

International Criminal Accountability and the International Criminal Court

Dr. Ray Murphy

Irish Centre for Human Rights, School of Law, National University of Ireland,
Galway

“A person stands a better chance of being tried and judged for killing one human being than for killing 100,000.”

- Jose Ayala Lasso, former United Nations High Commissioner for Human Rights

Introduction

Serious violations of international human rights and international humanitarian law have become an all too common feature of contemporary situations of conflict. The conflicts following the disintegration of the former Yugoslavia, and those in Liberia and Sierra Leone, are indicative of a wider trend of the deliberate targeting of civilians by groups and parties involved in armed conflicts. Political and military leaders have often found themselves able to avoid being held to account for atrocities committed under the guise of nationalistic or religious fervor, with Joseph Stalin, Pol Pot, and Idi Amin being only the more notorious examples.

International instruments for the protection of human rights in both peacetime and conflict abound. After the atrocities committed by war criminals under the Nazi regime in Germany, especially against the Jewish population of Europe, the General Assembly of the UN adopted a resolution in December 1946 declaring genocide a crime against international law and calling for the preparation of a convention on the

subject. Two years later, the General Assembly adopted the Convention for the Prevention and Punishment of the Crime of Genocide. Despite the strong language of the 1948 Genocide Convention, its most serious weakness remains the inability of the international community to ensure effective implementation. A similar conclusion may be made in regard to the four Geneva Conventions of 1949, and their Additional Protocols of 1977. The conventions were adopted after World War II in order to remedy the deficiencies that became apparent during the conflict in the shielding of civilians and other protected persons under international humanitarian law. The 1977 protocols were intended to update the conventions, but these too lacked an effective enforcement mechanism.

Bringing international criminals to justice has often proved a difficult task. This problem was compounded by the lack of an international criminal code. Proposals for the creation of an international criminal court date from the nineteenth century. A French proposal to the League of Nations in 1934 failed to bring about the establishment of such a court. Although international tribunals were established in the aftermath of World War II at Nuremberg and Tokyo, these were temporary institutions. It was the atrocities committed in the course of the conflict following the break-up of the former Yugoslavia and the genocide committed in Rwanda that mobilized the international community to some form of belated action to bring the perpetrators to justice. However, apart from their *ad hoc* nature, these tribunals raised the issue of selective justice, and were plagued by delays and related difficulties. In this light, the historical examples of international trials, such as that of Peter von Hagenbach in Austria in 1474, are often seen as flawed.

One of the stumbling blocks to the development of international criminal law is the notion of state sovereignty and respect for domestic jurisdiction. Even today,

the prosecution of breaches of international humanitarian and criminal law is primarily the responsibility of the individual states concerned. The issue of state sovereignty was overcome in the instance of the post-World War II tribunals by the unconditional surrender of Germany and Japan and, in the instance of the tribunals following the conflicts in Rwanda and the former Yugoslavia, by the UN Security Council's exercise of its enforcement powers under Chapter VII of the UN Charter.

The principle of legality is also a crucial issue in the prosecution of individuals under international criminal law; the alleged offense must be recognized as a crime punishable under international law at the time of its commission. At the end of World War I, a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties recommended that the proposed peace treaties confer criminal jurisdiction over persons involved in violations of the laws and customs of war. This included the German emperor, Kaiser Wilhelm II. The U.S. opposed this proposal on the grounds that domestic courts should try war crimes, not an *ad hoc* international tribunal—to do otherwise would violate the principle of legality. In the view of the U.S. at the time, the laws of humanity would amount to retroactive laws, since they had not been in existence before, or at least had not been articulated as laws. In the event, the Netherlands refused to extradite Wilhelm II, owing to the political nature of the charges against him and the fact that they were not punishable under Dutch law. The principle of legality also impeded the prosecution of Turkey's leaders for atrocities committed against the Armenian people in 1915. It was apparent, however, that a properly constituted permanent international tribunal could address obstacles of this nature.

The idea of establishing an international criminal court was not new; it was first mooted in 1948.¹ The UN General Assembly adopted a resolution mandating

that the International Law Commission (a body of experts named by the General Assembly and charged with the codification and progressive development of international law) should begin work on the draft Statute of an international criminal court. It was evident that a permanent international tribunal would prove more effective and cost efficient than temporary tribunals. One of the primary objectives of the UN is securing universal respect for human rights and the fundamental freedoms of individuals throughout the world. Linked to this is the fight against impunity, and the struggle for peace and justice in contemporary situations of conflict. It was felt that a permanent international criminal court would aid the UN in the pursuit of these objectives.

Agreement on the creation of an international criminal court took much longer than originally anticipated. Work on the project was suspended during the Cold War era, but resumed in 1989. Trinidad and Tobago, one of several Caribbean states situated at a crossroads in the illegal international trade in narcotics, initiated a resolution in the General Assembly directing the International Law Commission to consider the subject of an international criminal court. By 1993 the Commission had prepared a draft Statute, and in 1994 a final version was submitted to the General Assembly. Taking this as a basis, the General Assembly convened an Ad Hoc Committee to pursue work towards the establishment of an international court. The work of this committee revealed some serious differences of opinion regarding the future court, and it proved premature to convene a diplomatic conference where a finalized Statute could be adopted. At its 1995 session, the General Assembly decided to convene a "Preparatory Committee" composed of member states, non-governmental organizations, and international organizations. When the work of this committee was complete, few (if any) of the original International Law Commission

proposals had survived intact. However, the work of the Preparatory Committee paved the way for the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC), which convened on 15 June 1998 in Rome (the so-called “Rome Conference on the ICC”).

The *Rome Statute of the International Criminal Court* was adopted on 17 July 1998 amidst a fanfare of enthusiasm and excitement for this most recent international institution. The Statute required sixty ratifications or accessions by states before it could come into force. This was achieved after a remarkably short period, and the Statute became law (so to speak), effective 1 July 2002. This is an important date, as the Court does not have jurisdiction over crimes committed prior to that date.

It is worth keeping in mind why the ICC was proposed in the first instance, and what exactly its intended jurisdiction is. The ICC has jurisdiction over the most serious crimes under international law—i.e., genocide, crimes against humanity, war crimes, and aggression. It is notable that among its innovations, the Statute contains a number of provisions designed to address the plight of women and children in situations of armed conflict. In particular, the Statute recognizes rape, sexual slavery, and other forms of sexual violence as war crimes and crimes against humanity. The express recognition of and detailed provisions regarding such crimes can be primarily attributed to lobbying by non-governmental organizations. Furthermore, the ICC is not only concerned with the prosecution and punishment of individuals; it also accords recognition to individual victims. In contrast, the role of individuals before the International Court of Justice is marginal, and much of its judicial time is taken with determining boundary and similar disputes between states.

As is the case of the UN itself, the ICC relies heavily on the political support and goodwill of states in order to fulfill the role envisaged by its founders. This may

very well be its single greatest weakness, and the policies of some of the states opposed to the Court, especially the U.S., present a real threat to its future operation. The ICC needs the support and cooperation of the major states, such as India and China, if it is to be effective, as law without the power of enforcement is little better than no law at all. In some instances it may be worse than no law, as it may perpetuate the illusion of protection and accountability.

India shared concerns with the U.S. regarding the jurisdiction of the ICC, especially in relation to troops participating in peacekeeping operations. China had concerns about the election procedure for judges and the role of an independent prosecutor (although its real objections may not be reflected in official statements). India also expressed disappointment that it did not see the ICC playing a role in the fight against international terrorism. Libya and the former regime of Saddam Hussein were also probably fearful of what they perceived as the potential for politically motivated prosecution—ironically, a view that was shared by Israel. Nevertheless, the establishment of the Court was welcomed as one of the most significant developments in international human rights and criminal law in recent decades, and it is tempting to view it as a victory for those advocating international accountability and the rule of law above the standards of force and criminality. However, recent events have worked to undermine this assumption. Since 1998, a number of states have either changed their minds or increased their opposition to the Court.²

This case study examines the background of the International Criminal Court's development and the nature of the crimes over which it has jurisdiction. It analyzes the technical nature and definitions of these crimes, and some of the problems likely to be encountered by the Court in the future.

Nature and Jurisdiction of the ICC

Although the formation of the ICC was a most significant development, it is important at the outset to outline two fundamental limitations to its jurisdiction. In the first instance, it is only intended to deal with crimes of the most serious nature: aggression, genocide, crimes against humanity, and war crimes. In such cases, it is also intended to deal with the most serious criminals or perpetrators of such crimes, i.e., those who planned and carried out the crimes at the highest levels. Secondly, it is specifically designed to be “complementary” to national criminal justice systems, and as such it is not intended to replace national courts.³ The limited jurisdiction of the ICC is a positive factor, as it should allow the prosecutor to focus on appropriate cases of sufficient gravity.

The ICC Statute should be distinguished from the Statutes for the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Former Yugoslavia, which were adopted by the UN Security Council and placed a general obligation on states to cooperate with the tribunals in question and to obey certain orders issued by their respective trial chambers.⁴ In this way, the ICC should not be seen as a threat to national sovereignty. From the outset it was intended as an alternative to national judicial systems, only to be invoked when national prosecutions failed to materialize. It is designed to complement—not replace—national courts. It will exercise jurisdiction in cases where national courts are unable or unwilling to bring perpetrators of the most serious international crimes to justice.⁵ The inability to prosecute might arise in situations such as that of the former Yugoslavia, Sierra Leone, and Liberia, or the Khmer Rouge regime in Cambodia, cases where a state is unwilling or unable to prosecute its own nationals. The establishment of a Special Court for Sierra Leone, set up jointly by the government of Sierra Leone and the UN,

is a good example of a hybrid body that is created to deal with post-conflict accountability when domestic institutions have collapsed.

The complementarity provisions marked a departure from what had been proposed originally by the International Law Commission. Likewise, the crimes under the ICC's jurisdiction are defined in somewhat greater detail in the Statute. The International Law Commission had been satisfied to merely list the crimes subject to the Court's jurisdiction. The changes to what was originally proposed resulted from recommendations of the Ad Hoc Committee established by the UN General Assembly in 1994 to facilitate work towards the creation of a Court. The original draft Statute concluded by the International Law Commission had envisaged a Court with primary jurisdiction, similar to that of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. If the prosecutor for the Court decided to proceed with a case against an individual, then domestic courts would not be permitted to pre-empt this by initiating a prosecution themselves. However, what was eventually agreed upon in Rome was significantly different from this.

Once a state has ratified the Statute, all nationals of that state are subject to its provisions. But problems remain, as nationals of states that refuse to ratify will not be subject to the jurisdiction of the ICC, unless an offense is committed on the territory of another state that is party to the Statute. Thus, even though the U.S. has refused to ratify the ICC Statute, if U.S. forces are deployed for any reason on the territory of a State Party, then its provisions will bind those forces. This is a particular fear of the U.S., and as a result it has concluded bilateral agreements with a number of states in order to invoke the provisions of Article 98 of the ICC Statute to ensure that U.S. military personnel serving within the territory of States would not be

surrendered to the ICC. Under Article 98, the Court may not proceed with a request for the surrender of an individual that would require the requested state to act in a manner inconsistent with its obligations under international agreements. When a StateParty concludes such an agreement with the U.S., this is intended to create an international obligation that is recognized under Article 98.⁶ Many states have concluded agreements of this nature under varying degrees of pressure, especially aspiring members of NATO. Their legality is questionable, and the issue has caused political divisions between the European Union and the U.S.⁷ Such agreements are certainly contrary to the spirit of the Statute, but, until they are actually challenged, they remain *prima facie* lawful.

Structure of the Court⁸

The seat of the ICC is in The Hague, and the Court has international legal personality.⁹ This means it is not part of the UN or any other international organization. It consists of three branches: the judicial, the investigatory and prosecutorial, and the Registry. Judges must possess the usual qualities of impartiality and integrity, and be competent in criminal law or relevant areas of international law. There is a requirement for a fair balance of representation along the lines of geographic region and gender, as well as a representative mixture of judges grounded in the principal legal systems of the world. The judicial branch consists of the Presidency, an appeals division, a trial division, and a pre-trial division.

1. The Presidency

The Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor. It is composed of Judge Philippe

Kirsch (Canada) as President, Judge Akua Kuenyehia (Ghana) as First Vice-President, and Judge Elizabeth Odio Benito (Costa Rica) as Second Vice-President of the Court, all of whom were elected, in accordance with the Statute, by an absolute majority of the eighteen judges of the Court for a three-year renewable term. These judges serve on a full-time basis.

2. Chambers

After the election of the judges, the Court organizes itself into appeals, pre-trial, and trial divisions, and into respective chambers of the Court. The Assembly of States Parties, which is composed of representatives of the states that have ratified and acceded to the ICC Statute, elected the eighteen judges of the Court during its first resumed session held in New York in February 2003, for a term of office of three, six, and nine years. The judges constitute a forum of international experts that represents the world's principal legal systems. Seven were elected from Western Europe and other developed nations, four from Latin America and the Caribbean, three from Asia, three from Africa, and one from Eastern Europe. Seven judges are female and eleven are male. All the judges are nationals of states that are party to the ICC Statute. Judges were elected from two lists of candidates, the first with criminal law experience and the second with international law expertise. The judges can hold office for a term of nine years and are not eligible for re-election, except for in specific cases outlined in the Statute. The judges elected for a term of three years are eligible for re-election.

The judiciary of the Court is composed of three divisions: appeals, trial, and pre-trial. The appeals division is composed of the president and four other judges. Members of the appeals division serve their entire nine-year term in this division.

This is to prevent the unsatisfactory practice that plagued the International Criminal Tribunal for the Former Yugoslavia, where judges moved between trial and appeals chambers during their terms, from reoccurring within the ICC. The trial division is composed of the second vice president and five other judges, and the pre-trial division is made up of the first vice president and six other judges.

3. Office of Prosecutor

The office of prosecutor is a separate organ of the ICC, and the person appointed as prosecutor must act independently at all times.¹⁰ It is headed by the Chief Prosecutor, Mr. Luis Moreno-Ocampo (Argentina), who was elected on a full-time basis by the Assembly of States Parties and took up office on 16 June 2003. There is provision for the appointment of one or more deputy prosecutors. Mr. Serge Brammertz (Belgium) was elected Deputy Prosecutor on 9 September 2003. The role of the prosecutor is crucial to the proper functioning of the ICC and, as such, it is separate from and independent of the rest of the Court. While the initiative to prosecute a case may come from three sources—a party state, the UN Security Council, or the prosecutor—the prosecutor is an integral part of the apparatus of the ICC, and there are numerous articles governing his or her role.¹¹ Although the prosecutor is independent, the Statute contains a number of safeguards to prevent an overzealous prosecutor from exceeding his or her role. The mandate of the office is to conduct investigations and prosecutions of crimes that fall under the jurisdiction of the Court, such as genocide, crimes against humanity, and war crimes. The Assembly of States Parties has not yet agreed to a definition of the crime of aggression. When they do, the prosecutor will be empowered to investigate and prosecute this crime.

The chief prosecutor may start an investigation upon referral of situations in which there is a reasonable basis to believe that crimes have been or are being committed. Such referrals must be made by a State Party or by the Security Council, when it is acting to address a threat to international peace and security under Chapter VII of the UN Charter. In accordance with the Statute and the rules of procedure and evidence, the chief prosecutor has to evaluate the material

submitted to him before making the decision on whether to proceed. In January 2004, the President of Uganda referred the situation concerning the Lord's Resistance Army (LRA) in Uganda. The ICC was also monitoring alleged abuses in the Ituri region of the Democratic Republic of Congo when President Kabila made a referral in April 2004.

In addition to State Party and Security Council referrals, the chief prosecutor may also receive information on crimes under the jurisdiction of the Court provided by other sources, such as individuals or non-governmental organizations. Regardless of the source of the referral, the chief prosecutor will conduct a preliminary examination of the information in every case. If the chief prosecutor then decides that there is a reasonable basis to proceed with an investigation, he will request the pre-trial chamber to authorize an investigation.

As a consequence of its mandate, the prosecutor's office includes both investigation and prosecution divisions. The former is mainly responsible for preliminary examinations and the conduct of investigations (such as collecting and examining evidence, questioning persons being investigated, as well as victims and witnesses). In this respect, the Statute requires the prosecutor to extend the investigation to cover both incriminating and exonerating facts, recognizing the responsibility to strive to establish the truth in every case. The prosecution division has a role in the investigative process, but will be principally responsible for the litigation of cases before the various chambers of the Court.

The prosecutor is obliged to consider the principle of complementarity in deciding whether or not to start an investigation. It is the primary responsibility of states to investigate and prosecute international crimes. The ICC Statute provides

that a case is inadmissible before the Court when the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable to genuinely carry out the investigation or prosecution.

4. The Registry

The registry is responsible for the non-judicial aspects of the administration and servicing of the Court, and is headed by the registrar, who is the principal administrative officer of the Court, elected by secret ballot by an absolute majority of judges for a five-year term. Mr. Bruno Cathala from France was appointed first Registrar of the Court in June 2003. He is responsible for the administration of legal aid matters, court management, victims' and witnesses' matters, defense counsel, the detention unit, and the traditional services provided by administrations in international organizations, such as finance, translation, facilities management, procurement, and personnel. The rules of procedure and evidence for the ICC also place on the registrar the responsibility to receive, obtain, and provide information; to establish channels of communication with states; and to serve as the channel of communication between the Court and states, inter-governmental bodies, and non-governmental organizations (NGOs).

The Court, the UN, Peacekeeping, and Resolution 1422 (2002)

The relationship of the Court to the UN is set out in the formal agreement between both organizations made pursuant to Article 2 of the ICC Statute. The ICC is not an organ of the UN. Although much of the work towards the creation of the ICC was completed under UN auspices, the ICC is an independent international institution.

During the summer of 2002, in an effort to prevent U.S. personnel from coming under the jurisdiction of the ICC, the U.S. threatened to veto the renewal of crucial mandates for UN peace operations. The U.S. had found a loophole within the terms of the ICC Statute for obstructing the work of the prosecutor and, ultimately, the Court itself. Article 16 of the ICC Statute provides a means by which the UN Security Council can effectively interfere with the work of the prosecutor for an indefinite period of time. Specifically, the article stipulates that no investigation or prosecution may be commenced or pursued for a period of twelve months, if the Security Council so requests on the basis of a resolution adopted under Chapter VII of the UN Charter. Such requests can be renewed annually, thus preventing the investigation or prosecution from proceeding.

The International Law Commission had originally proposed that the Court be prohibited from prosecuting any case being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter. As this would have permitted any member of the Security Council to block a prosecution by placing a matter on the agenda, the proposal met with serious criticism. A compromise was worked out that permitted the Security Council to suspend prosecution, but with the suspension subject to annual renewal. However, the requirement that the resolution be adopted under Chapter VII and thereby be linked to action with respect to threats to the peace, breaches of the peace, and acts of aggression remained.

This novel arrangement seemed on its face to be an unlikely provision to be invoked. However, this was how the impasse with regard to U.S. participation in UN-established or UN-authorized operations was resolved in the summer of 2002, after the ICC Statute entered into force. When the U.S. threatened to veto the renewal

of crucial mandates for UN peace operations, the members of the Security Council agreed to adopt an appropriate resolution to meet the U.S. demands. Security Council Resolution 1422 (2002) effectively exempts officials and personnel participating in UN-authorized or UN-established operations who are from a state that is not party to the ICC Statute from the jurisdiction of the ICC for twelve months.¹² The resolution then goes on to provide that it is intended to be renewed annually for as long as may be necessary. It is submitted that states agreed to this only because they saw no alternative to the implied threat of the removal of U.S. participation in, and approval of, UN peace support operations in Bosnia and elsewhere.

A significant issue of controversy with regard to the jurisdiction of the Court related to the so-called trigger mechanisms, i.e., the ability to refer a case to the ICC. Under Article 13, reference to the ICC may be by a State Party, the Security Council, or by the prosecutor.¹³ The role of the Security Council was especially contentious, as it was feared that it might politicize the entire process. In the end it was agreed that the Security Council would have the capacity to refer to the prosecutor a situation in which one or more crimes under the Statute appear to have been committed pursuant to Chapter VII of the UN Charter.¹⁴ As this office is independent, the Security Council would then not be in a position to influence the conduct of the individual prosecution that might result.

The fact that the UN Security Council has a right to refer cases to the ICC, and that it also has a right to suspend the prosecution process on the basis of a resolution under Chapter VII, means that the Court and the UN have significant links apart from the formal written agreement. There is potential for clashes to occur between the institutions in the future. What if the Court makes a determination that an action by a state or group of states constitutes aggression, and the Security Council

has not fulfilled its role in the maintenance of peace and security under Chapter VII? There is also the potential for the Court to review the legality of decisions made by the Security Council. The International Court of Justice is a principal organ of the UN, and as such it does not consider that it has the legal competence to review decisions of another principal organ of the UN, such as the Security Council. The ICC should have no such legal misgivings, but the potential political ramifications of such a course of action will not be lost on the members of the Court or the Assembly of States Parties.

During the course of 2002 and 2003, the Bush Administration could afford to adopt a tough unilateralist approach to the UN. However, as the date for the renewal of Resolution 1422 coincided with the date for U.S. handover in Iraq, the Bush Administration did not have the same leverage as before. Doubtless other members of the Security Council will try to extract whatever concessions they can to dilute U.S. opposition to the ICC. Revelations about the conduct of U.S. forces in Iraq and Afghanistan have undermined U.S. credibility, and highlight the need for accountability at both domestic and international levels.

Criminal Jurisdiction¹⁵

The ICC Statute is a long and complex document, the core provisions of which are contained in Section 2. The ICC has jurisdiction over four categories of international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression, or what was formerly referred to as crimes against peace. The first three of these are generally referred to as the “core crimes.” The inclusion of the crime of aggression is facilitative, and can only be given full effect when agreement on a definition is reached. During the Rome Conference it proved impossible to reach

agreement on a definition, much less on the appropriate judicial mechanism for determining whether or not the crime of aggression had occurred. This is a controversial issue, and it can be anticipated that it will take some time to arrive at an agreement. Although these are by no means new international crimes, the provisions of the ICC Statute make it clear that they are the most serious crimes of concern to the international community as a whole.¹⁶ Consequently, the international community has a vested interest in dealing with them, owing to their heinous nature, their sweeping implications, and the threat they pose to international peace and security.

In order to assist in the interpretation and application of the definitions of the crimes contained in the ICC Statute, reference must also be made to the “Elements of the Crimes.” These were formally adopted by the States Party to the ICC Statute in September 2002,¹⁷ and may be amended. They are contained in a fifty-page document, which is a source of applicable law for the ICC. However, the “Elements of the Crimes” must be interpreted and applied in a manner consistent with the Statute. They contain lengthy provisions on each crime, and may be seen as an attempt to delimit the judicial discretion of the Court itself.¹⁸

It is noteworthy that the Statute gives express recognition to gender-related crimes, and includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other grave forms of sexual violence as crimes against humanity¹⁹ and as war crimes committed in international armed conflict.²⁰

Genocide²¹

There is no actual hierarchy of crimes under the Statute of the ICC. Nevertheless, the crime of genocide is now recognized as the most serious of the

crimes that fall under the jurisdiction of the Court. While the term “genocide” is often used by media and other commentators, it is a very specific crime with a narrow definition under international law, and it seems that its essential characteristics are not always understood. It may be described as the intentional killing, destruction, or extermination of entire groups or members of a group on the basis of their membership in that group. The origins of this crime in international law are similar to those of crimes against humanity in that both arose out of the atrocities perpetrated by the Axis powers during World War II. At first, genocide was considered as a sub-category of crimes against humanity. In this way it was not considered to be a discrete offense, but after WWII it was felt that a specific international treaty was necessary to provide a legal definition for the particular crime of trying to destroy an entire nation or ethnic group as such.

The International Military Tribunal at Nuremberg in Germany (which was established to try Nazi war criminals in the aftermath of World War II) was limited in terms of jurisdiction to three categories of offenses: crimes against peace, war crimes, and crimes against humanity. In all, twenty-four Nazi leaders were tried, and nineteen defendants were convicted (twelve of whom received the death penalty). The judgment of the Nuremberg Tribunal was controversial in some respects. Apart from the imposition of the death penalty and being open to the accusation of “victors’ justice” as a result of being established by the Allies in the aftermath of the war, the category of crimes against humanity received a relatively restrictive interpretation at Nuremberg. The limited scope given to such crimes at the time was one of the main reasons why it was considered necessary to draft a convention that dealt specifically with the crime of genocide. Furthermore, the charter of the International Military Tribunal was adopted after the crimes were committed, and this gave rise to

accusations of retroactive criminalization. Such arguments were rejected by the tribunal, which referred to pre-existing international treaty obligations. It is noteworthy that in the case of some war crimes, the tribunal refused to convict after hearing evidence of similar conduct by Allied soldiers. As the International Military Tribunal at Nuremberg was coming to a close, the first session of the UN General Assembly was getting under way.

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9 December 1948, and entered into force two years later on 11 January 1951, after being ratified by twenty states. This meant that genocide acquired autonomous significance as a specific crime. The drafting process involved significant disagreement among states regarding the nature and extent of the crime. One of the more controversial issues concerned Article I of the convention, which created an obligation on states to prevent and punish this crime. This was added at the Sixth (Legal) Committee of the General Assembly, based on proposals from Belgium and Iran. However, there is nothing in the relevant debates that indicates what the scope and implications of the obligation to prevent genocide entail, an omission that is in stark contrast to the provisions in the convention dealing with punishment.

The International Law Commission examined the issue of genocide on a number of occasions in the course of its work on draft codes and statutes. In 1954, it concluded that the definition of genocide set out in the convention should be modified, but later decided that the original text should be retained, as this was widely accepted by the international community. Hence the original definition in the convention is essentially repeated in Article 6 of the Rome Statute of the ICC and in

the relevant statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

Genocide means the commission of certain acts *with intent to destroy*, in whole or in part, a national, ethnical, racial or religious group.²² Article 6 sets out a definition of genocide for the purposes of the Statute. Proving genocide in any circumstances is difficult, as the major powers at the time of drafting ensured that the definition would be narrowly drawn. In particular, an essential element in the crime is the specific *intent* to destroy a group, so mere negligent or reckless acts that result in destruction do not qualify. The destruction must be directed at one of the recognized groups. A victim is targeted because of his or her membership in a group, and not on account of other personal attributes or characteristics.

As the four classes of protected groups are not defined, and no criteria for their definition are provided, this is a major weakness in the convention.²³ In order to determine what is meant by the notion of a “group,” it is necessary to refer to the decisions of the international tribunals for the former Yugoslavia and Rwanda. The narrow definition of what constitutes genocide under the Genocide Convention and the ICC Statute can lead to what some may view to be extreme situations failing to qualify as genocide—for example, targeting portions of the population based on imputed political opinions or social status, as in Cambodia during the Khmer Rouge regime.

Genocide does not require a successful outcome—that is, a particular group does not have to actually be exterminated. All that is required is that any of the enumerated acts be committed with the requisite mental intention, or *mens rea*. If the act of genocide was accompanied by declarations or speeches indicating genocidal intention, this will help in establishing the crime. (This was the situation

with regard to the genocide in Rwanda.) Otherwise, the prosecution will rely on the context of the crime, its massive scale, and conduct that suggests the deliberate and systematic targeting and hatred of a particular group.²⁴ However, where certain acts do not meet the high threshold of intent required for genocide, they may still constitute war crimes or crimes against humanity.

As with all crimes, national and international, the question of evidence is crucial in proving both intent and commission. There is no requirement to prove a plan or organized policy, although it would be difficult to envisage a prosecution for genocide that did not adduce such evidence.²⁵ Likewise, there is no actual threshold in terms of numbers of victims that must be reached in order for a crime or crimes to constitute genocide. Obviously, the greater the number of victims, the more probable the intent to destroy a group “in whole or in part.” The killing of Muslim men of military age in and around Srebrenica in 1995 is an interesting example. Although women and children were permitted to leave, the targeting of select members of a particular group within a small geographic area, according to the judgment of the International Criminal Tribunal for the former Yugoslavia, constituted an attempt to destroy in part the Bosnian Muslim population of Bosnia-Herzegovina and qualified as genocide.²⁶

The definition of genocide does not include cultural genocide—i.e., the destruction of the language or culture of a group. However, attacks on cultural or religious property and symbols of a targeted group may constitute important evidence of intent to destroy the group.²⁷

With regard to proving the crime of genocide, killing or imposing conditions of life calculated to destroy a group are not as potentially problematic as an act of violence causing serious bodily or mental harm but falling short of actual homicide.

The “Elements of the Crimes” elaborate on what acts may constitute genocide in such circumstances, and refer to “acts of torture, rape, sexual violence or inhuman and degrading treatment.”²⁸ The Rwanda Tribunal cited rape as an act of genocide.²⁹ This may seem at first to be inconsistent with the concept of genocide; however, when such crimes are committed with the requisite intent and motive of destroying a particular group, then there is no doubt that their classification as acts of genocide is correct.

Crimes against Humanity

A crime against humanity is the second of the three core crimes defined in the ICC Statute.³⁰ During World War II, the Allies became aware that some of the most serious acts committed by the Nazi regime against its own population were not prohibited by traditional international law. Murder, extermination, deportation, persecutions on political, racial, or religious grounds, and other inhumane acts were all reprehensible, but so long as they were perpetrated by a legitimate government against its own people, doubts existed as to the illegality of such conduct under international law. Consequently, crimes against humanity were first defined in the charter of the International Military Tribunal at Nuremberg.³¹

Unlike war crimes and the definition of crimes against humanity under the Nuremberg Charter, the wide range of acts enumerated in Article 7 of the ICC do not require any connection with an armed conflict.³² Like the crime of genocide, there are certain characteristics that set crimes against humanity apart from other crimes. In the first instance, under Article 7 such crimes must be *widespread or systematic, and they must be directed against a civilian population*.³³ This distinguishes crimes against humanity from war crimes, which may be targeted in time of armed conflict

at combatants or at civilians. The crimes must be of a serious nature, and may not be limited or sporadic but part of a pattern of extreme misconduct. They are particularly odious offenses in that they constitute a serious attack on human dignity or the human person (murder; extermination; torture; unlawful imprisonment or other severe deprivation of liberty; rape; political, racial, or religious persecution; or other inhumane acts).³⁴ In this way, such crimes are distinguished from common crimes that do not rise to the level of crimes under international law. It is noteworthy that there is a significant overlap between crimes against humanity and international human rights law.

Initially it was proposed that, in order to qualify as crimes against humanity, crimes must be both widespread and systematic. This would have created a very high threshold before the deliberate targeting of civilians could constitute a crime against humanity. Fortunately, this definition did not hold sway. However, under Article 7 of the Statute, “attack” is defined as “a course of conduct involving the multiple commission of any acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of any state or organizational policy to commit such attack.” This indicates that an attack must have both widespread and systematic aspects in order to constitute a crime against humanity. As the point has yet to be judicially determined, it is not possible to make a definitive statement on the implications of this definition. Nonetheless, it does seem to delimit the broad approach of what constitutes a crime against humanity under paragraph 1 of Article 7. Although the scope of the definition of crimes against humanity has been expanded upon in some instances by Article 7, especially in regards to gender-based crimes and crimes of a sexual nature, the article in some respects it also limits it.³⁵

It is also noteworthy that, pursuant to the Statute, non-state actors can commit crimes against humanity. Hutu civilians who participated in the killing of Tutsis in Rwanda were no less guilty than those who did so in some official capacity. The perpetrators of such crimes must be aware or have knowledge of the attack on civilians. This has been described as amounting to a form of specific intent, although of a lesser degree than that required for the crime of genocide.³⁶ It does not mean that the perpetrators need to know the details of a plan, only that it is part of a state or organizational policy to target civilians.

War Crimes³⁷

War crimes are crimes committed in violation of the strictures of international humanitarian law that apply during armed conflict.³⁸ A war crime must amount to a serious violation of international humanitarian law—according to the *Tadic* case before the International Criminal Tribunal for the former Yugoslavia, “it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.”³⁹ Not all violations of international humanitarian law will amount to war crimes. In the same decision, the appeal chamber gave the following example of a non-serious violation: “the fact of a combatant simply appropriating a loaf of bread in an occupied village,” though it may be regarded as violating the principle that private property must be respected, does not meet the definition of a war crime.⁴⁰ Article 8 of the ICC Statute dealing with war crimes is one of the lengthiest provisions of the Statute. The stipulations are quite complex, and they are divided into four main categories. This category is also the category of real concern to the U.S. because of its implications for military personnel acting as part of international forces.⁴¹

Article 8 consists of four categories of war crimes. The first two deal with international armed conflict, and the latter two with non-international armed conflict. These are very detailed provisions, and it is crucial to understand the different legal framework governing each type of armed conflict. Ultimately the Court must make the final determination as to the nature of the armed conflict, if any. Given the complex nature of contemporary conflicts, this may not be an easy task.⁴² It is noteworthy that, apart from those crimes enumerated in Article 8, no authoritative and legally binding list of war crimes exists in customary law (and Article 8 is not intended to codify customary law).⁴³

Under Article 8(1), the ICC has jurisdiction over war crimes, “in particular when committed as part of plan or policy or as part of a large scale commission of such crimes.” This expression is intended to ensure that the Court concentrates on the more serious commission of such offences. This has been described as a jurisdictional threshold aimed at preventing the Court from being overburdened with minor crimes.⁴⁴ Owing to concerns about its military forces serving abroad, the U.S. had proposed that the ICC have jurisdiction over war crimes “only when committed as part of a plan or policy or as part of a large scale commission of such crimes,” but this proposal was rejected.⁴⁵ It is as yet unclear what the significance of the compromise agreed upon is, but I submit that it will not preclude the prosecutor from pursuing an indictment arising from a single act of sufficient gravity.

Although Article 8 enumerates a number of acts that qualify as war crimes, not every murder or similar crime committed during an armed conflict will rise to this level. Ordinary criminal offenses may occur during armed conflict, but in order to qualify as a war crime the offense must be sufficiently linked to an armed conflict or closely related to hostilities taking place.⁴⁶ This is especially important in proving

the commission of war crimes by civilians, as there must be a link or connection between the offense and the armed conflict.

Although the ICC does not provide for reservations as such,⁴⁷ it is noteworthy that it is possible for states, on becoming a party to the Statute, to make provisional arrangements not to accept the jurisdiction of the Court with respect to war crimes for a period of seven years.⁴⁸ France and Colombia have declared their intention to avail themselves of this “transitional provision.” While crimes have been defined with the required degree of specificity, and the general principles of criminal law have been set out in detail, in some areas the provisions of Article 8 have been described as a retrograde step with regard to existing international law.⁴⁹ Some of the offenses listed regarding the conduct of warfare are defined in a manner that suggests they are to be considered war crimes under the Statute only if they are regarded as such under customary international law. At the same time, the legal regulation of the means and methods of warfare seems to be narrower than that laid down under customary international law. Furthermore, the somewhat artificial distinction between war crimes committed in an international armed conflict and those committed in an internal armed conflict is maintained. Given the long and complex evolution of customary rules, it was inevitable that the war crimes provisions would reflect this confusion. However, a lingering suspicion remains that, in the drafting and negotiation process, certain states sought to limit these provisions to the greatest extent possible in order to shield their soldiers from potential prosecution under Article 8.

U.S. Objections

As the leading economic and military power in the world today, the policy of the United States in relation to the ICC is worthy of special comment. The U.S. was one of the driving forces behind the establishment of the International Criminal Tribunals in the former Yugoslavia and Rwanda. However, it adopted a conservative approach on a number of issues in relation to the ICC Statute, and it opposed the establishment of a court with broad powers. Obviously, this was not the position of the majority of states at the Rome conference.

One of the principal arguments put forward by the U.S. for its reservations was the fear that U.S. soldiers participating in multinational peacekeeping operations might be subject to politicized prosecutions before the ICC.⁵⁰ However, the Court is not a serious alternative to the present system of criminal jurisdiction over peacekeepers. The preamble to the Statute states that the Court shall be complementary to national criminal jurisdictions.⁵¹ In this way, it is not clear that the Statute's practical implications are as far-reaching as its conceptual implications, as the jurisdiction of the ICC is clearly circumscribed. The practical consequence of the principle of complementarity is that it is highly improbable, given the transparency and sophistication of the U.S. judicial system, that the conditions required for admissibility before the ICC could be met with respect to any U.S. citizen, military or civilian.⁵² In addition, the Statute emphasizes the prosecution of war crimes on a large scale, whereas the crimes committed by peacekeepers have to date been isolated and not part of a plan or policy sanctioned by higher authorities. Prosecutions to date of military personnel for acts or omissions in the course of peace support operations have been dealt with by national jurisdictions, and they have been isolated acts by small groups or individuals.

Despite this, the possibility of a prosecution for a single act constituting a war crime still exists, and contrasts with the threshold level of gravity for a crime against humanity under the Statute.⁵³

In the U.S., the reaction to the ICC reflects American society and its perspective on the world.⁵⁴ What has been described as the twin reality of U.S. exceptionalism and the U.S. commitment to power politics remains essential to the United States' orientation to the ICC and other forms of international justice.⁵⁵ If one nation is superior to the rest, as any form of exceptionalism would dictate, then that nation has reason to chart a separate course. An effective international legal regime is perceived as a potential constraint on the exercise of U.S. power. Opposition to the ICC is widespread—it is found not only within the Bush Administration, but also across a broad coalition in American politics. No leader from the Democratic Party has spoken in out favor of the ICC. The U.S. is simply not willing to have what it perceives as its independence and freedom of decision second-guessed by the ICC.

The U.S. opposition to the ICC poses a serious threat to the Court's future. Apart from the numerous bilateral immunity agreements the U.S. has made with allies to shelter its nationals from the jurisdiction of the Court, there is also the matter of Security Council resolutions adopted in accordance with Article 16 of the ICC Statute, which can effectively obstruct the work of the prosecutor for an indefinite period. The American Service Members' Protection Act, which was signed into law on 2 August 2002, prohibits agencies of the U.S. government from cooperating with the ICC. It also prohibits U.S. assistance to States Party to the ICC Statute, and authorizes the use of force to free any U.S. citizen who is detained or imprisoned by or on behalf of the Court. Not surprisingly, it was soon christened the "Hague

Invasion Act” by its critics, who envisioned U.S. Marines storming the beaches of the Netherlands to free U.S. citizens detained in The Hague.

Such developments do little to enhance the global reputation of the U.S. as a law-abiding state. U.S. policy in relation to the ICC has already strained relations with the European Union and with U.S. allies in NATO. It is not denied that the ICC has its flaws. However, constructive engagement on the part of the U.S. with its allies offers the best means of addressing its concerns. If the U.S. continues to oppose the ICC in the investigation and prosecution of crimes against humanity, then history will record the folly of a great nation.⁵⁶

Conclusion

Ensuring the uniform and universal implementation of humanitarian law was one of the primary objectives in establishing the ICC. The principal issues of the controversy over the court’s jurisdiction were concerned with the “trigger mechanisms,” or the threshold of when a case would be referred to the ICC. There was a real fear that the role of the Security Council might politicize the entire process. The compromise reached provides the Security Council with the capacity to refer a situation pursuant to Chapter VII of the UN Charter to the prosecutor in which one or more crimes under the Statute appear to have been committed. As the prosecutor is independent, it was considered that the Security Council should then not be in a position to influence the conduct of any prosecution that might result from such a referral.

The adoption of Resolution 1422 (2002) and 1487 (2003) under Chapter VII, exempting certain nationals from the jurisdiction of the ICC when on a UN-established or UN-authorized operation, poses a significant challenge to the Court. It

is arguable that both resolutions have no legal force, since the article of the ICC Statute invoked is aimed at individual cases and is not intended to grant blanket exemptions. States perceive criminal jurisdiction over their nationals as an infringement on their jealously guarded sovereignty, and considerable national sensitivities are associated with participation in multi-lateral military operations. Nevertheless, the ICC remains a significant accomplishment that was a long time in the making. It should not be seen as a threat to national sovereignty. It is intended as an alternative to be invoked when national prosecutions fail to materialize; in this way it is designed to complement, not replace, national courts. The ICC Statute provides the tools to ensure that the Court will be an independent and effective institution, and it also contains sufficient safeguards to ensure that natural justice and due process are respected in procedural matters. The express reference to gender-based crimes and the specific requirements for gender balance in the composition of the Court will enhance the prospect that those crimes will be given the attention they deserve.

The original narrow definition of genocide is essentially repeated in the ICC Statute. There is some uncertainty with regard to the definition of crimes against humanity and war crimes under the Statute. The Court may still be required to make a determination regarding the nature of an armed conflict in order to decide which legal regime governs the matters before it. Given the complex nature of contemporary conflict situations, this will not be an easy task. It was inevitable that the negotiation process would not produce a perfect international criminal code. Unfortunately, it does seem that some states sought to limit the provisions to the greatest extent possible in order to shield their personnel from potential prosecution, especially with respect to war crimes under Article 8.

The as yet to be defined crime of aggression may present the independent prosecutor with some serious political and legal dilemmas. How would the prosecutor deal with a latter-day “Kosovo type” intervention carried out without UN approval by a state or group of states, especially if the states concerned were the U.S. and Great Britain?

The emphasis that the Statute places on local or domestic prosecutions reflects the reality of the international political system. It is likely that most cases will still be dealt with at the national level, but the threat of ICC intervention will help ensure that national trials and investigations will conform to minimum international standards. The special Courts, such as those established recently in Sierra Leone and East Timor, are a sort of “halfway house” between an international tribunal and a national court. These are an alternative model that may be useful in the future for states and conflict situations where the ICC would otherwise have little real prospect of being effective. Although this will undoubtedly weaken the potential of the ICC to develop a uniform jurisprudence, the threat of national prosecution may offer the best chance of influencing events when and where it matters most.

The role of the prosecutor’s office is central to the proper functioning of the court. If the Court succeeds in deterring potential war criminals, then it will have achieved one of its most important functions. Other potential problems may arise in the context of an amnesty, or immunity granted in the context of a post-conflict resolution process (this issue was fudged in the deliberations leading to the adoption of the Statute). Respecting the principle of complementarity may also prove problematic, as there are no criteria for assessing the capacity of national legal systems or the motivation of domestic prosecutors when dealing with crimes that fall under the jurisdiction of the ICC.

Ultimately, the fundamental dilemma of this new Court is not what types of crimes the prosecutor will pursue, but which particular crimes and in what country. In making such decisions, the prosecutor must be alert to the potential political ramifications of referrals, by state parties in particular, who may be seeking to abuse the process for domestic or international political purposes.

¹ See General Assembly Resolution 260 (9 December 1948), and Article VI of the Genocide Convention, 1948.

² Some of those states that are opposed make interesting bedfellows: the U.S., Israel, the People's Republic of China, India, Libya, and Iraq. For up-to-date information on the court's progress, see the Coalition for the ICC Home Page on the International Criminal Court, at <http://www.igc.org/icc/>.

³ The preamble to the Statute states that the court shall be complementary to national criminal jurisdictions. ICC Statute, Preamble, para. 10 and Arts. 1, 12–15, 17–19. O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court*, ([Author: please provide full citation information for this work—place of publication and publisher.], Baden-Baden: Nomos Verlagsgesellschaft, 1999), 15, 59–61, and *passim*. [Author: since you will be referring to it a good deal, it would be helpful if you could provide an on-line citation to the full text of the Statute in this note.] The complete text of the Rome Statute of the International Criminal Court is available on line at <http://www.un.org/law/icc/Statute/romefra.htm>

⁴ Under Article 29 of the Statute for the ICTY, and Article 28 of the Statute for the ICTR. See M. C. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* ([Author: place of publication and publisher?], New York: Transnational Publishers 1996), 780–93.

⁵ Art. 17, ICC Statute. A case is also inadmissible where a state has already investigated and declined to prosecute, or has tried the person concerned for the same conduct (Arts. 17 and 20; see Triffterer, *Commentary on the Rome Statute*, 383 and 419)

⁶ At the time of writing, the U.S. has signed around eighty such agreements; source, globalsolutions.org/ and [ICcnw.org](http://iccnw.org/). See also Amnesty International Press Release, 11 October 2002.

⁷ See C. Stephen, "E.U. in Tug-of-War over U.S. Immunity from War Crimes," *The Irish Times*, 27 August 2002, 8.

⁸ See <http://www.un.org/law/icc/>.

⁹ Article 4, ICC Statute. Under Article 3, there is provision for the court to sit elsewhere.

¹⁰ Article 42, ICC Statute. See K. Ambos, "The Role of the Prosecutor of an ICC from a Comparative Perspective," *McGill Law Journal* 43:3 (1998): 45; and Triffterer, *Commentary on the Rome Statute*, 627–36. Luis Moreno Ocampo of Argentina has been appointed Prosecutor.

¹¹ W. Schabas, *An Introduction to the International Criminal Court*, 2nd ed. (Cambridge: Cambridge University Press, 2004), 96–101. See ICC Statute, Articles 13 through 19, Articles 56 through 58, and Articles 42, 61, 67, 68, 72, 73, and 87. [Author: of the ICC Statute, or something else?]

¹² UN Security Council Resolution 1422 of 12 July 2002. This was renewed by Resolution 1487 of 12 June 2003.

¹³ See Triffterer, *Commentary on the Rome Statute*, 97–106 and 343–82; and D. McGoldrick, "The Permanent International Criminal Court: An End to the Culture of Impunity?" *Criminal Law Review* (1999): 640–41.

¹⁴ ICC Statute, Article 13(b). [Author: of the ICC Statute, or something else?]

¹⁵ See generally S. Rosenne, "The Jurisdiction of the International Criminal Court," and H. P. Kaul and Claus Kress, "Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromise," in *2 Yearbook of International Humanitarian Law* (The Hague: TMC Asser Press, 1999), 119–41 and 143–75, respectively. [Author: please provide full citation information for this publication, if it is in fact a book and not a periodical.]

¹⁶ See the Preamble, Art. 1, and Art. 5 of the ICC Statute.

¹⁷ They were unchanged from that which had been agreed upon by the Preparatory Commission two years earlier.

¹⁸ Personal Interview, P. Kirsch, President of the ICC, Galway, 2000.

¹⁹ ICC Statute, Art. 7(1)(g) [Author: of the ICC Statute?]; Triffterer, *Commentary on the Rome Statute*, 139–46.

²⁰ ICC Statute, Art. 8 (2) (b) (xxii) [Author: of the ICC Statute?]; Triffterer, *Commentary on the Rome Statute*, 248–53.

²¹ See W. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000). The term was coined by Raphael Lemkin using a combination of the Greek word *genos* (meaning race or tribe) and the Latin *-cide* (killing). See R. Lemkin, “Genocide as a Crime under International Law,” *American Journal of International Law* 41 (1947): 145.

²² Italics mine. For the purposes of Article 6 of the ICC Statute, “genocide” means any of the following acts, committed with intent to destroy in whole or in part, a national, ethnical, racial, or religious group, as such:

- (a) Killing members of the group
- (b) Causing bodily or mental harm to members of the group
- (c) Deliberately inflicting on this group conditions of life calculated to bring about its physical destruction in whole or in part
- (d) Imposing measures intended to prevent births within the group
- (e) Forcibly transferring children of the group to another group.

²³ A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 97.

²⁴ See *Akayesu case*, Case No. ICTR –96-4-T, Judgment, 2 September 1998, para. 477; *Prosecutor v. Jelusic*, Case No. IT-95-10, Judgment December 14, 1999, and Schabas, *Genocide in International Law*, 222

²⁵ However, the possibility (however unlikely) of a lone genocidal person has been accepted; see *Prosecutor v. Jelusic*, para. 100.

²⁶ *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, 2 August 2001, paras. 590 and 595.

²⁷ *Ibid.*, at 580.

²⁸ “Elements of the Crimes,” Art. 6 (b), para. 1, n. 3, ICC Statute.

²⁹ See *Akayesu case*.

³⁰ The definition is based on Art. 6(c) of the charter of the International Military Tribunal (IMT Charter) which was set up to try the Nazi leadership at Nuremberg.

³¹ Art. 6(c) of the IMT Charter; see E. Schelb, “Crimes Against Humanity,” *British Yearbook of International Law* 23 (1946): 178; and M. C. Bassiouni, *Crimes Against Humanity in International Law*, 2nd ed. ([Author: publication information?] Dordrecht: Martinus Nijhoff, 1999).

³² See Statute of the ICTR; and *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995), (1997) 105 I.L.R. 453.

³³ Italics mine. Article 7, para 1, ICC Statute.

³⁴ Cassese, *International Criminal Law*, 64; and Art. 7(1), ICC Statute.

³⁵ For example, the definition of persecution under Article 7; see Schabas, *Introduction to the International Criminal Court*, 48; and Cassese, *International Criminal Law*, 93–94. Cassese is critical, *inter alia*, of the exclusion of non-civilians (i.e., the military) from the class of victims of the crime.

³⁶ Schabas, *Introduction to the International Criminal Court*, 45.

³⁷ See G. Best, *War and Law Since 1945* ([Author: publication information ?] New York: Oxford University Press 1994), 158, 163–64, and *passim*; and H. Lauterpacht, *International Law: A Treatise by L. Oppenheim, Vol. II Disputes, War and Neutrality*, 7th ed. London: Longmans, Green and Co. ([Author: publication information?], 1955), 226–36.

³⁸ See Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001), 129–205; and M. Bothe, “War Crimes,” in A. Cassese, P. Gaeta & J.R.W.D. Jones eds., 1 *The Rome Statute of The International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002). 379–426. [Author: you have not previously cited a work by Cassese, Gaeta, and Jones, unless they are all the authors of *International Criminal Law*, in which case they should all be included in the first citation in n. 23. If not, please provide full citation of this work here.]

³⁹ *Prosecutor v. Tadic*, para. 94,

⁴⁰ *Ibid.*; also see Art. 46(1) of the 1907 Hague Regulations [on Land Warfare].

⁴¹ See J. Gurulé, “U.S. Opposition to the 1998 Rome Statute Establishing the International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions?” *Cornell International Law Journal* 35:1 (November 2001–February 2002): 1–45. It should be noted that it was also an issue of concern to military commanders in the United Kingdom; see R. Norton-Taylor,

“Forces Fear War Crimes Threat,” *The Guardian*, 7 March 2001.

⁴² See *Prosecutor v. Tadic*.

⁴³ Cassese, *International Criminal Law*, 54.

⁴⁴ Kittichaisaree, *International Criminal Law*, 133.

⁴⁵ *Ibid.*, 108, 124.

⁴⁶ *Prosecutor v. Tadic*, Jurisdiction Decision, para. 70; *Prosecutor v. Delalic & Delic*, Case No. IT-96-2-T, Judgment, paras. 193-94, (16 November 1998). . [Author: you have not cited this second case previously—please provide full citation.]

⁴⁷ Art. 120 declares that “No reservations may be made to this Statute.” This was only decided towards the end of the Rome conference, when the terms of the Statute were largely agreed upon; see Triffterer, *Commentary on the Rome Statute*, 1251–63.

⁴⁸ ICC Statute, Article 124, [Author: ICC Statute?]. The period of seven years begins from the date of entry into force of the Statute.

⁴⁹ Cassese, *International Criminal Law*, 59.

⁵⁰ M. Zwanenburg, “The Statute for an International Criminal Court and the U.S.: Peacekeepers under Fire?” *European Journal of International Law* 10 (1999): 124–43, at 126.

⁵¹ ICC Statute, Preamble, para. 10 and Arts. 1, 12–15, 17-19. Triffterer, *Commentary on the Rome Statute*, 15, 59–61, and *passim*.

⁵² For an alternative view, see Gurulé, “US Opposition to the 1998 Rome Statute Establishing the International Criminal Court”.”

⁵³ M. Arsanjani, “The Rome Statute of an International Criminal Court,” *American Journal of International Law* 93 (1999): 33. Article 7(1) of the Statute provides that particular acts must have been committed as part of a “widespread or systematic attack directed against any civilian population”; see Triffterer, *Commentary on the Rome Statute*, 126–27.

⁵⁴ Remarks by Prof. David Forsythe (University of Nebraska), Symposium on the ICC, NUI Galway, 1 July 2002.

⁵⁵ David P. Forsythe, “The United States and International Criminal Justice,” *Human Rights Quarterly* 24 (2002): 974–91, at 974. See also Ian Williams, “Bush Administration Seeks UN Escape Hatch,” *Foreign Policy in Focus* (Silver City, NM & Washington, DC), 3 June 2004.

⁵⁶ David J. Shaffer, “Staying the Course with the International Criminal Court,” *Cornell International Law Journal* 35:1 (November 2001–February 2002): 47–100, at 100.