United States was noted by the General Assembly in the veiled language of diplomacy. The Assembly asked the PrepCom to "discuss ways to enhance the effectiveness and acceptance of the Court." See *Establishment of an International Criminal Court*, G.A. Res. 53/105, 53d Sess., U.N. Doc. A/RES/53/105, ¶ 4 (Jan. 26, 1999). *Accord Establishment of the International Criminal Court*, G.A. Res. 54/105, 54th Sess., U.N. Doc. A/RES/54/105, ¶ 3 (Jan. 25, 2000).

24. The language of the elements of crimes clarifies that *overall* military advantage must be considered in assessing the proportionality of military choices. See Finalized draft text of the Elements of Crimes, *supra* note 20, art. 8(2)(b)(iv).

25. The Rome Treaty's language going beyond the Fourth Geneva Convention in regulating the transfer of populations was viewed by some as an attempt to castigate the West Bank settlements policy of Israel. The matter could have been an insurmountable obstacle to both American and Israel signatures of the treaty. It was resolved to Israel's relative satisfaction in a compromise struck in spring 2000, at a time of optimism in the peace process. In one of the arch rituals of diplomacy, the venue for compromise was a bilateral meeting between the European countries and Arab states, from which the United States and Israel were nominally excluded, while supporting the effort, *compare* Rome Statute, *supra* note 1, art. 8(2)(b)(viii)(emphasis added)(defining as an international crime "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.") with Finalized draft text of the Elements of Crimes, *supra* note 20, at 28 (required elements of proof include that the conduct "took place in the context of and was associated with an international armed conflict" and "[t]he term 'transfer' needs to be interpreted in accordance with the relevant provisions of international humanitarian law"). Israel signed the Rome treaty on December 31, 2000.

26. See Parts II and III of this article.

27. The Rome treaty provision in question is Article 12, grounding ICC jurisdiction upon the consent of the state whose national is accused, or the state in whose territory an offense occurred.

ture of the U.N. Charter. Under the Charter, the permanent members of the Security Council must concur in any U.N. enforcement decisions. And in the ordinary rules of treaty and customary law, a state cannot be bound without its consent, except perhaps to norms of *jus cogens*.

Some enthusiasts have argued that ICC prosecution of the nationals of a third-party state without Security Council concurrence does not amount to binding a state to a treaty regime without its consent. The individual and not the state is the formal party, it is argued, and the state will not have any direct duty of cooperation with the tribunal. But where the charged conduct consists of the faithful execution of official policy, the state remains a real party in interest and the matter is closely akin to the jurisdictional prerequisite of an “indispensable party.”²⁸ In addition, the ICC’s prescribed deference to the investigative and prosecutorial decisions of national courts, under the doctrine of “complementarity,”²⁹ means practically speaking that the state of a third-party national would be placed under extraordinary pressure to carry out its own investigation of his actions, even without joining the court, if the ICC provides notice that it intends to proceed with an international criminal investigation.

To be sure, in the changing geometry of international criminal law, some states have declared that their national courts are endowed with universal criminal jurisdiction to try serious violations of humanitarian law, even without any link of territory, nationality, or effect, and this may appear to resemble ICC jurisdiction over third parties. But the limits of this national jurisdiction are contentious as well, recently challenged before the International Court of Justice by the Democratic Republic of the Congo.³⁰ Claims over non-nationals are most reliably based on a treaty agreement between the affected states.³¹ There is no ordinary precedent for delegating national criminal jurisdiction to another

28. *Compare* East Timor (Port. v. Austl.), [1995] I.C.J. Reports 90 (June 30, 1995).

29. Rome Statute, *supra* note 1, arts. 17-19.

30. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Order Rejecting Request of Congo for Provisional Measures and Rejecting Request of Belgium for Removal of Case from List, International Court of Justice, Dec. 8, 2000; *see also id.*, dissenting opinion of Judge M. Francisco Rezek, ¶¶ 3, 6 (“C’est la première fois qu’un Etat s’adresse à la Cour pour dire qu’un membre de son gouvernement fait l’objet d’un mandat d’arrêt délivré par une juridiction d’un autre Etat, et que le gouvernement de ce dernier apporte un soutien à ce mandat d’arrêt en le faisant parvenir à l’ensemble de la communauté internationale. ... [une] question juridique dont l’importance et l’actualité sont incontestables.”); dissenting opinion of Judge Bula-Bula ¶ 20 (Imaginons la situation inverse où des juges congolais émettraient des mandats similaires contre des organes belges pour des faits commis au Congo postérieurement à Nuremberg, période de l’apparition de ce nouveau droit selon le conseil belge. Car, assure Antonio Cassese, la colonisation européenne a causé <la destruction d’ethnie entières>”); and declaration of Judge Van den Wyngaert ¶ 3 (“important question ... how far States are allowed (or are obliged) to go when implementing and enforcing norms of international criminal law”).

31. For example, the ultimate decision of the Law Lords in the Pinochet matter was founded on the Convention on Torture, acceded to by Chile, the United Kingdom, and Spain. *See* Ruth Wedgwood, *Augusto Pinochet and International Law*, 46 MCGILL L.J. 241 (2000), and *National Courts and the Prosecution of War Crimes*, in 1 PROCEDURAL AND SUBSTANTIVE ASPECTS OF INTERNATIONAL CRIMINAL LAW 393 (Gabrielle Kirk-McDonald & Olivia Swaak-Goldman eds., 2000).

tribunal, international or national, without the consent of the affected states, except in the aftermath of international belligerency.³²

With America's forward military posture in the world, Washington wants a guarantee that its soldiers, sailors, airmen, and marines will not be subject to the ICC's criminal jurisdiction unless and until the United States decides to join the court as a full treaty party. Despite the appointment of a conference facilitator—experienced Chilean diplomat Cristian Maquieira—to serve as a mediator in the efforts, the attempt to accommodate U.S. concerns has not yet been successful.

Part of this failure stemmed from a structural problem in U.S. negotiating techniques—the initial reluctance of the United States to decide its bottom line on treaty issues until the Rome negotiations were too far along.³³ Though American military leaders, including former Secretary of Defense William Cohen, asked for “100 percent” protection of their personnel against the exercise of the court's power—a demand made before the Rome conference by Senator Helms³⁴—it was sometimes difficult to value treaty procedures in “percentage” terms. The 1998 Rome conference also presented a difficult setting for effective negotiations. The intricate treaty text was never voted on article by article; instead, a conference chairman's “package” was presented as an unamendable text on the last day of a harried five-week session, leaving the United States without time for inter-agency review or consultation with its allies.³⁵ The American attempt to gain consideration for a safe harbor or “look-over” period was routed at Rome by a contest for rectitude among “like-minded” states and non-governmental supporters. To make an exclusion acceptable to other countries, after the treaty text was finalized at Rome, and

32. Compare Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW AND CONTEMPORARY PROBLEMS 13, pt. III (Winter 2001). Critics of the contemporary American position may be interested to compare the objections of former U.S. Secretary of State Robert Lansing and former U.S. Department of State Legal Adviser James Brown Scott to the post-World War I proposal to try the Kaiser in an international tribunal. See Commission on Responsibility of the Authors of War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L. 95 (1920); *Memorandum of Reservations Presented by the Representatives of the United States, annexed to id.*, 14 AM. J. INT'L L. at 127. In one of history's ironic turns, the Dutch government at that time refused to extradite the Kaiser to stand trial before the Allies because it was deemed inconsistent with Holland's historic role as a “land of refuge for the vanquished in international conflicts” and because the proposed charges were not part of Dutch law. See JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 98-112 (1982) (quoting Dutch diplomatic note of Jan. 23, 1920); AMRY VENDENBOSCH, THE NEUTRALITY OF THE NETHERLANDS DURING THE WORLD WAR 183-84 (1927).

33. See Ruth Wedgwood, *Fiddling in Rome*, 77(6) FOREIGN AFF. 20 (Nov./Dec. 1998); Ruth Wedgwood, *Courting Disaster: The U.S. Takes a Stand*, 77(3) FOREIGN SERV. J. 34 (March 2000).

34. See Letter of Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, to Secretary of State Madeleine Albright (Mar. 26, 1998) (“Recent reports indicated that the United States now seems willing to accept a ‘compromise’ in which the power to grant jurisdiction would be taken out of the jurisdiction of the Security Council. Under this scenario, an American citizen could very well come under the jurisdiction of a U.N. criminal court, even over the express objection of the United States Government. . . . A treaty establishing such a court without a clear U.S. veto . . . will be dead-on-arrival at the Senate Foreign Relations Committee.” (underlining in original)).

35. See Wedgwood, *Courting Disaster: The U.S. Takes a Stand*, *supra* note 33.

permit some limitation of third-party jurisdiction, may require that the protections be stated with indirection.

There have been several attempts at finding a venue for compromise, which are worth reexamining.

A. Article 12 and Jurisdiction

In early PrepCom negotiations in 1999, American diplomats tried to craft a compromise to protect American personnel through a gloss of the jurisdictional provision that purports to create third-party jurisdiction in the first place.³⁶ Article 12(3) of the Rome Treaty permits non-party states to accede to the ICC statute for one matter only. It sets as a jurisdictional prerequisite *ad hoc* consent by the state where the offense took place *or* the state of the offender's nationality. An American request to change "or" to "and" was rejected on the last night of treaty negotiations at Rome in July 1998, when the conference "bureau" decided the political center of gravity lay elsewhere. In the 1999 PrepComs, the renewed American proposal was to gloss Article 12 to exempt "official acts" from such third-party jurisdiction. Though Article 12's language might initially seem more expansive, the United States can point to the palpable self-contradiction of the treaty text itself, namely the stark inconsistency between Articles 11 and 12. In Article 11(2), the Rome treaty sets a strict limit on jurisdiction *ratione temporis*—the temporal competence of the ICC is as a court designed to operate only on future crimes. Under Article 11(2), if a state joins the ICC after the Rome treaty has entered into force generally, "the Court may exercise its jurisdiction only with respect to crimes committed *after the entry into force of this Statute for that State*, unless that State has made a declaration [accepting *ad hoc* jurisdiction] under Article 12, paragraph 3."³⁷ It is hard to reconcile this strict temporal limitation on the ICC's jurisdiction with a reading of Article 12 that permits a free-ranging selection of cases even before a third-party state joins. The PrepCom caucus of "like-minded" states has attempted to argue, as noted above, that there is no real third-party effect in the treaty, because before a state joins, it does not have to cooperate with the court even where its nationals might be subject to ICC jurisdiction. But this distinction between states and nationals cannot be reconciled with the plain and simple language of treaty article 11—which limits the ICC's own "exercise of jurisdiction" with respect to earlier crimes, rather than merely limiting a duty of state cooperation. Nonetheless, the proposal concerning Article 12 did not appear acceptable to many of America's interlocutors, and was not formally taken up.³⁸

36. See generally Ambassador David Scheffer, *International Criminal Court: The Challenge of Jurisdiction*, Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999).

37. Rome Statute, *supra* note 1, art. 11(2) (emphasis added).

38. One safeguard against opportunistic use of Article 12(3) was adopted by the PrepCom in the rules of procedure. A non-party state agreeing to the *ad hoc* exercise of ICC jurisdiction on a particular matter must be willing to accept symmetric application of ICC jurisdiction concerning its own actions. Saddam Hussein could not question Allied military action against him without submitting his own con-

B. Complementarity and Article 17

A chilly reception was also given by the like-minded states and NGO's to an alternative American draft rule at the December 1999 PrepCom concerning Article 17 and standards for admissibility. This rule concerned complementarity—the principle that the ICC should take a case only where national court systems are “unwilling or unable genuinely” to carry out an investigation or prosecution. The American proposal would have set out several principles for consideration (without dictating the outcome), when complementarity is considered. In particular, the court would have to “take into account” that a state attests the suspect was “acting in the course of his or her official duties authorized by [a] State”—so long as the state also undertook to “immediately investigate pursuant to its processes.”³⁹ The rationale was that few states would be willing to admit their authorization of a defendant's activities in case of horrific mistreatment of, say, a civilian population. The exemption for “official duties” would thus be self-limiting. However, this proffer was also rebuffed, and not further considered.

duct in the war to the court's jurisdiction. Compare Rome Statute, *supra* note 1, art. 12(3) (non-party State “may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question”)(emphasis added), with Finalized draft text of the Rules of Procedure and Evidence, *supra* note 20, Rule 44 (When a non-party State acts under article 12(3), “the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation [including genocide, crimes against humanity, and war crimes].”). See also Ruth Wedgwood, *The United States and the International Criminal Court: Achieving a Wider Consensus Through the “Ithaca Package,”* 32 CORN. INT'L L.J. 535, 541 (1999)(“A sensible reading of Article 12(3) will help parry misuse of the Court's jurisdiction. If a non-party State agrees to ad hoc ICC jurisdiction ‘with respect to the crime in question,’ the State must be willing to have its own conduct scrutinized as well.”).

39. *Proposal submitted by the United States of America concerning articles 17, 18 and 19 of Part 2 of the Rome Statute, concerning jurisdiction, admissibility and applicable law*, Preparatory Commission for the International Criminal Court, Working Group on Rules of Procedure and Evidence, U.N. Doc. PCNICC/1999/WGRPE/DP.45 (Dec. 2, 1999). The proposed Rule for article 17(1)(a) read as follows:

In determining, under article 17(1)(a) or (b) or (c), whether a case is inadmissible, the Court shall take into account, *inter alia*, the following:

- The independence of the State's applicable justice system, including its court martial system;
- Whether in the past the State has genuinely investigated or prosecuted similar conduct, whether official or non-official, by its military personnel or citizens; and
- Whether the State has communicated in writing to the Office of the Prosecutor that the person concerned was acting in the course of his or her official duties authorized by such State with respect to the matter under investigation and that the State shall immediately investigate pursuant to its processes, or has investigated or shall continue to investigate, fully such person's actions and, if warranted, shall prosecute expeditiously such person for any crime within the jurisdiction of the Court.

III RECENT PROPOSALS

A. Article 98(2) and the Relationship Agreement

The venue for a possible compromise has now moved to the obscurity of the treaty's closing sections—a coda that contains other efforts at accommodation, including a seven-year transition provision added at French insistence in the last moments of the Rome conference.⁴⁰ The third major American proposal builds on Article 98(2) and has traveled a considerable distance from the original U.S. demand, in a broad concession virtually unacknowledged by America's allies.

This American proposal was framed in a “non-paper” circulated at the March 2000 PrepCom, after full clearance by the interagency process that permits comment by interested Executive Branch departments and agencies in Washington. The proposal does not ask for any halter on the ICC's ability to investigate or even to frame charges against the nationals of third-party countries. Rather, the ICC would be limited only in seeking the actual surrender of or accepting physical custody of a third-party defendant for official acts, where the accused's government has not given consent following the investigation and the Security Council has not authorized the action. This proposal would enable the ICC to inquire into and even to charge any crime defined by the Rome statute, consistent with the requirements of complementarity and deference to the work of national courts.

If an ICC criminal investigation were opened scrutinizing official acts and yielded persuasive results, the cumulative evidence would raise the political cost of refusing voluntary surrender of the defendant. (Some ICC proponents seem to have surprisingly little faith in the ICC's prestige.) The ICC's investigative jurisdiction would give national military authorities a strong incentive to investigate allegations thoroughly through their own means as well. In the U.S. compromise proposal implementing the Rome treaty, the ICC's champions would gain “truth commission” capability and more, even over non-party states, limited only in the ability to seek arrest without state waiver. The acts of third-party nationals are thus most decidedly not immunized from international scru-

40. See Rome Statute, *supra* note 1, art. 124 (permitting a seven-year transition period for the acceptance of ICC jurisdiction over war crimes committed by a party's nationals or on its territory), and Interpretive Declaration of France, June 9, 2000, under article 124, available in Ratification Status of Rome Statute of the International Criminal Court <www.un.org/law/icc/statute/status.htm>. French NGOs have criticized Paris's reliance on the seven-year transition of Article 124. See Press Release, French Coalition for the International Criminal Court, France must ratify the statute of the International Criminal Court without restriction (Mar. 2000) (released at the March 2000 PrepCom). France is said to have worried that it “could be the target of unfounded complaints tainted with hidden political motives” because it was “engaged in numerous external theatres, notably in connection with peace-keeping operations.” *Id.* The French government's calculation, said the French NGO coalition, was that the seven-year delay would “enable the effectiveness of the guarantees incorporated in the Statute to be verified, in order to prevent abusive actions”—an argument they deemed “inadmissible.” *Id.* The Rome treaty conference bureau responded affirmatively to the French government's concerns.

tiny. The ICC's investigative work (if persuasive) would be bolstered by public opinion and discussion.

1. *Article 98.* The modality of this American proposal is Article 98 of the Rome Treaty. The proposal has two parts—a new rule under Article 98, and then a “relationship agreement” between the ICC and the United Nations.

The text of Article 98 explicitly limits surrenders by requiring the ICC to respect the international obligations of states—including the rules of diplomatic immunity, “State immunity” (in particular, head-of-state immunity), military status of forces agreements (“SOFAs”), and extradition agreements.⁴¹ Thus, some defendants are already protected from arrest under the plain text of the Rome statute—even when their own state has joined the treaty as a full party—unless their government specifically agrees to waive the immunity.

The American proposal suggested an analogous rule under Article 98, clarifying the court's competence to accept surrenders or take custody over defendants as provided by the ICC's relationship agreement with the United Nations. The Article 98 rule would require arrests to conform to any agreements entered into by the ICC itself (as a body with independent international personality). As originally proposed by the United States, the draft rule read as follows: “The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with its obligations under the relevant international agreement.”⁴²

As noted, the text of Article 98 already subordinates the ICC's power to ask for arrests to the binding force of other state-to-state obligations. The Court cannot ask treaty states to arrest or surrender foreign suspects where that action would be inconsistent with existing treaties or understandings. No state will be asked to violate the absolute immunity from arrest of diplomats and visiting heads of state, or the qualified immunity of military personnel under status of forces agreements. This does not immunize the underlying acts (immunity *ex materiae*) but rather safeguards the person of an individual while he retains a certain status (immunity *ex personae*).⁴³ The new American proposal builds on

41. See Rome Statute, *supra* note 1, art. 98:

Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

42. See *Proposed Text of Rule to article 98 of the Rome Treaty* (Non-Paper of the United States, Mar. 2000).

43. A comparable distinction may be implicit even in the *Statute of the International Criminal Tribunal for the former Yugoslavia*, U.N. Doc. S/25704, Annex (1993), reprinted in 32 I.L.M. 1192, 1994 (1993). Article 7(2) of the ICTY statute provides that “[t]he official position of any accused person,

this protection of state immunities by recognizing the capacity of the court to enter its own binding agreements, including agreements limiting the right to seek surrenders.

2. *The Relationship Agreement.* The shape of the elephant hiding in the garden is revealed by the second step—the proposed text for an Article 98 agreement between the United Nations and the ICC. A “relationship” agreement between the court and the United Nations is called for in the original Rome treaty.⁴⁴ The ICC is a separate legal entity from the United Nations,⁴⁵ even though a portion of the court’s funding may come from the General Assembly⁴⁶—hence the court needs an agreement to define its working relationship with the United Nations. The U.N. General Assembly asked the PrepCom to attempt to address U.S. concerns with the ICC, and, perhaps not coincidentally, Ambassador Cristian Maquieira of Chile was named by the PrepCom chairman, Ambassador Philippe Kirsch, as the “contact point for the draft texts of a relationship agreement between the [ICC] and the United Nations” and, as well, the contact to address “the request contained in paragraph 4 of General Assembly resolution 53/105.”⁴⁷ This opaque phrase was a discreet reference to the attempt to address U.S. concerns.⁴⁸

U.S. negotiators have conceded that the particular form of the jurisdictional rule is not essential—the guarantee could also take the form of a “protocol . . . or perhaps some other side agreement that would be binding on the ICC and its judges.”⁴⁹ But the proposed modality for the safeguard—including a proviso on

whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.” The ultimate criminal responsibility of an official for acts that exceed any permissible conception of his duties (*ratione materiae*) does not itself resolve the question of personal immunity from arrest (*ratione personae*) in a limited set of conditions, for example, while he is a sitting head of state. The recent dismissal from office of President Slobodan Milosevic of Yugoslavia avoids the question of whether the Hague Tribunal indictment itself could authorize the arrest of a sitting head of state. But one might ask how the English Law Lords would have ruled if General Pinochet remained as a sitting head of state. Compare Memorandum of [U.S.] Reservations, *supra* note 32, 14 AM. J. INT’L L. at 136, 148-49.

44. See Rome Statute, *supra* note 1, art. 2 (“The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.”). The 1998 Rome conference directed the PrepCom to prepare a relationship agreement. See *Final Act of the United Nations Diplomatic Conference*, *supra* note 4, Annex I, Res. F ¶ 5(c).

45. See Rome Statute, *supra* note 1, art. 4(1) (“The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”).

46. *Id.* art. 115(b).

47. See *Proceedings of the Preparatory Commission at its first, second, and third sessions*, U.N. Doc. PCNICC/1999/L.5/Rev.1, ¶ 12 (Dec. 1999).

48. See *Establishment of an International Criminal Court*, *supra* note 23; Press Release, United Nations, Legal Committee Reviews Progress Made in Setting Up World Criminal Court; Speakers Urge Against Altering Rome Statute in Quest for Universality, U.N. GA/L/3114 (Oct. 20, 1999).

49. *Talking points of the United States, March 2000.* The talking points were in general circulation among NGOs at the March 2000 PrepCom. Another strategy (not adopted by the United States, but suggested early on by a conference official) might contemplate an American agreement to cooperate with the tribunal, adding conditions to that agreement limiting the court’s domain over non-party nationals. An evident problem with this option, however, is a reluctant chicken and unavailable egg—the

arrests and surrenders in an Article 98 relationship agreement between the United Nations and the ICC—was circulated informally at the March 2000 PrepCom,⁵⁰ though it was not formally introduced.⁵¹ It would clarify the ICC's personal jurisdiction over third-party nationals where two conditions are met. First, if a U.N. member state has not yet ratified the treaty, the ICC could not arrest or take custody of an accused for acts "within [the member state's] overall direction," as long as the state has acknowledged its role. Second, the state's officials and agents could still be detained where the non-party state provides consent, or where the Security Council votes to make the criminal referral.⁵²

The American proposal for a relationship agreement speaks of "overall direction" rather than "official duties," perhaps in a post-Pinochet attempt to avoid controversy on what legitimately qualifies as an official duty.⁵³ But the political premise of the U.S. proposal is that the heinous offenses for which the ICC was designed, such as genocide and systematic outrages against civilians, are not likely to be openly embraced by governments as official policy or acts under their direction. Hence, the immunity's practical reach would be limited to military conduct within the range of reason.

U.S. Congress would surely dispute the competence of any American president to enter into a cooperation agreement with the court through unilateral Executive action, and Congress in its current mood is not likely to approve any promise of cooperation with the court. Even if the president is constitutionally competent to enter into a limited cooperation agreement without congressional concurrence, the political cost is likely to be unattractive. Concededly, the president could not constitutionally authorize the surrender of a defendant on his own authority. *See Factor v. Laubheimer*, 290 U.S. 276 (1933).

50. *See Proposed Text to Supplemental Document to the Rome Treaty* (Non-Paper of the United States, Mar. 2000).

51. *See Proposal submitted by the United States of America concerning rules and procedure and evidence relating to Part 9 of the Statute (International Cooperation and Judicial Assistance)*, U.N. Doc. PCNICC/2000/WGPRE(9)/DP.4, also reproduced in Bruce Zagaris, *Prep Com to Finish Work on Procedure and Elements of Crime While Status of U.S. to the Court Undecided*, 16 INT'L ENFORCEMENT L. REP. No. 7 (July 2000).

52. *See Proposed Text*, *supra* note 50:

The United Nations and the ICC agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a U.N. Member State, and such directing State has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the U.N. Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply.

Reproduced in Bruce Zagaris, Prep Com to Finish Work on Procedure and Elements of Crime While Status of U.S. to the Court Undecided, 16 INT'L ENFORCEMENT L. REP. No. 7 (July 2000).

53. The Pinochet decisions of the Law Lords held that systematic torture could not qualify as official acts, even for a former head of state. *See Regina v. Bow Street Metro. Stipendiary Magistrate, Ex parte Pinochet*, 3 W.L.R. 1456 (H.L.) (Nov. 25, 1998) (Lord Slynn, Lord Lloyd, Lord Nicholls, Lord Steyn & Lord Hoffman), *reprinted in* 37 I.L.M. 1302 [hereinafter *Pinochet I*], *vacated by* 2 W.L.R. 272 (H.L.) (Jan. 15, 1999), *reprinted in* 38 I.L.M. 430 [hereinafter *Pinochet II*] (on grounds of potential conflict of interest); *Regina v. Bow Street Metro. Stipendiary Magistrate, Ex parte Pinochet*, 2 W.L.R. 827 (H.L.) (Mar. 24, 1999) (Lord Browne-Wilkinson, Lord Hope of Craighead, Lord Hutton, Lord Saville of Newdigate, Lord Millett, and Lord Phillips of Worth Matravers in majority, and Lord Goff of Chieveley in dissent), *reprinted in* 38 I.L.M. 581 [hereinafter *Pinochet III*], *aff'g and rev'g in part Pinochet I. See generally* Wedgwood, *Augusto Pinochet and International Law*, *supra* note 31.

3. *Crabwise Walk*. The Article 98(2) proposal was floated at the March 2000 preparatory meeting in New York, and drew reflexive opposition from some NGOs.⁵⁴ The NGO coalition's initial response, though not necessarily definitive,⁵⁵ appeared to miss the forest for the trees. Without a word of surprise, the NGO non-paper acknowledged that the U.S. proposal "means that the Court would be able to exercise its jurisdiction up to the point of seeking surrender. Investigations will have been authorized under [Article] 15, will have been conducted, arrest warrants and indictments may have been issued."⁵⁶ Though the issuance of an arrest warrant is inconsistent with the American proposal, the earlier stages of the criminal process leave a wide swath for the ICC in discharging a critical and didactic role, even over non-party nationals.

It is frankly surprising that the United States Executive was prepared to go so far in limiting what the U.S. military might want for its protection. The military may enjoy "100 percent protection" against arrest, but there is no similar guarantee against use of the court as a platform to critique U.S. or NATO military policy. In rejecting the extraordinary American concession, the NGOs and like-minded states would be discarding the very court they profess to want.

The PrepCom approved the necessary underlying rule for this compromise in June 2000, with the stringent caveat that it did not commit states parties to accepting the second step of a proposed relationship agreement. Rule 195(2) of the proposed rules of procedure and evidence, benignly headed "Provision of Information," states that

[t]he court may not proceed with a request for the surrender of a person, without the consent of a sending State, if, under article 98, paragraph 2, such a request would be inconsistent with *obligations under an international agreement* pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.⁵⁷

In the arcanae of negotiated texts, the change of reference from a "requested State" and "its obligations under international agreements" in Article 98(2) of the Rome Statute, to a generic reference in Rule 195(2) to the consistency of surrender with "obligations under *an international agreement*" (emphasis added) was believed sufficient to provide the necessary room for further negotiation of an ICC-United Nations relationship agreement to protect third-party

54. The attempt to gain a more soothing reception was hobbled (as seems the American habit) by delay in preparing the diplomatic ground. Approval of the proposal was reportedly reached within the U.S. interagency process only one working day before the PrepCom opened in New York. Diplomatic notes were dispatched to national capitals, but the specialized personnel needed by each government to answer questions about the court were already en route to the PrepCom. Representatives of the like-minded states and NGOs in the U.N. basement conference rooms thus were able to coordinate an informal multilateral cold-shoulder.

55. Because many NGOs could not commit themselves to a view before the deliberations of their boards of directors, the NGOs informally issued the equivalent of a diplomatic "non-paper." *Points on U.S. proposal on U.N./ICC relationship agreement* (Mar. 2000)(circulated at March 2000 PrepCom).

56. *Id.*

57. *Report of the Preparatory Commission for the International Criminal Court, Addendum*, Finalized draft text of the Rules of Procedure and Evidence, *supra* note 20, § V (Cooperation under article 98), Rule 195 (Provision of Information), ¶ 2 (emphasis added).

nationals from arrest or involuntary surrender. This understanding of the rule is confirmed by the demurrers issued by some states upon its adoption, as well as by the negative pregnant proviso incorporated in the Commission proceedings—that “[i]t is generally understood that rule [195(2)] should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or State.”⁵⁸

Despite predictions by some observers that the deadline of December 2000 was crucial for a compromise since the American presidency would change hands, the third-round U.S. proposal found little reception among allies or the caucus of like-minded states. In the absence of any visible support, the American negotiators held back on any formal introduction of language of the proposed relationship agreement in the record of the 2000 PrepCom. However, the chairman of the PrepCom, Ambassador Philippe Kirsch, by leave of the General Assembly, has extended the time for completion of the relationship agreement, and this will permit future consideration.

B. Fourteen-year Transition Provision and Article 124

In the PrepCom of November-December 2000, one last pair of informal proposals for compromise were discussed in the corridors. The first was a proposal by Switzerland that would build upon the architecture of the transition provision permitted under Article 124. As noted above, at the urging of France in the 1998 Rome negotiations, the final treaty text included an “opt-out” clause that permits a state party to exclude ICC jurisdiction over its nationals for “war crimes” for a seven-year “transitional” period. The conference chairman at Rome declined a somewhat broader American proposal that would have allowed a treaty party to exclude ICC jurisdiction over both war crimes and crimes against humanity for a ten-year period. However, the Swiss floated a proposal at the November-December 2000 PrepCom that built upon the fact that Article 124 does not discuss the application of the opt-out to non-treaty states. The thought is to separate the status of signatory countries and full parties. Each would be permitted a separate seven-year transition provision allowing an opt-out from war crimes jurisdiction. Thus a signatory state could qualify for a seven-year exemption from war crimes jurisdiction commencing on the date the treaty comes into effect, and an additional seven-year exemption upon ratification. This gives a more significant transitional period to resolve American attitudes toward the court. This fourteen-year limit on war crimes jurisdiction was discussed in the caucus of like-minded states, and encountered some initial opposition but may well be revived.

A final compromise proposal offered informally at the November-December 2000 PrepCom would tighten the procedures for determining admis-

58. See Press Release, United Nations, Preparatory Commission for International Criminal Court Adopts Rules of Procedure and Evidence and Text on Elements of Crimes, U.N. GA/L/2963 (June 30, 2000).

sibility. In particular, under the Rome treaty, states parties and non-parties alike can challenge a proposed ICC investigation as inconsistent with the ICC duty to defer to national court proceedings—so-called complementarity.⁵⁹ In addition, the court can review the admissibility of an investigation on its own motion, including issues of complementarity.⁶⁰ The compromise proposal would permit a challenge to be brought before the Pretrial Chamber upon the opening of an investigation, and to be renewed or initiated upon any actual arrest of a defendant,⁶¹ at least in cases concerning actions outside a state's own territory. This too was not formally offered in the record of the PrepCom and may be considered further in 2001.

IV

ON AGGRESSION (TEN YEARS EARLY)

It is worth noting that the need felt by the United States for legal protection, while it remains a non-party, has only been heightened by the PrepCom's ongoing discussions about the possible crime of "aggression."⁶² This jurisdictional category was added to the Rome treaty text with the strong support of Germany and Arab states,⁶³ but there was no agreement at Rome on how to distinguish aggression from the legitimate exercise of military power. The category was left outside the operational span of the court until a definition could be settled at the first review conference of the ICC, almost a decade from now.⁶⁴

During the Rome negotiations, senior conference officials offered the private assurance that consensus on the definition of aggression was unlikely to be reached even at the first review conference. In any event, treaty parties dissenting from a proposed definition of aggression would apparently be exempt from the jurisdictional power of the court in applying this category of offense.⁶⁵ But no such exemption from a controverted definition of aggression has been explicitly accorded to non-parties, and recent PrepComs have seen an eager

59. See Rome Statute, *supra* note 1, arts. 17-19, 82(1) & 82(2).

60. See *id.* art. 19(1).

61. Authority for this renewed examination includes Article 19(1), first sentence, which requires that the court "shall satisfy itself that it has jurisdiction in any case brought before it" (applicable if admissibility is deemed jurisdictional), and Article 19(1), second sentence, which allows the court to determine admissibility on its own motion.

62. Rome Statute, *supra* note 1, art. 5(1)(d).

63. See generally Herman von Hebel & Daryl Robinson, *Crimes within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 81-85 (Roy Lee ed., 1999).

64. See Rome Statute, *supra* note 1, art. 5(2) ("The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."). Articles 121 and 123 permit a treaty amendment defining "aggression" to be considered at a review conference seven years after the Rome Treaty enters into force. *Id.* arts. 121, 123. Entry into force requires ratification by sixty countries. *Id.* art. 126. As of December 31, 2000, twenty-seven countries had ratified the statute and one hundred thirty-nine countries had signed. See Rome Statute Signature and Ratification Chart <<http://www.igc.org/icc/rome/html/ratify.html>>.

65. Rome Statute, *supra* note 1, art. 121(5).

discussion, in closed sessions, by states seeking to operationalize a crime of “aggressive war.”

To be sure, aggression was charged at Nuremberg, and American prosecutors took the lead in convicting German leaders who planned and executed the Third Reich’s invasion of Poland, Belgium, France, and other victim states.⁶⁶ But the Allied prosecutors at the time acknowledged that the German war for “lebensraum” provided an unusually clear case.⁶⁷ Today, what constitutes “aggression” in other less malign circumstances is problematic, and many international rules on the legitimate use of force are disputed.

The U.N. Charter of 1945 delegates to the Security Council the primary responsibility to assess threats to international peace and security.⁶⁸ The Charter also recognizes an inherent right of self-defense that belongs to states and collective groups of states, at least in response to an “armed attack” (or “agression armée” in the French text).⁶⁹ In a world of real dangers, the Council often doesn’t function as the U.N. founders supposed it would. Countries face uncharted questions concerning the limits of *anticipatory* self-defense (acting *before* an adversary can invade or mobilize), counter-measures against hostile acts of force,⁷⁰ as well as the right of humanitarian action.

Kosovo provides a cautionary tale. NATO’s military campaign against Belgrade in 1999 did not fit within the traditional paradigm of the U.N. Charter—despite its morally compelling aim to stop ethnic cleansing. Secretary-General Kofi Annan has sketched the dilemma: Security Council authority must be respected, but where the Council is stymied, notes Mr. Annan, a forcible response may be demanded nonetheless to counter humanitarian outrages such as ethnic cleansing or genocide. Inaction may be too high a price for procedural perfec-

66. See generally SHELDON GLUECK, *THE NUREMBERG TRIAL AND AGGRESSIVE WAR* (1946).

67. U.S. Supreme Court Justice Robert Jackson, the chief American prosecutor at Nuremberg, noted in a foreword to Professor Glueck’s book, the signal difficulties of defining aggression in less extreme circumstances.

In the evolution of the law that it is a criminal offense to plan, incite, or wage a war of aggression . . . [t]here are many theoretical difficulties which cause violent debate but which do not plague us practically in the Nürnberg case at all. These questions might cause considerable trouble in other circumstances. But the evidence at Nürnberg has shown that in this war an aggressive intention was declared by the Nazis—secretly of course—from the very beginning; an intention to get their neighbors’ lands without the incumbrance of the neighbors. . . . In not one of these invasions is it claimed that Germany was actually attacked first, or that any one of these countries, with the possible exception of Russia, had the forces to make attack on Germany a serious threat . . . the result is that by any possible definition of aggression, this war was aggressive in its plotting and execution.

Foreword in *id.*, at viii-ix.

68. U.N. Charter art. 39.

69. *Id.* art. 51.

70. In the *Nicaragua* case, for example, the International Court of Justice denied the right of the United States to use forcible countermeasures against a country allegedly providing sanctuary, funding, and logistical support to cross-border insurgents, holding that this staging did not qualify as an “armed attack” eligible for collective self-defense. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, [1986] I.C.J. Reports 14 (June 27), *reprinted in* 25 I.L.M. 1023 (1986).

tionism, at least in extreme circumstances.⁷¹ In Kosovo, as surely as in Rwanda, the values of the U.N. Charter were at risk because of the failure of U.N. procedures.⁷²

To be sure, NATO's military action in Kosovo found substantial legal comfort from a number of circumstances.⁷³ The Security Council recognized the existence of a threat to international peace and security in Kosovo, and voted down by a large margin the draft Russian resolution condemning the NATO campaign.⁷⁴ Security Council resolution 1244 after the conflict authorized a U.N. administration and international military presence to consolidate Kosovo's "substantial autonomy"⁷⁵—adopting the results of the NATO effort. NATO's multilateral action may be likened to the changed role of regional organizations under Chapter VIII, where the Council has acted after the fact to approve previous regional enforcement action.⁷⁶ But the argument for the legitimacy of NATO's action does not follow traditional legal blueprints. "Emerging" legal principles (*lege feranda*) give little comfort to military leaders against a roving international prosecutor.⁷⁷

71. Press Release, United Nations, Secretary-General Presents His Annual Report to General Assembly, UN SG/SM/7136 (Sept. 20, 1999):

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask — not in the context of Kosovo— but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

72. Richard Holbrooke's parting statement to his colleagues on the Security Council, in a somewhat different context, may be apropos. "[F]lexibility [] in which we put outcome ahead of process is important," he said. "My greatest criticism of this institution, really, is about the dominance of process over outcome." Statement of Richard Holbrooke before the U.N. Security Council, Jan. 19, 2001, UN SCOR, U.N. Doc. S/PV.4259, at 14 (Jan. 19, 2001).

73. See generally Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828 (Oct. 1999), and *Unilateral Action in the U.N. System*, 11 EUROPEAN J. INT'L L. 349 (2000). Compare Alain Pellet, *Brief Remarks on the Unilateral Use of Force*, 11 EUROPEAN J. INT'L L. 385 (2000).

74. Belarus, India, and Russian Federation: Draft Resolution, U.N. Doc. S/1999/328 (Mar. 26, 1999), reprinted in Press Release, United Nations, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. SC/6659 (Mar. 26, 1999) (3-12 vote).

75. U.N. SCOR Res. 1244, S/RES/1244, June 10, 1999.

76. See Statement of Ambassador Danilo Turk, Permanent Representative of Slovenia, in Press Release, supra note 74 ("[T]he Council had chosen to remain silent at times when regional organizations sought to remove regional threats to peace and security. . . . According to the United Nations Charter, the Security Council had the primary, but not exclusive responsibility for maintaining international peace and security."). But compare Press Release, United Nations, Transcript of Press Conference by Secretary-General Kofi Annan at Headquarters, U.N. SG/SM/7668 (Dec. 20, 2000) (Press Question: "[I]s there not also a danger of competition, . . . when regional groups like the upcoming European Union rapid deployment force or the North Atlantic Treaty Organization (NATO) do their own thing, as in Kosovo?" The Secretary-General: "I do not see competition. Even our own Charter foresees a role for regional organizations. . . . I really do not believe that after what we went through with Kosovo we are going to see too many Kosovos tomorrow. I suspect that in the future regional organizations will approach the Security Council before they move forward.").

77. In the recent filing by Yugoslavia against NATO countries in the half-century-old International Court of Justice, the Court's dismissal of the civil complaint against the United States and most claims against the United Kingdom on jurisdictional grounds was accompanied by the striking aperçu of Acting President Christopher Weeramantry announcing that the "use of force in Yugoslavia" presented "very serious issues of international law," causing concern throughout NATO's SHAPE headquarters.

The United States has every reason to be protective of the role of the Security Council in determining the existence of threats to peace and security. Yet the need to respond to unprecedented emergencies under changing principles of law may warrant concern about the reviewing power of a new judicial body, especially one that strays beyond the task of looking for humanitarian outrages.

Nor would the Security Council retain the last word in findings of aggression. Under the proposals floated at the December 1999 PrepCom,⁷⁸ the ICC prosecutor need not wait for Council action before bringing a criminal charge of aggression. The Council would be referred any allegation of aggression, but if the Council failed to act within six or twelve months, the ICC could begin a case anyway. In one proposal, the prosecutor and ICC could proceed immediately.⁷⁹ In another, the General Assembly would first be asked to take the Council's place in finding or dismissing the allegation of aggression.⁸⁰ If the General Assembly also failed to act, the ICC could make the extraordinary judgment of what constitutes aggression.⁸¹ This wide array of proposals remains on the table following the November-December 2000 PrepCom.⁸²

A finding by the Security Council requires the concurrence of the five permanent members.⁸³ To obtain an affirmative finding that no aggression has occurred, the U.S. would have to subject its military actions to the approval of Russia, China, and France—not an easy prospect in the real world. Nonpermanent members could also block the necessary three-fifths majority required for a finding.

A prosecutor trained in the precepts of international humanitarian law (*jus in bello*) is not the obvious authority to judge the legitimacy of using force in protection of community safety and common values.⁸⁴ Current disputes over Security Council reform are an inadequate reason for overturning the role of

See, e.g., Legality of Use of Force (Yugo. v. U.S.), [1999] I.C.J. Reports ¶ 16 (June 2), reprinted in 38 I.L.M. 1188, 1193 (1999); Legality of Use of Force (Yugo. v. U.K.), [1999] I.C.J. Reports ¶ 16 (June 2), reprinted in 38 I.L.M. 1167, 1172 (1999). See also the proposal of 15 Arab states that aggression should be defined broadly to include “depriv[ing] other peoples of their rights to self-determination, freedom or independence.” *Proposal submitted by Algeria, et al., Article 5, Crimes within the jurisdiction of the court*, U.N. Doc. A/CONF.183/C.1/L.37 (July 1, 1998).

78. *Discussion paper proposed by the Coordinator, Consolidated text of proposals on the crime of aggression*, Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, U.N. Doc. PCNICC/1999/WGCA/RT.1, at 3-5 (Dec. 9, 1999)(conditions for the exercise of jurisdiction).

79. *Id.* at 3-4 (option 1, variation 1).

80. *Id.* at 3 (option 1, variation 2).

81. *Id.*

82. See Proceedings of the Preparatory Commission at its sixth session (Nov. 27-Dec. 8, 2000), U.N. Doc. PCNICC/2000/L.4/Rev.1 (Dec. 14, 2000), Annex V (Crimes of Aggression).

83. U.N. Charter art. 27.

84. *Cf. Statement of the United States on the Crime of Aggression*, Dec. 6, 1999 (“The fact that the Security Council does not determine that aggression in a particular situation has occurred can be as significant, as a matter of law and political reality, as a decision that aggression has occurred. . . . It may be frustrating that the Council has not acted, but that frustration does not create the jurisdiction for the Court that some may seek.”).

the Council in U.N. architecture—and doing so by an irregular process that ignores Charter amendment rules.⁸⁵

V

CONCLUSION

More than one cynic has suggested that some countries may actually *prefer* that the United States not join the court—so that the tribunal could be seen as a test of Europe going it alone. Europe does enjoy a new independence. The Cold War is over, and Lord Ismay's triple task for the North Atlantic alliance seems remote. The Rome conference was at the hub of an unusual political weather pattern, with new NGO competence, like-minded states in Europe announcing an "ethical foreign policy," and post-Maastricht Europe searching for a common foreign and security policy.⁸⁶ Hostility toward the Security Council and the veto power of its permanent members added to the brew.⁸⁷

With the close of the Cold War, some political leaders in Europe and elsewhere have felt a heady independence, doubtful that U.S. power remains crucial in global security tasks. Deterring regional bullies and terrorist groups is seen by some as insufficient reason to accommodate American military needs, even with the tensions remaining between India and Pakistan, North and South Korea, Taiwan and the People's Republic of China. But a disdain for American power will have wide-ranging consequences. In peace enforcement operations, whether in the Persian Gulf or Kosovo, the traditional U.S. tasks of airlift, logistics, intelligence, and air power cannot be delegated to countries that lack capacity. A new generation of smart weapons has not been purchased by Europe, and no country matches U.S. naval capacity. Even in regional peacekeeping, as in East Timor, a successful operation often depends on U.S. materiel and diplomatic support.

In peace enforcement, peacekeeping, and counter-terrorism, the United States will continue to play a flagship role. There are other new threats to the peace as well, including the proliferation of biological, chemical, and nuclear weapons. It would be a pity to allow misjudgment of the long-term security environment to generate a disregard for the constructive tasks of American military power, and fatally hobble shared support for an effective criminal tribunal. American Senators and military leaders—and the American public—will want to see how the court works in practice before considering the possibility of full ratification and formal membership. If this "look-over" period is not safe, the advocates seeking a "war on the court" may win the day.

Where to go from here is unclear. The ICC may seek to gain the confidence of responsible national militaries by involving them in the process of investi-

85. U. N. Charter art. 108.

86. See Wedgwood, *Courting Disaster*, *supra* note 33.

87. *Id.* Ambassador Richard Holbrooke's announcement that the United States may agree to a significantly enlarged Council may lessen this wellspring of resistance. See Barbara Crossette, *U.S. Ready for Much Larger Security Council*, N.Y. TIMES, Apr. 4, 2000, at A4.

gating and prosecuting humanitarian law violations. The International Criminal Tribunal for the former Yugoslavia has felt a practical dependence upon NATO—for example, the court needs military security for its investigations in hostile areas of former conflict. The ICC's interplay with legitimate militaries should be intellectual as well. Operationalizing ideas such as "proportionality" requires hard judgments about military tactics and alternative ways of conducting a military operation. Civilian judges of any stripe (national or international) may not be equipped without expert assistance to evaluate battlefield decisions—for example, a decision on military necessity often depends on the nature of the battle plan and practical alternatives. This gap in understanding can be mitigated by involving NATO and other responsible militaries in the court's practical operations: on a military advisory council, on rosters of expert witnesses, or (for retired or seconded personnel) even as military law clerks. The ICC cannot afford to be an institution opposed to the legitimate use of force in the protection of global security. ICC judges and prosecutors will be selected for their expertise in criminal law and international law.⁸⁸ They should also recognize that there is expert military knowledge and judgment to which they may occasionally need to defer, and certainly of which they must have an understanding.

In the present moment, it is the question of third-party status that will determine whether the United States remains supportive of the court. Third-party coverage was not contemplated in the International Law Commission draft for the ICC in 1994, or through most of the four years of preparatory meetings that preceded the Rome negotiations. Its sudden emergence just before the end substantially changed the parameters of the debate. Whatever the limits of international law, the original impetus of the Rome treaty was to build a permanent court on the solid principle of state consent.

The ability of the United States to have a "safe zone" while it watches the court in operation is key to gaining confidence in the new institution. A transition period will be central to a renewed alliance. The rebuff of earlier American proposals has left some European friends supposing that another palliative will have to be offered by the like-minded—that the United States may live with a measure that does not go quite so far as its own proposals. Our Rome interlocutors are bound to realize, however, that the issue of third-party jurisdiction goes to the heart of the debate over American security policy. The worthy aims of the International Criminal Court will not justify unworkable constraints on the exercise of the American security role in the common interest.

88. Rome Statute, *supra* note 1, arts. 36(3)(b), 42(3).