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The Statute of the International Criminal Court: Some Preliminary Reflections

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Abstract

The author appraises the contribution of the International Criminal Court (ICC) to substantive and procedural international criminal law. He portrays it as a revolutionary innovation. Its substantive features include: a definition of crimes falling within its jurisdiction which is more specific than in existing international law; and impressive detail in spelling out general principles of international criminal law such as actus reus, mens rea, nullum crimen and nulla poena, as well as various forms of international criminal responsibility (for commission of crimes, aiding and abetting, etc.). Certain of the substantive provisions, however, may be considered retrogressive in the light of existing law. These include: the distinction between international and internal armed conflicts, needlessly perpetuated in Article 8; an insufficient prohibition of the use in armed conflict of modern weapons that cause unnecessary suffering or are inherently indiscriminate; the excessively cautious criminalization of war crimes offences; the omission of recklessness as a culpable state of mind at least for some crimes; and excessive breadth given to the defences of mistake of law, superior order and self-defence. The author considers the ICC's major contribution to be procedural. The Statute has set up a complex judicial body with detailed regulations governing all the stages in the criminal adjudication. The prerequisites to the exercise of jurisdiction, however, depend greatly on the willingness of all states parties concerned in the prosecution to cooperate with the Court. In its present form, the author argues, the Statute is somewhat too deferential to the prerogatives of state sovereignty, a fact which could impair the ICC's effectiveness.

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1 Introduction

It is easy to find fault in any new legal institution. In the case of the International Criminal Court (ICC), whose Statute was adopted in Rome on 17 July 1998, however, one should be mindful of the fact that, firstly, this is a revolutionary institution that intrudes into state sovereignty by subjecting states' nationals to an international criminal jurisdiction. Consequently, if and when it becomes an operational and effective judicial mechanism, the ICC could mark a real turning point in the world community. Secondly, as happened in the case of the International Court of Justice (ICJ), and subsequently the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), only gradually and over a fairly long period of time can the ICC become vital and credible. A thorough and sound appraisal of this new institution must therefore wait some time.

Subject to this caveat, however, by and large one cannot but welcome the institution of the ICC as a significant building block in the construction of a truly international legal community. Although it is premature to make an in-depth assessment of a complex treaty and the merits and flaws of the legal institution it is designed to set up, I shall nevertheless attempt in this article to set out some initial and tentative comments on some of the salient traits of the future ICC.

2 General Remarks

The Statute of the ICC can be examined from various angles. In particular, it may be considered from the viewpoint of treaty law, *qua* a multilateral international treaty, or it can be viewed from the perspective of its contribution to international criminal law, both substantive and procedural.

Considered as a contribution to international treaty law, the Statute strikes the commentator as a text that is markedly different from other modern multilateral treaties. It bears the mark of strong political and diplomatic differences over certain major issues, and shows the difficulty of ironing them out. The existence of these differences and of their partial solution manifests itself in many ways, some of which may be pinpointed briefly as follows.

First of all, unlike most multilateral treaties concluded under the auspices of the United Nations, in the case of the Rome Statute there hardly exist preparatory works reflecting the debates and negotiations that took place at the Rome Diplomatic Conference. The need for informal, off-the-record discussions clearly arose out of the necessity to overcome major rifts in a smooth manner and in such a way as to avoid states losing face by changing their position. Secondly, it is striking that the text was drafted in one language (English) and that for months after its adoption no official text was available in the other five languages which, pursuant to Article 128, are 'equally authentic'. Thirdly, one must emphasize the fact that on some crucial issues the Rome Conference failed to take action and simply put off any decision until amendments to the Statute are adopted: this holds true for the definition of the crime of aggression (Article 5), for the articulation of the elements of crimes (Article 9(1)) and for the

determination of weapons whose use is contrary to the prohibition on weapons that cause superfluous suffering or are inherently indiscriminate (Article 8(2)(b)(xx)). Fourthly, it is surprising that while Article 120 provides that no reservations may be made to the Statute, Article 124, entitled ‘Transitional Provision’, in fact provides for reservations narrowing the jurisdiction of the Court. Pursuant to this provision, on becoming a party to the Statute a state ‘may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to [war crimes] when [such a] crime is alleged to have been committed by its nationals or on its territory’. Admittedly, these are reservations whose purpose and contents, as well as duration in time, are predetermined by the Treaty. The fact remains, however, that, on account of their object and scope, they cannot but be regarded as reservations proper.

Turning to consider the Rome Statute from the perspective of its contribution to international criminal law, the balance sheet is more positive. In brief, it can be said that the Statute has made a notable contribution to the development of *substantive* international criminal law, in that it has defined three of the classes of crimes it envisages in addition to setting out the most important among the general principles of international criminal law. Clearly, though, its major contribution lies in the field of *procedural* international criminal law: the Statute has set up a complex judicial body with detailed regulations governing all the stages in the adjudication of international crimes.

In this paper I shall endeavour to appraise in some detail how the Rome Statute has contributed to both substantive and procedural criminal law.

3 The Scope of the Court’s Jurisdiction; Or the Rome Statute’s Contribution to Substantive Criminal Law

A *Subject-matter Jurisdiction*

1 *The Question of Aggression as a Crime under the Court’s Jurisdiction*

The Court’s jurisdiction embraces four categories of crimes: genocide, crimes against humanity, war crimes and aggression.¹

While it was wise to exclude such crimes as terrorism and drug trafficking, which at the present stage of international relations are best investigated and prosecuted at the national level, doubts can be expressed about the inclusion of aggression. Aggression is in some sense the arch-crime which most menaces international society. Once war is unleashed, all the horrors and miseries of war are let loose. At Nuremberg it was therefore regarded as the ‘supreme international crime differing only from other war

¹ Article 5(1)(d) states that the crime of aggression is within the jurisdiction of the Court, although Article 5(2) provides that such jurisdiction will not exist until a definition and conditions for exercising jurisdiction are adopted in accordance with Articles 121 and 123. Those articles concern ‘amending’ the Statute.

crimes in that it contains within itself the accumulated evil of the whole'.² It has been suggested that one ought to beware the tendency of the Security Council to be treated as 'the mouth of the oracle' for the determination of whether aggression has taken place, with the consequence that none of the Permanent Members has ever been accused by the United Nations of aggression. On the other hand, it may be argued that only a political organ such as the Security Council can ascertain whether aggression has occurred and that it would be difficult for a judicial body to do so, the more so because the evidence may prove difficult to obtain. In fact, it is fair to say that such evidence is likely to be obtained only or primarily when the aggressor state has been defeated, militarily or politically.

Another factor is that aggression is a crime for which a definition (in its form as a state's wrongful act) has not yet been achieved, despite United Nations discussions lasting many decades and culminating in the disappointing General Assembly Resolution 3314 (xxix) adopted by consensus on 14 December 1974. As is well known, the definition laid down in that resolution is not exhaustive, as stated in Article 4 of the resolution, which adds that 'the Security Council may determine that other acts [than those listed in Articles 2 and 3 as amounting to aggression] constitute aggression under the provisions of the Charter'. That the definition was deliberately left incomplete is quite understandable: to define aggression also means, among other things, to decide whether so-called pre-emptive self-defence is lawful under the Charter or must instead be regarded as a form of aggression. There may be other reasons. Arguably, an enumerative list of cases of aggression might contain gaps which would encourage the aggressor to exploit the definition. It was most likely felt that any definition of aggression had to contain a margin of discretion and that therefore an exhaustive definition was impossible.

It thus seems most probable that the definition of this crime, to be adopted under Article 5(2) of the Statute in accordance with Articles 121 and 123, will not be agreed upon, at least not in the near future. If this is so, the ICC is likely to start out on the wrong footing, for lack of definition of one of the four classes of crimes over which it has been granted jurisdiction.

Nevertheless, the fact that Article 5(1)(d) provides that the crime of aggression is within the jurisdiction of the Court does create, at least, the *expectation* that the states parties will strive to find an acceptable definition, creating an impetus which would be altogether absent if Article 5(2) did not exist. It is also important that *if* a definition of aggression is ever agreed upon, the 'conditions under which the Court shall exercise jurisdiction with respect to this crime' remain to be agreed, and the Statute does not exclude the possibility that, in addition to the Security Council, the Prosecutor or states might one day be allowed to initiate investigations into whether aggression has been committed. This eventuality would be a welcome development inasmuch as it would break the Security Council's stranglehold on the notion of aggression. Judicial

² See Trial of the Major War Criminals before the International Criminal Tribunal, Nuremberg 1947, Vol. 1, at 186.

review of aggression might prove a useful counterbalance to the monopolizing power of the Security Council.

2 Main Traits of the Regulation of Classes of Crimes Defined by the Statute

It is well known that the current rules of international law on individual criminal responsibility make up a body of law that is still rudimentary and fairly unsophisticated. These rules, among other things, suffer from a major defect. Unlike national law, where the principle of *specificity* of criminal law (*Bestimmtheitsgrundsatz*, *tassatività delle norme penali*, *nullum crimen sine lege stricta*) is prevalent, international criminal law includes many provisions that do not determine the essential elements of the crime in detail. To this extent, international criminal law departs from the fundamental principle of specificity, which requires that a criminal rule be detailed and indicate in clear terms the various elements of the crime. This principle constitutes a fundamental guarantee for the potential accused and any indicted person, because it lays down in well-defined terms the confines of the prohibited conduct, thus giving him notice of what he stands accused. By the same token, that principle greatly restricts the courts' latitude (*arbitrium iudicis*).

This striking feature of international criminal rules — lack of specificity — primarily manifests itself in three ways.

First, and more generally, unlike the corresponding national rules, most international rules do not prohibit a certain conduct (say, murder, rape, etc.) by providing a specific detailed description of such conduct. They instead embrace a broad set of offences (say, war crimes or crimes against humanity), without individual identification by a delineation of the prohibited behaviour.³ A typical example of this approach can be found in some provisions of the Statute of the ICTY: Article 2 (on grave breaches of the Geneva Conventions), Article 3 (on violations of the laws or customs of war) and Article 5 (on crimes against humanity). It follows that, when applying these rules, one must first of all identify the *general* ingredients proper to each category of crime (say, crimes against humanity) and then the *specific* ingredients of the sub-class one may have to deal with (say, rape or persecution). Often, while the general ingredients may be inferred from the international rule (for instance, a widespread or systematic context for crimes against humanity), the specific ingredients are not identifiable (for instance, the precise definition of rape), let alone spelt out

³ To the best of my knowledge, this feature of international criminal rules has only been emphasized by the German Supreme Court in the German zone occupied by Britain, in its judgment of 20 May 1948 in the *P.* case. See *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. 1 (1949), at 12–14.

in the rule. The interpreter must therefore draw on comparative analysis of national criminal law.⁴

Secondly, some international criminal rules are quite loose and do not specify the prohibited conduct, not even by indirect reference to national rules. The most conspicuous illustration is the provision on crimes against humanity laid down in the London Agreement of 8 August 1945 (Article 6(c)) and taken up in Control Council Law no. 10 (Article II(1)(c)) and in the Statutes of the ICTY (Article 5(i)) and ICTR (Article 3), whereby 'other inhumane acts' are prohibited and therefore fall under the jurisdiction of those courts. 'Other inhumane acts' are not further defined in those instruments.

Thirdly, current international criminal law does not define accurately and in incontrovertible terms the *mental* element (*mens rea*) of the various international crimes.

The Rome Statute has to a large extent obviated most of these flaws, thus making a notable contribution to the evolution of *substantive* criminal law. However, we will see below that this contribution may be faulted in some respects. Let us first focus on the meritorious side of the Rome Statute.

First of all, the Statute sets out in Article 8 the various instances of war crimes and defines each war crime in a specific and detailed manner. Furthermore, it is commendable that Article 8 lays emphasis on war crimes which are 'committed as part of a plan or policy or as part of a large-scale commission of such crimes'. At both the ICTY and ICTR, this would have been a useful qualification to avoid prosecutions of isolated atrocities, which do not pose a threat to international order as much as atrocities which are committed as part of a plan or policy or on a large scale.⁵ It should, however, be noted that the requirement that war crimes be committed as part of a plan or policy or a large-scale practice only relates to the Court's jurisdiction and must not affect the existing notion of war crimes. In other words, the fact that the Court shall only pronounce upon war crimes that form part of a plan or policy does not mean

⁴ In the *Akayesu* Judgment of 2 September 1998, Trial Chamber I of the ICTR defined rape, murder, torture and extermination for the purposes of determining whether or not the accused had committed crimes against humanity (see paras 589 (definition of murder), 592 (definition of extermination), 594 (definition of torture), and 598 (definition of rape)). The ICTY Judgment in *Delalić et al.* of 16 November 1998 has likewise furnished detailed definitions of murder, rape, torture and other war crimes. On the definition of rape and torture as war crimes see now the judgment delivered by Trial Chamber II of the ICTY in *Furundžija* (Judgment of 10 December 1998, para. 131 ff).

⁵ It is mainly the leaders and organizers of such plans or policies who threaten international public order and who should therefore be prosecuted by an international court. See the ICTY *Martić* Rule 61 of 6 March 1996, para. 21: 'The Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes. In a Decision of 16 May 1995, this Trial Chamber considered that such persons "more so than those just carrying out orders (...) would thus undermine international public order" (Karadžić, Mladić and Stanišić, IT-95-5-D, official request for deferral, para. 25). Since the criminal intent is formulated at a high level of the administrative hierarchy, the violation of the norm of international humanitarian law is part of a system of criminality specifically justifying the intervention of the Tribunal.'

that the definition of war crimes under international law is thereby narrowed so as only to cover such large-scale war crimes. It should be added that another commendable feature of the Rome Statute lies in its extending the class of war crimes to serious violations of international humanitarian law perpetrated in internal armed conflicts. This is in line with the pronouncement of the ICTY in the *Tadić (Interlocutory Appeal on Jurisdiction) Decision*,⁶ and subsequent ICTY judgments, notably in *Delalić et al.*⁷ However, as argued below, an even better approach would be simply to establish one body of law applicable to *all* armed conflicts — internal or international — without distinction.

Secondly, Article 7 gives a fairly precise definition of crimes against humanity ('any of the foregoing acts when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the act'), followed by the enumeration of the various sub-classes of acts amounting to such a crime. It is worth noting, incidentally, that, unlike the charter provisions of the Nuremberg Tribunal and the ICTY relating to crimes against humanity, but like the relevant article of the ICTR Statute, Article 7 of the ICC Statute does *not* require that crimes against humanity be committed in connection with an armed conflict. This seems to reflect current international law.

As regards the classes of crimes against humanity enumerated in the ICC Statute, such offences as enforced prostitution, forced pregnancy and enforced disappearance of persons are now explicitly included. These practices, often associated with 'ethnic cleansing' and, in the case of disappearances, the pursuit of power by terror and elimination of political opposition, properly belong in any modern description of crimes against humanity by virtue of the role they play in policies of repression against civilian populations. Examples of each of these practices readily spring to mind.

Emphasis on the principle of specificity is also evident in the sub-class of crimes against humanity termed 'other inhuman acts'. This broad class is narrowed down in the ICC Statute because it is specified that they must be 'of a similar character [to that of the other subclasses and] intentionally causing great suffering, or serious injury to body or to mental or physical health'.

3 *Flaws in the Definitions of Crimes*

A number of flaws can be discerned in the norms concerning the various categories of crimes. I shall confine myself to war crimes (Article 8).

(A) Insofar as Article 8 separates the law applicable to international armed conflict from that applicable to internal armed conflict, it is somewhat *retrograde*, as the current trend has been to abolish this distinction and to have simply one *corpus* of law applicable to *all* conflicts. It can be confusing — and unjust — to have one law for international armed conflict and another for internal armed conflict.

(B) Two provisions of the general article on war crimes are worded in such a way as to give rise to serious problems of interpretation. On the face of it, they markedly

⁶ See Decision of 2 October 1995, at 68–71, paras 128–137.

⁷ *Judgment*, 16 November 1998, paras 202 and 314.

differentiate the various classes of war crimes they envisage from all the other war crimes provided for in the Statute as well as genocide and crimes against humanity. I am referring to Article 8(2)(b) and (e), which deal respectively with war crimes in international armed conflicts and war crimes in non-international war crimes. These two provisions are worded as follows:

[For the purposes of this Statute 'war crimes' means] Other serious violations of the laws and customs applicable in international armed conflict [in armed conflicts not of an international character: *litt* (e)], *within the established framework of international law*, namely, any of the following acts ... (emphasis added)

Strikingly, neither in the other provisions of Article 8 concerning war crimes nor in the Statute's provisions on genocide and crimes against humanity is reference made to 'the established framework of international law'. A plausible explanation for this odd phrase could be that for the purposes of the Statute the offences listed in the two aforementioned provisions are to be considered as war crimes only if they are so classified by *customary international law*. In other words, while in respect of the other classes of war crimes (or, for that matter, crimes against humanity and genocide) the Statute confines itself to setting out the content of the prohibited conduct, and the relevant provision can thus be directly and immediately applied by the Court, it would be otherwise in the case of the two provisions under consideration. The Court might find that the conduct envisaged in these provisions amounted to a war crime *only if and to the extent that* general international law already regarded the offence as a war crime. Under this interpretation, 'declaring that no quarter be given' (Article 8(2)(b)(xii)), for example, would no doubt be taken to amount to a war crime, because denial of quarter is indisputably prohibited by customary international law and, if it should be declared that no quarter be given (i.e. that no prisoners be taken), a war crime would thereby have been committed. By contrast, an offence such as 'the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies ...' (Article 8(2)(b)(viii)) could not be *ipso facto* regarded as a war crime. The Court would first have to establish (i) whether under general international law such transfer or deportation is considered a breach of international humanitarian law of armed conflict, and in addition, (ii) whether under customary international law such a breach would amount to a war crime.

To support the above explanation one could stress that for the two other classes of war crimes envisaged in Article 8 no reference to the 'established framework of international law' is made. These two classes, provided for in Article 8(2)(a) and (c), respectively, embrace two categories of crimes undoubtedly covered by international customary law: grave breaches of the Geneva Conventions and serious violations of common Article 3 of the Geneva Conventions. It would follow from this interpretation of Article 8 that, as regards two broad categories of war crimes, the Statute would not provide a self-contained legal regime, but would rather presuppose a mandatory examination by the Court, on a case by case basis, of the current status of general international law.

However, this interpretation should not be entertained. First of all, it would loosen

the net of international prohibitions to which combatants are subject. What is even more important, it would result in a deviation from the legal regime envisaged by the framers of the Rome Statute which, as I have pointed out above, is designed to implement the principle of specificity, i.e. to set out in detail all the classes of crimes falling under the jurisdiction of the Court, so as to have a *lex scripta* laying down the substantive criminal rules to be applied by the ICC. On the other hand, one cannot simply read out of Article 8 the expression ‘within the established framework of international law’ *tamquam non esset*; this would run counter to basic principles of treaty interpretation. Perhaps the following construction could commend itself: the expression at issue is intended to convey the notion that for the authors of the Statute the various classes of war crimes specified in Article 8(2)(b) and (e) are already part of the ‘established framework of international law’. In other words, by the use of that expression the draughtsmen aimed at making it clear that these two provisions were declaratory of customary international law, as much as the provisions of Article 8(2)(a), concerning ‘grave breaches’, and Article 8(2)(c), concerning common Article 3. Since no one contests that these two last provisions refer to war crimes already firmly established in customary law, whereas for the other two categories doubts might arise, the framers of the Rome Statute aimed at dispelling such doubts by making reference to the ‘established framework of international law’.

(C) The Statute does not classify as crimes falling under the ICC jurisdiction the use in international armed conflict of modern weapons that are contrary to the two basic principles prohibiting weapons which (a) cause superfluous injury or unnecessary suffering or (b) are inherently indiscriminate. Under Article 8(2)(b)(xx) the use of weapons, projectiles, materials or methods of warfare contrary to one of those two principles amounts to a war crime if the weapon, projectile, etc. ‘are the subject of a comprehensive prohibition and are included in an Annex to this Statute, by an amendment’ to the Statute made pursuant to Articles 121 and 123. In practice, given the extreme unlikelihood that such amendment will ever be agreed upon, the use of those weapons, projectiles, etc. may eventually not amount to a war crime within the jurisdiction of the Court. Thus, ultimately the two principles are deprived of their overarching legal value. This seems all the more questionable because even bacteriological weapons, which are undoubtedly prohibited by general international law, might be used without entailing the commission of a crime falling under the jurisdiction of the Court. The same would hold true for the use of nuclear weapons, to the extent that such weapons prove to be indiscriminate and to cause unnecessary suffering (it would seem that by contrast the use of chemical weapons is covered by the ban on ‘asphyxiating, poisonous or other gases and all analogous liquids, materials or devices’, contained in Article 8(b)(xviii)).

(D) The prohibited use of weapons in internal armed conflicts is not regarded as a war crime under the ICC Statute. This regulation does not reflect the current status of general international law. As the Appeals Chamber of the ICTY stressed in the *Tadić (Interlocutory Appeal on Jurisdiction) Decision*, it no longer makes sense in modern warfare to distinguish between international and internal armed conflicts:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State?⁸

The Appeals Chamber rightly answered this question by finding that the prohibition of weapons causing unnecessary suffering, as well as the specific ban on chemical weapons, also applies to internal armed conflicts.⁹

(E) While children may be conscripted or enlisted from the age of 15 (Article 8(2)(b)(xxvi), and (e)(vii), the Court has no jurisdiction over persons *under* the age of 18 at the commission of the crime (Article 26). Thus, a person between 15 and 17 is regarded as a lawful combatant and may commit a crime without being brought to court and punished. A commander could therefore recruit minors into his army expressly for the purpose of forming terrorist units whose members would be immune from prosecution. Moreover, in modern warfare, particularly in developing countries, young persons are more and more involved in armed hostilities and thus increasingly placed to commit war crimes and crimes against humanity.

B General Principles of Criminal Law

One of the merits of the Rome Statute is that it sets out in detail the most important principles of criminal law: the ban on analogy, the principle of *favor rei*, the *nullum crimen* and *nulla poena* principles, the principle of non-retroactivity of criminal law, the various forms of international criminal responsibility (for commission of crimes, aiding and abetting, etc.), the responsibility of military commanders and other superiors, the notion of *mens rea*, the grounds for excluding criminal responsibility, the rule of speciality, and so forth. Although most of these principles are familiar to national criminal lawyers, they had never until this time been specified in international treaties or at any rate been spelt out in detail. Hence, this section of the Rome Statute undoubtedly constitutes a major advance in international criminal law and, in addition, contributes to making this branch of law more congruent with the basic requirement of 'specificity'.

Nevertheless, some provisions of the Statute give rise to serious misgivings. I shall confine myself to commenting on only a few provisions.

1 *Mens Rea*

Article 30 of the Rome Statute defines the mental element of crimes as consisting of intent and knowledge.¹⁰ While it is no doubt meritorious to have defined these two

⁸ At 54, para. 97, emphasis added.

⁹ See *ibid.*, at 64–67, paras 119–124.

¹⁰ Article 30 ('Mental element') reads, '1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a

notions, it appears questionable to have excluded recklessness as a culpable *mens rea* under the Statute. One fails to see why, at least in the case of war crimes, this last mental element may not suffice for criminal responsibility to arise. Admittedly, in the case of genocide, crimes against humanity and aggression, the extreme gravity of the offence presupposes that it may only be perpetrated when intent and knowledge are present. However, for less serious crimes, such as war crimes, current international law must be taken to allow for recklessness: for example, it is admissible to convict a person who, when shelling a town, takes a high and unjustifiable risk that civilians will be killed — without, however, *intending*, that they be killed — with the result that the civilians are, in fact, thereby killed.

Hence, on this score the Rome Statute marks a step backwards with respect to *lex lata*, and possibly creates a loophole: persons responsible for war crimes, when they acted recklessly, may be brought to trial and convicted before national courts, while they would be acquitted by the ICC. It would seem that the draughtsmen have unduly expanded the shield they intended to provide to the military.

2 Self-defence

Article 31(1)(c) of the ICC Statute addresses the subject of self-defence.¹¹ The notion of self-defence as a ground for excusing criminal responsibility laid down in this provision seems to be excessively broad and at variance with existing international criminal law.

While it seems admissible to extend self-defence to the protection of another person or to property essential to the survival of the person or of another person (this may be regarded as implicit in the current notion of self-defence in international criminal law), it is highly questionable to extend the notion at issue to the need to protect ‘property which is essential for accomplishing a military mission’. This extension is manifestly outside *lex lata*, and may generate quite a few misgivings. Firstly, via international criminal law a norm of international humanitarian law has been created whereby a serviceman may now lawfully commit an international crime for the purpose of defending any ‘property essential for accomplishing a military mission’ against an imminent and unlawful use of force. So far such unlawful use of force against the ‘property’ at issue has not entitled the military to commit war crimes. They

consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.’

¹¹ Article 31 (‘Grounds for Excluding Criminal Responsibility’) reads in pertinent part: ‘1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct: . . . (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.’

could only react by using lawful means or methods of combat or, *ex post facto*, by resorting to lawful reprisals against enemy belligerents. Secondly, the notion of 'property essential for accomplishing a military mission' is very loose and may be difficult to interpret.

3 Mistake of Law

Under Article 32(2) a mistake of law may constitute a ground for excluding criminal responsibility 'if it negates the mental element required for such a crime, or as provided for in Article 33 [on superior orders]'. Thus, a serviceman may be relieved of his responsibility if he can prove that he was not aware that what he was doing was prohibited by international law as a crime and that therefore he lacked the requisite intent and knowledge or that he was not aware that the superior order he executed was contrary to international criminal law.¹²

First, this rule seems to diverge from current international criminal law, which rules out mistake of law as an excuse, in accordance with the principle upheld in the criminal law of most countries that *ignorantia legis non excusat*. International case law (the *Scuttled U-boats*,¹³ the *Flick*¹⁴ and the *Wilhelm Jung*¹⁵ cases) seems to bear out this principle.¹⁶ Admittedly, there are areas of international criminal law which may still be regarded as shrouded in uncertainty and therefore open to conflicting interpretations. Nevertheless, it should be recalled that the broad categories of crimes against humanity, war crimes and genocide embrace offences (such as murder, extermination, enslavement, torture, rape, persecution, deportation, etc.) that are punished by all criminal codes of the world, regardless of whether or not those offences are perpetrated during an armed conflict. It would therefore be to no avail to claim that while individuals are expected and required to know the criminal laws of their own country, they cannot be required to know international criminal law. In short,

¹² Interestingly, the Rome Statute thus takes up the argument put forward by a defence counsel in the *Flick* case, before a United States Military Court sitting at Nuremberg ('This statute ... cannot mean and concern ... the act of a human being who acted free from guilt, because he neither was aware of the criminal nature, that he was not conscious of its illegality, or because he had acted under physical compulsion', Closing statement by defence counsel Dix, in Law Reports of Trials of War Criminals, vol. VI, at 1153).

¹³ See Law Reports of Trials of War Criminals, vol. XV, at 182–183.

¹⁴ See Law Reports of Trials of War Criminals, vol. IX, at 23 and Law Reports of Trials of War Criminals, vol. VI, at 1208: 'It was stated in the beginning that responsibility of an individual for infractions of international law is not open to question. In dealing with property located outside his own state, he must be expected to ascertain and keep within applicable law. *Ignorance thereof will not excuse guilt but may mitigate punishment.*' (emphasis added)

¹⁵ See Record of Proceedings of the Trial by Canadian Military Court of Wilhelm Jung and Johann Georg Schumacher, held at Aurich (Germany) 15–25 March 1946 (unpublished typescript), at 221.

¹⁶ See, however, the decision delivered by the German *Bundesgerichtshof* on 14 October 1952, in 6 *Neue Juristische Wochenschrift* (1953), at 112.

mistake of law — at least as regards general international law on international crimes¹⁷ — cannot be regarded as an excuse but may be urged in mitigation.

My second remark is that Article 32(2) is all the more questionable within the context of the Rome Statute, for it refers to criminal offences that are enumerated in a specific and detailed manner in the relevant provisions of the Statute: Articles 6 (genocide), 7 (crimes against humanity) and 8 (war crimes). As I have emphasized above, these provisions do not confine themselves to indicating in a summary fashion the classes of offences that they do not define; rather, they provide a detailed description of the main elements of the crimes envisaged therein. This being so, there seems to be no justification for relieving persons of criminal responsibility whenever, by ignoring the fact that certain conduct amounts to a crime under the Statute, they lacked the requisite *mens rea* or were unaware that a superior order was unlawful. At the least, it is to be hoped that armies will furnish soldiers with a copy of Article 8 (war crimes) of the Statute and teach them its commandments. It follows that Article 32(2) amounts to a serious loophole in the whole system of international criminal law and may eventually be misused for the purpose of justifying the perpetration of crimes clearly prohibited by international law.

Thirdly, Article 32(2) may constitute a disincentive to the dissemination and implementation of international humanitarian law (why bother learning this branch of law if one can be relieved of criminal responsibility for one's acts by proving that one was ignorant of the fact that they were prohibited under international humanitarian law?).

4 Superior Orders

As pointed out in the paper by Gaeta published in this issue of the *EJIL*, the correct position under customary international law would seem to be that superior orders are *never* a defence to serious violations of international humanitarian law, be they crimes of genocide, crimes against humanity or war crimes, but may only be urged in mitigation. The Rome Statute provides in Article 33 for a different regulation. Under this provision, superior orders shall not relieve a person of criminal responsibility *unless* the person (a) was legally bound to obey the order, and (b) did not know that the order was unlawful, and (c) the order was not manifestly unlawful. The Article adds, however, that orders to commit genocide or crimes against humanity are always manifestly unlawful. It follows that under Article 33 a superior order may only be urged as a defence for *war crimes* when the order was not *manifestly illegal*. The order would itself remain illegal, and the superior issuing the order liable to punishment, but the subordinate who executed the order in good-faith reliance on its legality, and in circumstances in which it was not 'manifestly unlawful', would have a complete

¹⁷ In the light of the *Scuttled U-Boats* case, where the question revolved around the issue of whether or not the accused was required to know the act of German surrender which laid down law binding upon him, it would seem appropriate to exclude from the proposition set out in the text those pieces of special legislation which are not of a general nature and are not part of the general corpus of international criminal law. This issue could also be construed as a mistake of fact — the fact of German surrender and its consequences — rather than an issue of mistake of law.

defence entitling him to an acquittal. This conclusion is first of all at odds with *lex lata*, under which any order to commit an international crime — regardless of its classification — is illegal and therefore may not be urged in defence by the subordinate who obeys the order. Secondly, it is all the more surprising because Article 8 of the Rome Statute is intended to specify and enumerate through an exhaustive list the war crimes falling under the ICC jurisdiction. Given this specificity of Article 8, one fails to see under what circumstances the order to commit one of the crimes listed therein may be regarded as being not manifestly unlawful, i.e. if nothing else, it would be 'manifest' in the text of the Rome Statute itself. Therefore, if the subordinate knew the Rome Statute's provisions, then the illegality of any order to commit a war crime as defined in the Statute would *ipso facto* be manifest to him. Of course, the issue may be clouded by a mistake of fact, but the Statute already provides for defences based on this principle.

On this score, therefore, Article 33 must be faulted as marking a retrogression with respect to existing customary law.

C Could Retrogressions in the Rome Statute Jeopardize Existing International Law?

If the above propositions are correct, it follows that in various areas of substantive international criminal law the Rome Statute constitutes a retrogression. Will this affect current international law?

The draughtsmen of the Statute seem to have been alert to this danger, for they formulated a few provisions designed to leave existing law unaffected. First of all, Article 10 provides that: 'Nothing in this Part [Part II, on Jurisdiction, Admissibility and Applicable Law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.' Secondly, Article 22 (on *nullum crimen sine lege*), provides in paragraph 3 that: 'This Article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.' Thus, the Statute itself seems to postulate the future existence of *two possible regimes or corpora of international criminal law*, one established by the Statute and the other laid down in general international criminal law. The Statute also seems to presuppose the partial coincidence of these two bodies of law: they will probably be similar or identical to a very large extent, but there will be areas of discrepancy.

Is there a way of creating a bridge between the two regimes? Clearly, the Court will have to give pride of place to the Statute, as is provided in Article 21, which states that only 'in the second place' can the Court apply 'where appropriate, applicable treaties and principles and rules of international law, including the established principles of international law of armed conflict'. Hence, in case of discrepancy, the Court is bound to give precedence to the rules of criminal law established in the Statute.

While no doubt in some grey areas where the Statute is not explicit or does not regulate matters, general international law will be relied upon by the Court, it remains true that the restrictive attitude taken at Rome in many provisions of substantive

criminal law might have adverse consequences on general international law. The gradual development of a Court's case law based on that restrictive attitude might in the long run be conducive to a gradual narrowing of the scope of general principles and rules. This, no doubt, would constitute a serious setback. Moreover, national courts — as well as the ICTY and ICTR — might be tempted to rely on the ICC's restrictive provisions as codifying existing international law.

4 Procedural Law

A Complementarity

Preambular paragraph 10 of the Statute as well as Articles 1, 17 and 18 lay down the principle that the ICC is complementary to national criminal courts. These provisions create a presumption in favour of action at the level of states. In other words, the ICC does not enjoy primacy over national courts but should only step in when the competent domestic prosecutors or courts fail, or are unwilling or unable to act. The Rome Statute makes it clear that states' judicial authorities have the primary responsibility of prosecuting and punishing international crimes. This should be their normal task, and the ICC can only deal with cases where national judicial systems do not prove to be up to this assignment.

To have provided for this sort of complementarity is in many respects a positive step. Plainly, it falls primarily to national prosecutors and courts to investigate, prosecute and try the numerous international crimes being perpetrated in many parts of the world. First of all, those national institutions are in the best position to do justice, for they normally constitute the *forum conveniens*, where both the evidence and the alleged culprit are to be found. Secondly, under international law, national or territorial states have the right to prosecute and try international crimes, and often even a duty to do so. Thirdly, national jurisdiction over those crimes is normally very broad, and embraces even lesser international crimes, such as sporadic and isolated crimes, which do not make up, nor are part of, a pattern of criminal behaviour. Were the ICC also to deal with all sorts of international crimes, including those of lesser gravity, it would soon be flooded with cases and become ineffective as a result of an excessive and disproportionate workload. To a certain extent, this has already occurred at the ICTY and has necessitated the *withdrawal* of indictments of minor individuals in the political-military hierarchy.¹⁸

It is therefore quite appropriate that the ICC should intervene only when national institutions fail to do so.

¹⁸ See, for example, the *Order granting leave for withdrawal of charges against Govedarica, Gruban, Janjić, Kostić, Paspalj, Pavlič, Popović, Predojević, Savić, Babić and Spaonja* issued by Judge Riad on 8 May 1998: '... Considering the submission of the Prosecutor that the increase in the number of arrests and surrenders of accused to the custody of the International Tribunal has compelled her to re-evaluate all outstanding indictments *vis-à-vis* the overall investigative and prosecutorial strategies of the Office of the Prosecutor ... Considering that the named accused could appropriately be tried in another forum, such as a State forum ...'

However, complementarity might lend itself to abuse. It might amount to a shield used by states to thwart international justice. This might happen with regard to those crimes (genocide, crimes against humanity) which are normally perpetrated with the help and assistance, or the connivance or acquiescence, of national authorities. In these cases, state authorities may pretend to investigate and try crimes, and may even conduct proceedings, but only for the purpose of actually protecting the allegedly responsible persons.

This danger is all the more serious because the principle of complementarity also applies to *third states*, i.e. *states that are not parties to the Statute*. Under Article 18(1) all states parties, as well as ‘those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned’, must be notified by the Prosecutor that he intends to initiate an investigation upon referral of a state or intends to proceed with an investigation initiated *proprio motu*. Furthermore, although no notification is necessary in case of referral by the Security Council under Article 13(b), any state having jurisdiction over the crimes which form the object of the referral is entitled to inform the Prosecutor that it is investigating or prosecuting the case (this proposition can be logically inferred from Article 17). All this entails that any third state having jurisdiction over the crimes may invoke the principle of complementarity, thus obliging the Prosecutor to defer to the state’s authorities. True, for all these cases Article 17 of the Court’s Statute envisages a range of safeguards designed to quash any attempt made by national authorities *de facto* to shield the alleged culprits. One may however wonder whether the monitoring by the ICC of such state attempts to escape its jurisdiction will be sufficiently effective and thorough to ensure that international justice is done.

By the same token, one might wonder whether the ICC may act efficiently to preserve the evidence whenever it might appear that national authorities are trying to evade international justice: Are the provisions of Article 18(6)¹⁹ sufficient when one is faced with a state bent on shunning international jurisdiction and therefore unwilling to cooperate in the search for and collection of evidence, or even willing to destroy such evidence to evade justice?

B Preconditions to the Exercise of Jurisdiction

The preconditions to the exercise of the jurisdiction of the ICC are laid down in Article 12(2) of the Rome Statute.²⁰ This article — like so much else, the product of intense

¹⁹ Article 18(6) provides, ‘Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.’

²⁰ Article 12 (‘Preconditions to the exercise of jurisdiction’) reads:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

negotiations and compromise — has its pros and cons. On the one hand, it is meritorious in allowing that the nationals of a state which did not sign the treaty may be internationally prosecuted for crimes committed on foreign soil. An important class of persons falling under this category would be soldiers serving abroad; for instance, troops of one country committing atrocities in another country. It is right that they should be prosecutable under the Statute.

It would be fallacious to consider that in this way the Rome Statute imposes obligations upon states not parties (for example, the United States, if — as anticipated — it never signs and ratifies the treaty). Nationals of third states perpetrating crimes at home are, of course, not subject to the ICC's jurisdiction. Admittedly, if they commit crimes abroad, they may become amenable to the Court's jurisdiction if the territorial state has accepted the Court's jurisdiction. However, the territorial state would have jurisdiction over the crimes in any event — territorial jurisdiction over crimes is firmly established in international law, alongside the active and passive personality principles. The ICC would simply exercise its jurisdiction in lieu of the territorial state. Hence, the Rome Statute does not impose obligations upon third states. It simply authorizes the Court to exercise its jurisdiction with regard to nationals of third states, whenever these nationals may have committed crimes in the territory of a state party (or of a state accepting *ad hoc* the exercise of the Court's jurisdiction). Thus the Rome Statute authorizes the ICC to substitute itself for a consenting state, which would thus waive its right to exercise its criminal jurisdiction. This does not appear to be contrary to international law.

However, a serious problem may arise whenever a third state has made a treaty with a state party or a state accepting *ad hoc* the Court's jurisdiction, whereby the latter state either waives its criminal jurisdiction over crimes committed on its territory by nationals of the former state or undertakes to extradite those nationals to the other state. In such cases there obviously arises for the state party to the Rome Statute (or a state having accepted *ad hoc* the Court's jurisdiction) a conflict between inconsistent international obligations. The Rome Statute only partially takes into account and makes provision for such conflicts. In Article 90(4–6) it envisages the possibility that extradition may be requested, under an international treaty, by a state not party to a state party, and this request for extradition may be in conflict with a request for surrender from the ICC. For such cases the Rome Statute does not impose upon states parties the obligation to give priority to the Court's request for surrender from the Court: Article 90(6) simply lists a set of factors that the requested state must take into account when deciding on the matter. This regulation would seem to be

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- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.
- The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

questionable on three counts: first, it does not take into account the possibility that under its national legislation the requested state may be obliged to waive its jurisdiction without even triggering the extradition process; secondly, it does not envisage the case of a requested state that, while not a party to the Rome Statute, has accepted the Court's jurisdiction *ad hoc*; thirdly, it does not impose upon the requested state the obligation to give priority to the Court's request for surrender.

Let us now move to an even more questionable side of the rule on the preconditions to the exercise of jurisdiction, namely Article 12(2). The major flaw of this provision appears whenever one is faced with crimes such as genocide, war crimes in a civil war, or crimes against humanity, that are normally committed at the instigation or with the support or acquiescence of the national authorities. If a state on whose territory such crimes are perpetrated by its own nationals has not accepted the Court's jurisdiction at the time the crimes are committed, the ICC will be impotent to act. There is however an exception: this is when the Security Council decides to refer the 'situation' to the Prosecutor pursuant to Article 13(b), in which case the state's acceptance of the Court's jurisdiction is not required. This is the 'sledgehammer' of the ICC. In effect, the mechanism by which the Security Council established the ICTY and ICTR is imported into the ICC. This mechanism may prove to be the most effective to seize the Court whenever situations similar to those in the former Yugoslavia and Rwanda occur.

C The Trigger Mechanisms and in Particular the Role of the Prosecutor

It is well known that two tendencies clashed at the Rome Conference: some states (including the United States, China and others) insisted on granting the power to set investigations and prosecutions in motion to states and the Security Council only; other states (the group of the so-called like-minded countries) were bent on advocating the institution of an independent Prosecutor capable of initiating *proprio motu* investigations and prosecutions. The clash was between sovereignty-oriented countries and states eager to implement the rule of law in the world community.

The final result was a compromise. First of all, the right to carry out investigations and prosecute was not left to the authorities of individual states or entrusted to a commission of inquiry or similar bodies; this option, which was undoubtedly open to the Rome conference, was discarded. Instead, a Prosecutor was envisaged.

Once they decided to set up a Prosecutor, states had two options: (i) the Nuremberg model, whereby the Prosecutor is an official of the state that has initiated the investigation and prosecution, and is therefore designated by that state and remains throughout under its control; (ii) the ICTY and ICTR model, whereby the Prosecutor is a totally independent body. Fortunately the latter option was chosen. As an independent and impartial body, the Prosecutor was granted the power to investigate and prosecute *ex officio*, although subject to significant restrictions.

Secondly, the power to initiate investigations was conferred both on the Prosecutor (subject to judicial scrutiny) and on states, as well as the Security Council. In short, a

three-pronged system was envisaged:

- (a) investigations may be initiated at the request of a state, but then the Prosecutor must immediately notify all other states, so as to enable those which intend to exercise their jurisdiction to rely upon the principle of complementarity.
- (b) investigations may be initiated by the Prosecutor, but only subject to two conditions: (i) a Pre-trial Chamber must authorize them and (ii) they must be notified to all states.
- (c) investigations may be initiated at the request of the Security Council, and in this case the intervention of the Pre-trial Chamber is not required, nor is notification to all states.

Clearly, this is a balanced system, which takes into account both the interests of states and the demands of international justice. In addition, as has been rightly pointed out,²¹ the Prosecutor acts both as an ‘administrator of justice’ (in that he acts in the interest of international justice by pursuing the goal of identifying, investigating and prosecuting the most serious international crimes) and, as in common law legal orders, as a party in an adversarial system.

The best safeguard for the proper administration of international justice can be seen in a key provision of the Statute: Article 53(2). On the strength of this provision, the Prosecutor enjoys broad powers in sifting through cases initiated either by entities that may be politically motivated (states) or by a political organ (the Security Council). By virtue of Article 53(2) the Prosecutor may decide that there is not a sufficient basis for a prosecution even when the case has been initiated by a state or by the Security Council. It should be noted that under this provision the Prosecutor may conclude that a prosecution is not warranted not only because (i) there is no legal or factual basis for a warrant of arrest or a summons to issue, but also because (ii) the case is inadmissible under Article 17, as a state which has jurisdiction over the crimes is investigating or prosecuting it, and — what is even more important — if (iii) ‘a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime’.

This rule is of crucial importance, for it assigns to the Prosecutor the role of an independent and impartial organ responsible for seeing to it that the interests of justice and the rule of law prevail. The Prosecutor may thus bar any initiative of states or even any deferral by the Security Council which may prove politically motivated and contrary to the interests of justice. In short, ‘prosecutorial discretion’ has been enshrined in the Statute (subject to review by the state making a referral and by the Pre-trial Chamber); an important principle, since not every crime which technically falls within the ICC’s jurisdiction should be prosecuted before the Court.

One might object that this balanced and well-justified relation between political entities (states and the Security Council) and an ‘administrator of justice’ such as the Prosecutor may be thwarted whenever the Security Council decides, under Article 16

²¹ See on this point the apposite remarks of Zappalà, ‘Il procuratore della Corte Penale Internazionale: luci ed ombre’, 82 *Rivista di diritto internazionale* (1999) 39 *et seq.*

of the Rome Statute, to request the Prosecutor to defer any investigation or prosecution for a period of 12 months (or a shorter period). At first sight this provision seems to allow a political body to interfere grossly with a judicial body. However, a sound interpretation of this provision leads to the conclusion that the powers of the Security Council are not unfettered. The request may only be made by a resolution adopted under Chapter VII of the United Nations Charter. Hence, the Security Council may request the Prosecutor to defer his activity only if it explicitly decides that continuation of his investigation or prosecution may amount to a threat to the peace. The Prosecutor is undoubtedly bound by that request, but the whole context of the Statute and the reference in Article 16 to Chapter VII of the United Nations Charter seem to rule out the possibility that that request be arbitrary.²² Moreover, the Security Council must 'show its hand' if it wishes to stay an ICC proceeding — and continue to show its hand every 12 months — and this visibility creates accountability.

D *The Role of the Judges*

The Rome Conference has rightly opted for a system that ensures that the 18 Judges making up the Court be and remain independent of any state: under Article 36(9)(a) they are elected for nine years and may not be re-elected.

Nevertheless, the Statute seems to evince a certain mistrust in the Judges, despite the safeguard that, to qualify for that position, they must not only be professionally competent but also of high moral character, impartiality and integrity (Article 36(3)(a)). First of all, the Statute includes provisions that are unusual in a basic text and are normally laid down in sub-statutory provisions (e.g. the Rules of Procedure): (i) detailed provisions envisage the disqualification of Judges (Article 41); (ii) similarly, the Statute regulates in detail the removal of Judges from office (Article 46); and (iii) disciplinary measures are provided for (Article 47).

Secondly, the Rules of Procedure and Evidence may only be proposed by Judges and must be adopted by the Assembly of the states parties (Article 51). It appears likely that this was a reaction against the ICTY and ICTR precedents, where the Judges were, in a sense, both rule-makers and decision-makers. There were good reasons, however, for allocating this role to the Judges of the *ad hoc* tribunals and for the extensive amendments they made in discharging this role. The ICTY's and ICTR's Rules of Procedure and Evidence constituted the first international criminal procedural and evidentiary codes ever adopted and they had to be amended gradually to deal with a panoply of contingencies which were not anticipated by the framers of their Statutes.

Under the ICC Statute, such judicial rule-making is impossible, or at least only marginally possible; under Article 51(3):

After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

²² *Ibid.*

Nevertheless, what the Statute does not rule out — and indeed cannot rule out — is the emergence of a doctrine of precedent (*stare decisis*) among the Judges of the Court, whereby they follow each other's decisions and practice in the interests of a coherent jurisprudence. This is likely to emerge, as occurred at the ICTY and ICTR, and should be welcomed. In this respect, attention should be drawn to Article 21(2), which provides that 'the Court may apply principles and rules of law as interpreted in its previous decisions', and which clearly favours this development of precedent.

E Cooperation of States

1 General

Plainly, in the case of the ICC as in that of the ICTY and ICTR, state cooperation is crucial to the effectiveness of judicial process. The decisions, orders and requests of international criminal courts can only be enforced by others, namely national authorities (or international organizations). Unlike domestic criminal courts, international tribunals have no enforcement agencies at their disposal: without the intermediary of national authorities, they cannot execute arrest warrants; they cannot seize evidentiary material, nor compel witnesses to give testimony, nor search the scenes where crimes have allegedly been committed. For all these purposes, international courts must turn to state authorities and request them to take action to assist the courts' officers and investigators. Without the help of these authorities, international courts cannot operate. Admittedly, this holds true for all international institutions, which need the support of states to be able to operate. However international criminal courts need the support of states more, and more urgently, than any other international institution, because their actions have a direct impact on individuals who live on the territory of sovereign states and are subject to their jurisdiction. Trials must be expeditious; evidence must be collected before it becomes stale and the court must be able to summon witnesses to testify at short notice.

I shall make a second general point. In deciding upon how to regulate the cooperation of states with an international criminal court, the framers of the Court's Statute had to choose between two possible models. First, the inter-state model, whereby the relations between states and the international court are shaped on the pattern of inter-state judicial cooperation in criminal matters. Under this model the Court has no superior authority over states except for the legal power to adjudicate crimes perpetrated by individuals subject to state sovereignty. Apart from this power, the Court cannot in any way force states to lend their cooperation, let alone exercise coercive powers within the territory of sovereign states.

The second model could be termed 'supra-state'. It departs from the traditional setting of state to state judicial cooperation, where by definition all cooperating states are on an equal footing. This more progressive model presupposes that the international judicial body is vested with sweeping powers not only *vis-à-vis* individuals subject to the sovereign authority of states, but also towards states themselves. Under this model the international court is empowered to issue binding orders to states and, in case of non-compliance, may set in motion enforcement

mechanisms. What is no less important, the international court is given the final say on evidentiary matters: states are not allowed to withhold evidence on grounds of self-defined national interests or to refuse to execute arrest warrants or other courts' orders. In short, the international court is endowed with an authority over states that markedly differentiates it from other international institutions. The ICTY and ICTR — with the Chapter VII authority of the Security Council behind them — follow this coercive, 'supra-state' model.

It is interesting to note, as a third general point, that there exists a marked difference between the ICC and the two *ad hoc* tribunals. The law of the *ad hoc* international tribunals as it concerns state cooperation is largely judge-made. Article 29 of the ICTY Statute — and the corresponding article, Article 28 of the ICTR Statute — simply provide in a general way that 'States shall cooperate with the International Tribunal' and 'shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber'. However, the specific practice as it relates to arrest warrants and orders for transfer of an accused, requests for assistance, *subpoenas* — to whom they may be addressed, the required breadth and specificity — the penalties available for a non-cooperative state, and many related questions, were left to the Judges to define. This happened in due course in the *Blaskić* case when a Trial Chamber issued *subpoenas* to Croatia and one of its senior ministers; a decision which was later overturned on appeal, confining *subpoenas* to individuals acting in a private capacity, while allowing binding orders to be directed to states.²³

In contrast to the ICTY and ICTR, which are creatures of the Security Council moulded into their present shape in large part by the Judges, states have had the opportunity, in drawing up the ICC Statute, to express themselves, in no uncertain terms, about how they wish international justice to work, and they have adopted a mostly state-oriented approach.

2 The Largely State-oriented Approach Taken in the Rome Statute

Four points are relevant in this regard.

First, the Statute does not specify whether the taking of evidence, execution of summonses and warrants, etc. is to be undertaken by officials of the Prosecutor with the assistance, when needed, of state authorities, or whether instead it will be for state enforcement or judicial authorities to execute those acts at the request of the Prosecutor. Judging from the insistence in the Statute on the need to comply with the requirements of national legislation, however, the conclusion would seem to be warranted that the framers of the Statute intended the latter.

Secondly, in the event of failure of states to cooperate, Article 87(7) provides for the means substantially enunciated by the ICTY in the Appeals Chamber decision in *Blaskić (subpoena)*, namely, 'the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'. However, the ICC could arguably have

²³ Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, Appeals Chamber.

gone further and articulated the consequences of a Court's finding of non-cooperation by a state. The Statute could have specified that the Assembly of States Parties might agree upon countermeasures, or authorize contracting states to adopt such countermeasures, or, in the event of disagreement, that each contracting state might take such countermeasures. In addition, it would have been appropriate to provide for the possibility of the Security Council stepping in and adopting sanctions even in cases where the matter had not been previously referred by this body to the Court: one fails to see why the Security Council should not act upon Chapter VII if a state refuses to cooperate and such refusal amounts to a threat to the peace, even in cases previously referred to the Court by a state or initiated by the Prosecutor *proprio motu*. Of course, this possibility is not *excluded* by the ICC Statute, but it also would have been a good idea expressly to include it.

Thirdly, in case of competing requests for surrender or extradition, i.e. a request for arrest and surrender of a person, emanating from the Court, and a request for extradition from a state not party, the request from the Court does not automatically prevail. As I have already pointed out above, under Article 90(6) and (7), a state party may decide between compliance with the request from the Court and compliance with the request from a non-party state with which the state party is bound by an extradition treaty. This seems odd, for one would have thought that the obligations stemming from the Rome Statute should have taken precedence over those flowing from other treaties. Arguably, this priority would follow both from the primacy of a Statute establishing a *universal* criminal court over bilateral treaties (or multilateral treaties binding on a group of states) and from the very purpose of the Statute — to administer international justice in the interest of peace. It seems instead that the Statute, faced with the dilemma of international justice versus national justice, has left the option to the relevant states.

Fourthly, as regards the protection of national security information, the Statute substantially caters to state concerns by creating a national security exception to requests for assistance. Article 93(4) provides that 'a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security'. Admittedly, Article 72, to which this provision refers, does envisage a complex mechanism designed to induce a state invoking national security concerns to disclose as much as possible the information it wishes to withhold. This mechanism is largely based on the *Blaskić* decision of the ICTY Appeals Chamber. However, the various stages of this mechanism are turned in the Statute into formal modalities that will be cumbersome and time-consuming.²⁴ In addition, in *Blaskić* the emphasis was on the obligation of states to disclose information; only in exceptional circumstances were

²⁴ Article 72 ('Protection of national security information') establishes a three-step procedure when a State — or individual — invokes national security. Article 72 is triggered when a state is of the opinion that 'disclosure of information [requested by the Court or Prosecutor] would prejudice its national security interests'. First, cooperative means are employed to reach an amicable settlement, e.g. modification of the request, a determination by the Court of the relevance of the information sought or agreement of conditions under which the assistance could be provided. Second, if cooperative means fail, and the state

states allowed to resort to special steps for the purpose of shielding that information from undue disclosure to entities other than the Court. In Article 72 emphasis is instead laid on the right of states to deny the Court's request for assistance.

F *The Role Assigned to the Victim*

One of the merits of the ICC Statute is the role assigned to the victims of atrocities. Article 15(3) (The Prosecutor) provides that, 'Victims may *make representations* to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence' regarding the reasonableness or otherwise of proceeding with an investigation (emphasis added). Under Article 19, victims may also make submissions in proceedings with respect to jurisdiction or admissibility. What is even more important, the victims may take part in the trial proceedings. They may do so in two ways. First of all, they may set out in court their 'views' and 'concerns' on matters of fact and law. Pursuant to Article 68(3):

Where the personal interests of the victims are affected, the Court shall permit *their views and concerns* to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence. (emphasis added)

This provision is of great significance. For the first time in international criminal proceedings the victims are allowed to take part in such proceedings by expounding in court their 'views and concerns', either in person or through their legal counsel, on matters relevant to the proceedings. Although it will be for the Assembly of States Parties to define and specify the standing of the victims in the Rules of Procedure and Evidence, there is no gainsaying that this Article marks a great advance in international criminal procedure.

The second modality of victims' participation in the trial proceedings concerns the possibility for the victims to seek reparation, restitution, compensation or rehabilitation. This possibility is envisaged in Article 75(1) and (3), albeit in a rather contorted or convoluted manner. Once again, it is to be hoped that the Rules of Procedure and Evidence will duly elaborate upon this matter and adequately spell out the procedural rights of victims.²⁵

decides against disclosure, it must notify the Court or Prosecutor 'of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests'. The Court may then hold further consultations on the matter, if need be *ex parte* and/or in camera. The third step in the event that the state is found to be not complying with its obligations is for the Court to refer the matter to the Assembly of States Parties or, if the Security Council originally referred the matter to the Court, to the Security Council.

²⁵ See also Article 65(4) stating that a Trial Chamber may request additional evidence if this is required 'in the interest of the victims'. It should also be noted that Article 43(6) provides for the establishment of a Victims and Witnesses Unit, in common with the ICTR and ICTY.

These provisions allowing victims to have a role in the administration of justice before the Court are highly innovative in the context of international tribunals. No such allowance was made at Nuremberg, Tokyo, the ICTY or the ICTR. In continental civil law systems, the concept of *partie civile* is, of course, well known, but in adversarial systems — of whose procedure the four above-mentioned tribunals overwhelmingly partake — justice is administered in the form of a contest between the state, or the executive, in the shape of the Prosecutor, and the defendant, with the Judge acting as arbiter between them, and played out before the jury as trier of fact. Victims, in this system, utterly lack *locus standi*. However, the ICC differs from national, adversarial systems, in which the law courts are the permanent, indispensable components of a civilized and ordered society; the ICC, by contrast, was created in response to the fact that ‘during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity’ (Preamble). The victims of these atrocities are thus central to the notion of international criminal justice. It is therefore appropriate that their needs and demands be given voice in the ICC Statute.

G The Attempt to Weld Elements of the Inquisitorial Model into the Adversarial System

The points just made with regard to the role of victims lead me to deal, albeit briefly, with the more general question of the type of proceedings chosen at Rome, i.e. whether the trial before the ICC must follow the civil law model (the inquisitorial system) or rather the common law model (the adversarial approach).

It is clear from even a cursory examination of the Rome Statute that states have basically opted for the common law approach. No investigating judge or chamber has been instituted, and the investigations and prosecution are entrusted to the Prosecutor, to whom it falls to search for and collect the evidence and prosecute the case before the Court. In addition, one can discern in the Statute the typical feature of adversarial proceedings, namely the fact that the evidence, instead of being submitted to the court by an investigating judge, is presented in oral proceedings and exhibits tendered by each party to the trial are admitted into evidence if and when it is so decided by the Court.

Although the common law system has been basically adopted, a number of fundamental elements typical of the civil law approach have been incorporated. I shall list those which I consider the principal ones.

First of all, it is clear from the Statute that the Prosecutor is not simply, or not only, an instrument of executive justice, a party to the proceedings whose exclusive interest is to present the facts and evidence as seen by him or her in order to accuse and to secure the indictee’s conviction. The Prosecutor is rather conceived of as both a party to the proceedings and also an impartial truth-seeker or organ of justice. This is, among other things, evinced by Article 54(1)(a) whereby:

In order to establish the truth [the Prosecutor] shall extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this

Statute and, in doing so, *investigate incriminating and exonerating circumstances equally*.
(emphasis added)

Secondly, at the pre-trial stage, the Prosecutor normally acts under the scrutiny of a Pre-trial Chamber, which to a large extent resembles the *Giudice per le indagini preliminari* (Judge dealing with preliminary matters) provided for in the 1989 Italian Code of Criminal Procedure (that basically opts for the adversarial system, subject however to some major concessions to the inquisitorial approach). If the Prosecutor decides to initiate investigations *proprio motu*, pursuant to Article 15(3), he needs the Chamber's authorization to conduct such investigation. Furthermore, any time a state having jurisdiction over a crime requests the Prosecutor to defer to the state jurisdiction, a Pre-trial Chamber may nevertheless, upon request of the Prosecutor, authorize the investigation (Article 18(2)). Similarly, the Chamber may authorize the Prosecutor to take steps for the purpose of preserving evidence when the Prosecutor has deferred an investigation to a state (Article 18(6)). The Pre-trial Chamber is also responsible for deciding upon challenges to the admissibility of a case or to the jurisdiction of the Court, prior to the confirmation of the charges (Article 19(6)).

Thirdly, as pointed out above, victims may take part in the proceedings, even at the pre-trial stage, and seek compensation or reparation. Thus, as in civil law systems, civil proceedings designed to claim reparation for the injuries caused by a crime are made part and parcel of criminal proceedings (designed to establish whether the accused is liable for the crime).

Fourthly, at the trial stage the Trial Chambers are entrusted with a pro-active role — typical of civil law systems— with regard to evidence. Pursuant to Article 64(5)(d), a Chamber may 'order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties'.

Fifthly, the accused has the right, during trial, 'to make an unsworn oral or written statement in his or her defence' (Article 67(1)(h)). This, again, is a departure from the common law system and from the ICTY and ICTR Statutes and Rules of Procedure and Evidence (where no provision is made for the accused to be confronted by the witnesses; the accused may take part in the proceedings only *qua* witness in his own behalf and only if he decides to testify during the defence case, after all the prosecution evidence has been heard). This regulation of the Rome Statute seems to be a move towards the civil law system.

Having stressed the points of convergence between the two systems, I should add that in many areas the Statute does not provide any clue as to whether the proceedings will be adversarial or inquisitorial. Thus, for instance, it does not indicate whether the order of presentation of evidence will be that typical of common law systems (examination-in-chief, cross-examination and re-examination). Nor does the Statute indicate whether appeals will follow the continental or the common law system, i.e. whether appellate proceedings will entail a complete rehearing on facts and law, or cassation on a point of law, or will be confined to the judicial review of specifically alleged grave errors of fact or law.

5 Concluding Remarks

As a multilateral treaty,²⁶ the Rome Statute, in spite of its unique features as well as its flaws, marks an indisputable advance in international *procedural* criminal law. It establishes a permanent and complex mechanism for international justice which by and large seems well balanced. In particular, the three-pronged system set up in Rome for triggering the Court's action, if somewhat cumbersome, strikes a fairly satisfactory balance between states' concerns and the demands of international criminal justice. In addition, the role assigned to victims in international criminal proceedings before the Court is extremely innovative; it is indicative of the meritorious acceptance of a fundamental feature of civil law systems within a procedure basically grounded in the adversarial system typical of common law countries. By contrast, the framers of the Rome Statute were not sufficiently bold to jettison the sovereignty-oriented approach to state cooperation with the Court and opt for a 'supra-national' approach. Instead of granting the Court greater authority over states, the draughtsmen have left too many loopholes permitting states to delay or even thwart the Court's proceedings.

The Rome Statute appears to be less commendable as far as *substantive* criminal law is concerned. True, many crimes have been defined with the required degree of specificity, and the general principles of criminal liability have been set out in detail. Furthermore, the notion of war crimes has rightly been extended to offences committed in times of internal armed conflict. In addition, much progress has been made in the field of penalties, for capital punishment has been excluded.²⁷ However, in many areas of substantive criminal law the Statute marks a retrogression with respect to existing international law. This applies in particular to war crimes (in spite of the progress just underlined). Among the various means of restricting jurisdiction over such crimes, the following appear in the Statute: (i) the exclusion of the use of modern weapons that are inherently indiscriminate or cause unnecessary suffering from this category of crimes; (ii) the fact that allowance has been made for superior orders to relieve subordinates of their responsibility for the execution of orders involving the commission of war crimes; (iii) the exclusion of liability for reckless commission of international crimes (as pointed out above, in practice this exclusion is only relevant with respect to war crimes); (iv) the fact that Article 124 allows states to declare, upon becoming parties to the Statute, that the Court's jurisdiction over war crimes committed by their nationals or on their territory shall not become operative for a

²⁶ See Section 2 *supra*.

²⁷ It is worth noting that the ICC Statute provides for a maximum penalty of life imprisonment of a person convicted of offences under the Statute; the death sentence is not envisaged. This represents an advance, in humanitarian terms, on the Nuremberg and Tokyo Tribunals' imposition of the death penalty and is in line with the Statutes of the ICTY and ICTR and current international human rights law, which does not endorse capital punishment (see, e.g. Article 6(2), (4) and (5) of the International Covenant on Civil and Political Rights).

period of seven years.²⁸ One is therefore left with the impression that the framers have been eager to shield their servicemen as much as possible from being brought to trial for, and possibly convicted of, war crimes.

In sum, a tentative appraisal of the Rome Statute cannot but be chequered: in many respects the Statute marks a great advance in international criminal law, in others it proves instead faulty; in particular, it is marred by being too obsequious to state sovereignty.

The diplomat and historian C.J. Burckhardt once stated that the 1899 Hague Conventions constituted a 'mis-print in world history'. Certainly, he was wrong. It is equally certain that, for all its flaws, the Rome Statute, far from amounting to a 'mis-print', represents a luminous page in world history.

It is to be hoped that the ICC will be established as soon as possible. One of the keys to its success, it is submitted, lies in the choice and election of highly professional and absolutely independent persons for the positions of Prosecutor and Judges. The election of persons of great competence and integrity may ensure that the ICC will become an efficient body, capable of administering international criminal justice in such a manner as to attract the trust and respect of states, while fully realizing the demands of justice. Furthermore, it will be crucial for the Court to be provided with adequate financial means so as to be able to work efficiently. Thirdly, the provisions on state cooperation with the Court should be clarified and strengthened so as to leave no loopholes available to those states which are unwilling to allow the Court to exercise criminal jurisdiction over persons under their control. Fourthly, the Rules of Procedure and Evidence to be drafted should enhance certain significant elements of civil law systems so as to weld into a fundamentally adversarial system the best features of the inquisitorial model.

In short, it is imperative that all states and individuals concerned strive not only to make the ICC a living reality, but also to improve its profile as much as possible. Now more than ever is a permanent international criminal court needed to curb man's tendency to annihilate his neighbour, mistaking him for his own shadow.²⁹

²⁸ Article 124 ('Transitional Provision') reads, 'Notwithstanding article 12 paragraph 1, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. . . .'

²⁹ C. G. Jung, describing a person's shadow as 'his own worst danger', wrote: 'It is everybody's allotted fate to become conscious of and learn to deal with this shadow . . . If, for instance, the French Swiss should assume that the German Swiss were all devils, we in Switzerland could have the grandest civil war in no time . . .', 'The Fight with the Shadow' in *Essays on Contemporary Events* (1946), at 6–7.