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Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court

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Cassese, Antonio, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*. Oxford: Oxford University Press, 2002. 2 vols. & Materials Pp. 2018, clvi, 184 (Materials), £225.

Dörmann, Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. Cambridge: Cambridge University Press, 2003. Pp. 498, lv, index, £70.

Lee, Roy S. (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*. The Hague: Kluwer Law International, 1999. Pp. 639, xxxv, Index. \$194.50, €166.50.

Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*. Baden-Baden: Nomos, 1999. Pp. 1295, €197.

1 Introduction: Four Commentaries at the ICC Cradle

The four works under review are very different in nature, though they have one thing in common in addition to the topic itself. They constitute invaluable reference tools for the international criminal lawyer dealing with the International Criminal Court, written by the most respected authorities in the field. Of course, it is hardly possible for anyone to read them page by page. Rather, they provide the materials and information necessary for both practitioners and researchers to understand and interpret the rules of the Rome Statute. The great majority of the contributors to these

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huge volumes are insiders, both from governments and NGOs, or have served various functions in the International Criminal Tribunals established by the Security Council. In addition, these works provide an almost complete account of the Court from the perspective of its founders, that is those men and, in this case more than in any before in history, women, who were there at the beginning of the renewal of the idea of an international criminal court in the late 1980s, and who saw its way from an idealistic proposal to institutional reality. Thus, these works also provide deep insights into the views of the ‘Court founders’: diplomats, activists, international lawyers. At a time when the US–UK-led coalition attack on Iraq has put into question the idea of something akin to the ‘rule of law’ in international affairs, these commentaries present a counter-image of international criminal law, if not international law at large: the image of a law which is slowly progressing towards institutionalization and ‘legalization’,¹ a law which is in the process of comprehensive codification and adjudication. From this viewpoint, once the institution is working, sceptics such as the United States will soon be proven wrong and will change course. One cannot help but think of the fate of the League of Nations — the institution which has been, rightly or wrongly, discredited by its impotence in the face of the World War waged by Nazi Germany and Imperial Japan, and which is largely cited as a warning example for the future of the United Nations, and even international law as a whole.² But, as we shall see, the reader asks too much of the founding generation if she expects reflections on these problems in the volumes at hand. Rather, the founding generation is intent on transforming its vision into reality, that is, legalizing the ‘atrocities regime’ in as comprehensive and positivist fashion, regardless of the strength of its opposition. And indeed — did it not succeed in establishing the Court against all odds?

The International Criminal Court. The Making of the Rome Statute centres on the drafting history of the Statute. Edited by Roy Lee, former Director of the Codification Division of the UN Office of Legal Affairs, this book is written by those involved in the process who consider the Statute a tremendous historical and also personal success.³ In the absence of official records, the book is intended ‘to make available an authoritative, objective account of the complex negotiations on the key provisions of the Statute’. However, this approach cannot substitute for a critical analysis, and it sometimes leads to a defensive tone, even in light of indefensible failures in the

¹ On the alleged ‘legalization’ of international relations, see, e.g., O’Connell *et al.*, ‘The Legalization of International Relations’, 96 *ASIL Proceedings* (2002) 291; Goldstein *et al.*, ‘Legalization and World Politics: A Special Issue of International Organization’, 54 *Int’l Org.* (2000).

² See, e.g., Perle, ‘United They Fall’, *The Spectator*, 3 May 2003, available at www.spectator.co.uk (visited 21 May 2003); also US President George W. Bush, Address to the United Nations General Assembly, 12 Sept. 2002, available at www.whitehouse.gov/news/releases/2002/09/20020912-1.html (visited 21 May 2003).

³ See also Triffterer, ‘Preliminary Remarks: The Permanent ICC — Ideal and Reality’, margin number (MN) 81, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* [hereinafter Triffterer Commentary], but see also *ibid.*, MN 80 (no ‘ideal solution’, but ‘a rather difficult compromise’).

substance of the agreed rules (such as the absence of chemical and biological weapons in the list of prohibited weapons).⁴

The *Commentary on the Rome Statute of the International Criminal Court* [hereinafter Triffterer Commentary], edited shortly after the Rome Conference by the Salzburg professor of criminal law Otto Triffterer, is intended to be a 'classical' commentary in the Austrian/German tradition, that is an exegesis of each and every article, article-by-article, even word-by-word. The list of contributors comprises renowned experts both from the international law and the criminal law worlds, with a particular bias towards renowned German scholars such as Albin Eser and Andreas Zimmermann. Thus, it is not surprising that a certain 'German touch' is also visible in the contributions, which often cite German language sources, even for documents, just as much as the English literature. The advantages of the commentary method are obvious: each comment focuses on the precise text of the Statute, and the contributors are forced to stick to the interpretation of the text and nothing but the text. There is a related disadvantage, though: sometimes the larger picture is lost. The 'self-contained' character of the system of rules in question is emphasized, the relationship of the ideal rule-world with the social world around it are easily underestimated, the systematic features of the legal document sometimes get lost. Provisions of a formal character receive greater attention than is appropriate. However, there are methods for working around these problems, such as broad introductory chapters and introductions. In Triffterer's commentary, we find not only a preface by Cherif Bassiouni and an introduction by Philippe Kirsch — I imagine they have spent significant amounts of the years following the Rome Conference writing prefaces, introductions and conclusions (not surprising, then, that Bassiouni quotes himself at length) — but also 'Preliminary Remarks' amounting to 34 pages by the editor on 'The Permanent International Criminal Court — Ideal and Reality'. An index would have been helpful. Written in the year after the Conference, the Triffterer commentary suffers from its very earliness, and omits important developments, such as the PrepCom and entry into force. The commentary thus provides a quasi-authentic interpretation of the Statute before reality could settle in and adapt the legal text to the real world. However, as an article-by-article commentary of an acceptable length, it is an extremely useful volume, enabling the reader to understand the meaning and impact of every word in the Rome text. Thus, one can only hope that a second edition will be published soon.

The Rome Statute of the International Criminal Court: A Commentary [hereinafter: Cassese/Gaeta/Jones Commentary] was edited by former ICTY President Antonio Cassese, Professor Paola Gaeta and John R.W.D. Jones, now Defence Counsel at the ICTY. All three editors practice or have practised at the International Criminal Tribunal for the former Yugoslavia. The book is impressive in every respect: it contains

⁴ Von Hebel and Robinson, 'Crimes within the Jurisdiction of the Court', in R. Lee (ed.), *The International Criminal Court* (1999) [hereinafter Lee, ICC] 125; Kirsch and Robinson, 'Reaching Agreement at the Rome Conference', in: A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) [hereinafter Cassese/Gaeta/Jones Commentary] 80.

more than 2000 pages, and the list of contributors reads like a ‘Who’s Who’ of International Criminal Law, including many who also contributed to the Triffler Commentary. But unlike the latter, the Cassese/Gaeta/Jones Commentary does not comment on the Statute article by article. Rather, it contains, in 10 sections, general articles on each and every aspect of the Court, from the drafting history to outlooks for the future. Issues going beyond specific articles are addressed in detail, such as developments after the adoption of the Statute, the relationship between the Statute and general international and domestic law, the impact of the Court on third states, and an overall assessment of the Court. This method leads to a familiar effect: whereas an article-by-article commentary at times loses sight of the ‘big picture’, the Cassese/Gaeta/Jones Commentary may sometimes omit the details which a commentary is intended to cover. The contribution dealing with a specific problem may be difficult to find, in spite of the extensive indexes provided. In any case, whether one regards the Commentary rather as a gigantic *Festschrift* or as a Commentary in the proper sense of the term, it is a tremendous achievement. Indeed, some of the best contributions are not related to a specific article, such as the superb, because succinct but nevertheless complete, historical introduction by Antonio Cassese, who also manages to include some information not yet generally known (such as, not unimportant from a European perspective, that the idea for the establishment of the ICTY did not originate in the United States, but with the German Foreign Minister Klaus Kinkel and the French Foreign Minister Roland Dumas⁵). Cassese also addresses the criticisms voiced against the ICTY and the ensuing ‘tribunal fatigue’, a term coined by US Ambassador David Sheffer, but concludes that the *Tadić Interlocutory Appeal* has put the question to rest.⁶ Like the other authors of the volumes, Cassese does question the underlying rationale of an international prosecution of atrocities. No doubt, the commentators were the main players in Rome and before, and theirs is not so much a critical evaluation, but the presentation and defence of their — impressive — historical record. By way of conclusion, the Commentary carries a brief ‘tentative assessment’ of the Court by the Board of Editors,⁷ a superb, though somehow oddly placed, reflection on the relationship between the international and the national legal order in the emergence of international criminal law by M. Delmas-Marty,⁸ and a rather enthusiastic five-page ‘Rausschmeißer’ by Robert Badinter.⁹ In general, the Commentary is edited with great care.

The Cassese/Gaeta/Jones Commentary benefits from the advantage of time.

⁵ Cassese, ‘From Nuremberg to Rome: International Military Tribunals to the International Criminal Court’, Cassese/Gaeta/Jones Commentary, 3, at 12 n. 28.

⁶ *Ibid.*, at 15 and n. 35. For a much more sceptical assessment of the lawfulness of the establishment of the Tribunals, see Crawford, ‘The Work of the International Law Commission’, in Cassese/Gaeta/Jones Commentary, 23, at 25: ‘arguably *ultra vires*’.

⁷ Board of Editors, ‘The Rome Statute: A Tentative Assessment’, in: Cassese/Gaeta/Jones Commentary, at 1901–1913. It remains unclear, though, whether this includes the five members of the advisory board.

⁸ Delmas-Marty, ‘The ICC and the Interaction of International and National Legal Systems’, in Cassese/Gaeta/Jones Commentary, 1915.

⁹ Badinter, ‘International Criminal Justice: From Darkness to Light’, in Cassese/Gaeta/Jones Commentary, 1931.

Published in 2002, it could already take account of the International Court of Justice judgment in the *Arrest Warrant* case, for example. It not only devotes much space to the drafting history, but also provides some historical perspective. In a brief but comprehensive contribution by Luigi Condorelli and Santiago Villalpando, the Commentary also deals with the relationship between the Court and the UN in light of the draft relationship agreement.¹⁰ The Commentary includes a brief contribution on the Post-Rome Conference Preparatory Commission, which decided important issues such as the Elements of Crimes, the Rules of Procedure and Evidence and the relationship with the United Nations.¹¹ However, one does not find comments on the attempts by the United States to amend the Statute rules concerning surrender of United States citizens and personnel.

The book *Elements of War Crimes* goes into even greater detail than Cassese/Gaeta/Jones, dealing only with the codification of war crimes in Article 8 of the Statute. This volume originated in a study by the ICRC on the relevant jurisprudence in line with the role of the ICRC as guardian of international humanitarian law. It was written by Knut Dörmann, Legal Advisor at the ICRC's Legal Division, and also includes contributions by Louise Doswald-Beck, former head of the ICRC Legal Division, and Robert Kolb, at the time researcher at the ICRC. Mr Dörmann and Mrs Doswald-Beck served as ICRC representatives at the Elements of Crimes negotiation. The Commentary deals with the Elements of Crimes negotiated after the Rome Conference which are intended to 'assist the Court in the interpretation and application' of the crimes contained in the Statute (Statute Article 9). In practice, the elements will serve as a kind of authoritative interpretation. The discussion of the precise role of the Elements of Crimes, however, is sparse.¹² The Dörmann Commentary can go into more intricate legal details than the other commentaries. It thus provides important guidance for the 'internal' development of international criminal law, e.g. its technical aspects to be applied by judges.¹³ On the other hand, the comments largely limit themselves to the presentation of the *travaux* and the relevant jurisprudence, without doctrinal debate. Thus, the commentary will prove extremely useful to practitioners, but is not intended to lead to doctrinal reinterpretations. The judicial precedents cited are not limited to the international criminal tribunals or the Nuremberg and Tokyo judgments, but also extend to human rights jurisprudence by international, European and Inter-American human rights institutions and national courts and tribunals.

Taken together, these four works draw an almost complete picture of the negotiations in Rome, the legal precedents, and the doctrinal debate on international criminal law as contained in the Rome Statute. Hardly any international institution could benefit from such an abundance of commentary and interpretation at its beginning, or even in its entire history, except probably the United Nations itself — in

¹⁰ Condorelli and Villalpando, 'Relationship of the Court with the United Nations', in Cassese/Gaeta/Jones Commentary, 219.

¹¹ Kirsch and Oosterveld, 'The Post-Rome Conference Preparatory Commission', in Cassese/Gaeta/Jones Commentary, 93.

¹² K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), at 8.

¹³ Cf. H. L. A. Hart, *The Concept of Law* (2nd ed., 1994), at 89–91.

the case of which it took quite some time before extensive commentary was published.¹⁴

2 The Founders' Account of the Drafting History

The adoption of the Rome Statute was only possible as a result of a variety of innovations in the negotiating process,¹⁵ some of which will certainly remain in place for any future such processes, for instance, NGO participation — both as such and as part of government delegations. Others may not, for example, such as the rush to commence the process of signature after adoption.¹⁶ With regard to the procedures of the conference, any reader not present in Rome will wonder about the tremendous influence of the 'Bureau' of the Conference and the more or less hierarchical way in which decision-making took place, in particular concerning the 'political' decisions on the key provisions in Part II, adopted on the final day of the conference upon a proposal of the Bureau (and not the Drafting Committee).¹⁷ It remains a diplomatic success story that the Statute was adopted in the brief time frame of the Rome Conference — in contrast to the process of codification as a whole, from 1948 to 1998 and beyond, which has been particularly long and arduous. As Philippe Kirsch, elected first ICC President in March 2003, remarks, the text prepared by the Preparatory Committee contained about 1700 unresolved issues in brackets.¹⁸ The accounts of the dramatic moments of the last days of the conference do not fail to make their impression on the reader, even in the rather dry account contained in the introduction to Lee's book.¹⁹ It is thus not surprising that, in his final remarks to the book, Conference president Giovanni Conso cannot help but give an almost triumphalist account of the atmosphere of those final hours.²⁰

All the volumes under review here describe the role of NGOs, which can hardly be overestimated, in enthusiastic terms.²¹ One might wonder, however, whether it was

¹⁴ The first commentary on the Charter, L. Goodrich and E. Hambro, *Charter of the United Nations, Commentary and Documents*, was published in 1946, in the year after the San Francisco Conference; Hans Kelsen's *The Law of the United Nations* followed four years later, in 1950.

¹⁵ For a brief summary see Lee, 'Introduction', in Lee, *ICC*, 37; Kirsch, 'The Development of the Rome Statute', in Lee, *ICC*, 451; Kirsch and Robinson, *supra* note 4, at 67. On the role of NGOs, see Pace and Schense, 'The Role of Non-Governmental Organizations', in Cassese/Gaeta/Jones Commentary, 107, who cite the Canadian Foreign Minister Axworthy for coining the term 'new diplomacy' for the coordination between governments, inter-governmental and non-governmental organizations.

¹⁶ Lee, in: Lee, *ICC*, 1, at 11.

¹⁷ *Ibid.*, at 22–23; Kirsch, *supra* note 15, at 455 *et passim*; Conso, 'Looking to the Future', in Lee, *ICC*, 471, at 472. For a more detailed account see Kirsch and Robinson, *supra* note 4, at 75–77; Pace and Schense, *supra* note 15, 105, at 134–136.

¹⁸ Kirsch, *supra* note 15, at 452.

¹⁹ Lee, *ICC*, at 24–26. See also Kirsch and Robinson, *supra* note 4, at 77.

²⁰ Conso, *supra* note 17, at 471–477.

²¹ See esp. Pace and Thieroff, 'Participation of Non-Governmental Organizations', in Lee, *ICC*, 391; Pace and Schense, *supra* note 15, at 105–143; A. Bos, 'The International Criminal Court: A Perspective', in Lee, *ICC*, 463, at 469–470.

the best editorial decision in all these cases to let NGO representatives comment on their own role. Nevertheless, they provide important insights into the functioning of the ‘new diplomacy’, which includes NGOs not only as an independent force, but ‘embedded’ into governmental delegations; indeed, often serving as representatives of small countries which were not able to set up a negotiating team of their own.²² In the words of the chief counsel of the Israeli delegation: ‘They were on nearly every meeting. They were in on everything.’²³ The NGO Coalition’s Rome report is the only account of the *travaux préparatoires* which can claim a certain completeness.²⁴ If NGOs work to give a voice to those which would otherwise be doomed to silence, this is a welcome development. If their involvement leads to the ‘hijacking’ of small states for activist agendas, this innovation might do more harm than good. However, if one expects a critical examination of this development in the volumes at hand, one will be disappointed.

Most contributors defend the solutions reached by arguing that any other solution would not have been acceptable and were thus essential to the ‘package deal’.²⁵ While this may be true, the inevitability claimed may hide the choices before the negotiators and result in defending any solution as being better than none. Thus, by examining the negotiation history from the viewpoint of the negotiators, the volumes provide tools for a critical analysis of the Statute, but do not provide such an analysis themselves. Von Hebel and Robinson remind us that the crime of ‘terrorism’ was not included in the list of crimes against humanity because it was considered not to be a crime against humanity under customary law²⁶ — an argument which seems untenable after the widespread condemnation of the attacks of September 11 as a crime against humanity. In light of the hostility of the current US Administration to the very idea of an International Criminal Court, it is also interesting to note that the United States was one of the most active participants in the negotiations, and that states went to quite some extent to accommodate US concerns — from the elaboration of elements of crimes to the threshold clause in the definition of war crimes.²⁷ In the end, however, in the words of the current President Philippe Kirsch, ‘obtaining US support at the Rome Conference would have entailed further concessions on the jurisdictional provisions, concessions which the great majority of States were clearly unwilling to accept for fear of creating a court that would be paralysed by jurisdictional hurdles’.²⁸

The gradual expansion — some would say radicalization — of the Court project is probably best visible in Elizabeth Wilmshurst’s contribution to the Lee volume on

²² See Pace and Schense, *supra* note 15, at 118.

²³ *Ibid.*, at 125.

²⁴ *Ibid.*, at 127.

²⁵ See, e.g., Lee, ICC, at 21–23; Holmes, ‘The Principle of Complementarity’, in Lee, ICC, 41, at 74; Kirsch, *supra* note 15, at 460; Kirsch and Robinson, *supra* note 4, at 75 and 87.

²⁶ Von Hebel and Robinson, *supra* note 4, at 103.

²⁷ *Ibid.*, at 87–88, 107; Kirsch and Robinson, *supra* note 4, at 81 and 90.

²⁸ Kirsch and Robinson, *supra* note 4, at 90.

jurisdiction.²⁹ While the ILC draft had envisaged mandatory ICC jurisdiction only for genocide involving states parties to both the Genocide Convention and the Statute,³⁰ states warmed up in the Ad Hoc Committee and the Preparatory Committee to the idea of ‘inherent jurisdiction’ without the possibility of opting out. Finally, two alternatives emerged: a British proposal, which provided for ‘automatic jurisdiction’ for the Court, and was predicated on the consent — either by membership of the Statute or ad hoc — of both the territorial and the custodial state; and a German proposal, which was based on a truly universal jurisdiction of the Court for the ‘core crimes’ of genocide, crimes against humanity and war crimes, even without special state consent. The rest is history — the US counter-proposal requiring the consent of both the territorial and the custodial states, the provisional agreement on the ‘Korean proposal’, which contented itself with the consent of one of the four states involved (territorial, national, custodial, victim states), the eleventh-hour compromise now enshrined in Article 12 of the Statute and in the provisional opt-out for war crimes in Article 124, and the continuing US opposition. In the Lee volume, Elizabeth Wilmshurst gives her account of the last four days in a dry, fact-like manner, but the drama of the situation remains breathtaking.³¹ It is surprising, though, that she omits, contrary to Hans-Peter Kaul in his detailed contribution to the Cassese/Gaeta/Jones Commentary,³² the remarkable meetings of the permanent members of the Security Council which almost ‘killed’ the principle of automatic jurisdiction. No doubt, the insiders have some exciting stories to tell.

3 The Rome Statute and General International Law

The relationship between the Statute and other norms of international law is not without friction. In the following, we will deal with three examples and their treatment in the commentaries under review: First, the — to date unsuccessful — attempts to codify the crime of aggression; second, the relationship of the Court to the UN, in particular the Security Council; and third, the rules of immunity which might prevent the Court from working effectively. In some comments on the coalition war against Saddam Hussein, governments and public international lawyers have avoided designating the attacks as ‘aggression’, even if some were quite comfortable in dubbing the war as contrary to the Charter law on the use of force. Thus, the question arises under what circumstances a use of force contrary to the Charter would qualify

²⁹ Wilmshurst, ‘Jurisdiction of the Court’, in Lee, *ICC*, 127.

³⁰ James Crawford, in the Cassese/Gaeta/Jones Commentary, justifies the caution of the ILC on the ground that its goal was to lure sceptical states to Rome. Crawford, ‘The Work of the International Law Commission’, in Cassese/Gaeta/Jones Commentary, 23, at 25–27. See also Kirsch and Robinson, *supra* note 4, at 88–89. Be that as it may, the ILC approach of what was basically an ‘Opt-in’ Court may indeed have played this role rather effectively.

³¹ Wilmshurst, *supra* note 29, at 135–139.

³² Kaul, ‘Preconditions to the Exercise of Jurisdiction’, in Cassese/Gaeta/Jones Commentary, 583, at 596–605, esp. at 602–603. However, Kaul cannot resist leading again the struggle for universal jurisdiction, see *ibid.*, at 599 *et passim*.

as aggression. By allowing the Security Council to refer situations to the Court and to defer, at least temporarily, others, the Statute intersects with the UN Charter, but the relationship of the Charter to the Statute is not entirely clear. When dealing with immunities, the Statute relates to an area of general international law which has recently been at the centre of the controversies. The apparent contradiction between the 'irrelevance of official capacity' pursuant to Article 27 of the Statute³³ and immunity agreements recognized by Article 98 of the Statute also needs some clarification.

A 'Aggression' — or 'Peace through Justice'?

As James Crawford reminds us in his contribution to the Cassese/Gaeta/Jones Commentary, the lack of a definition of aggression held the whole idea of an international criminal court hostage for a long time.³⁴ Giorgio Gaja opens his contribution with a statement of the basic problem: 'Political considerations generally get in the way of repression'.³⁵ He is certainly correct when he asserts that the Statute has confirmed that aggression is, in principle, a crime, and allows for national prosecutions.³⁶ But can a conduct be regarded as criminal if there exists neither a generally agreed definition nor a realistic means of repression? In the Lee volume, Rome Conference president Giovanni Conso justly wonders: 'But what is aggression?'³⁷ In spite of maintaining, in Article 5, that a 'war of aggression' is a crime, the resolution is not very helpful as a guide to a definition, particularly because it is subject to opt-ins or opt-outs by the Security Council, which seem unwarranted for the definition of a crime. In a succinct and informative manner, Andreas Zimmermann argues in the Triffterer Commentary³⁸ that neither the General Assembly's definition of aggression,³⁹ nor customary law have so far found a satisfactory solution. In particular, the question of the distinction between an illegal use of force and a criminal 'war of aggression' remains unresolved. Concerning the related distinction between the terms 'aggression' and 'war of aggression', Zimmermann relies on Article 5 of the GA definition of aggression and the Friendly-Relations Declaration.⁴⁰ A certain distinction of degree seems indeed warranted. Thus, Resolution 3314 includes the 'action of a State in allowing its territory . . . to be used . . . for perpetrating an act of aggression' in its definition of 'acts of aggression', but it

³³ Article 27 para. 2 reads: 'Immunities . . . which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

³⁴ Crawford, *supra* note 30, at 24.

³⁵ Gaja, 'The Long Journey towards Repressing Aggression', in Cassese/Gaeta/Jones Commentary, 427.

³⁶ *Ibid.*, at 432; but see J. Crawford, ILC's 2360th meeting, *YbILC*, vol. I (1994) 221.

³⁷ Conso, *supra* note 17, at 475.

³⁸ Zimmermann, in Triffterer Commentary, Art. 5 MN 19.

³⁹ Definition of Aggression, GA Res. 3314, 14 Dec. 1974, UN Doc. A/RES/3314 (XXIX), Annex.

⁴⁰ Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 Oct. 1970, Annex, comment on principle 1, para. 2: 'A war of aggression constitutes a crime against peace'.

seems obvious that support of aggression committed by others only amounts to participation in the crime.

The debate concerning the Iraq war is a case in point. The narrow definition of aggression currently debated in the Preparatory Commission⁴¹ demands for the crime of aggression a ‘flagrant violation of the Charter’. But where is the borderline? Does the lack of a Security Council authorization for the US/UK invasion of Iraq constitute a ‘flagrant’ or just an ‘ordinary’ Charter violation? And how to assess the claims advanced by the two governments that their actions were justified under the existing resolutions?⁴² What about ‘humanitarian interventions’?⁴³ In the Trifflerer Commentary, Lionel Yee and Andreas Zimmermann argue that Article 5 paragraph 2 of the Statute was drafted with a prior designation by the Security Council in mind.⁴⁴ But, as Yee adds in a footnote, Article 39 extends only ‘primary’ responsibility to the SC, and thus need not be understood in the sense of an exclusive competence of the Council to determine the occurrence of aggression.⁴⁵ As Gaja remarks in the Cassese/Gaeta/Jones Commentary,⁴⁶ the designation under Article 39 Charter relates to the Chapter VII regime, whereas the Statute deals with *individual* criminal responsibility. Besides, if Security Council assent were required, the permanent members would be able to shield their leaders from prosecution.⁴⁷ In addition, the requirement of an explicit Security Council determination might prevent the Council from designating any attack an aggression, which it is reluctant to do anyway.⁴⁸

Remarkably, none of the authors in these volumes questions in earnest the very desirability of the inclusion of aggression in the jurisdiction of the Court.⁴⁹ After Kosovo and Iraq, one may have serious doubts in this regard — not so much for the purpose of shielding ‘well-meaning’ aggressors from prosecution, but for the nature of the international system, in which superpowers would not accept being prosecuted for waging war in the alleged interest of ‘national security’. In addition, one may also be concerned that the consideration of issues of *jus ad bellum* might render difficult the acceptance of the Court’s impartiality when dealing with *jus in bello*. For the founders,

⁴¹ The Discussion paper proposed by the Coordinator, Working Group on the Crime of Aggression, 11 July 2002, Doc. PCNICC/2002/WGCA/RT.1/Rev.2, requires for the crime a ‘flagrant violation of the Charter’.

⁴² Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations, 21 Mar. 2003, UN Doc. S/2003/351; Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations, 21 Mar. 2003, UN Doc. S/2003/350.

⁴³ Gaja, *supra* note 35, at 436. On the ‘thin red line’ between legality and the Kosovo intervention, see Simma, ‘NATO, the UN, and the Use of Force: Legal Aspects’, 10 *EJIL* (1999) 1, at 22.

⁴⁴ See Yee, ‘The International Court and the Security Council: Articles 13(b) and 16’, in Lee, *ICC*, 143, at 144–145; Zimmermann, in Trifflerer Commentary, Article 5 MN 21, 28, referring to the ILC and US proposals.

⁴⁵ Yee, *supra* note 44, at 145 note 9.

⁴⁶ Gaja, *supra* note 35, at 433.

⁴⁷ Similarly *ibid*, at 434; Yee, *supra* note 45, at 147.

⁴⁸ According to Gaja, *supra* note 35, at 434, the SC only once designated a military attack an aggression, in Res. 387 (1976), condemning ‘South Africa’s aggression against ... Angola’.

⁴⁹ But see Board of Editors, *supra* note 7, at 1904.

however, the crime of aggression remains the cornerstone of their vision of 'peace through justice'. In this vision, international criminal law is beyond a simple cost/benefit analysis. Be that as it may, the almost indefinite deferral of the codification of the crime raises the probability that it will not be operational for a long time to come.⁵⁰

B *The Potential for Conflict between Court and Security Council*

In the interpretation of the Statute, the relationship between the United Nations, in particular the Security Council, and the ICC probably constitutes the main area of contestation. Whereas, for some, the Security Council is the guardian of legality in the international system, in its relationship with the Court, the Council rather symbolizes political intervention in an independent international judiciary. With the showdown in the Security Council over the submission of UN operations under the jurisdiction of the Court, the intricacies of this relationship have already tarnished the entry into force of the Statute.

Article 16 was already controversial at the preparatory committee and at the Rome Conference.⁵¹ Lionel Yee, in the Lee volume, is correct in pointing out that, in any case, due to the precedence of the Charter over other international agreements (Charter Articles 103 and 25), UN members are under an obligation to follow the Council rather than the Court.⁵² This does not answer the question, however, of what happens in the event that the SC acts *ultra vires*, that is, beyond the powers conferred upon it by the Charter.⁵³ In their very detailed and succinct commentary to Article 16 in the Trifflerer Commentary, Morten Bergsmo and Jelena Pejić sum up the 'mélange' between legal and political considerations as follows:

First, political considerations were given as much, if not more, weight than legal arguments in the determination of the appropriate role for the Security Council in ICC proceedings. *Secondly*, the Security Council's deferral power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict. *Thirdly*, article 16 provides an unprecedented opportunity for the Council to influence the work of a judicial body.⁵⁴

The adoption of SC Resolution 1422, which exempted UN personnel of non-member states from ICC jurisdiction for one year, confirms the primacy of the political over the legal, a primacy which was intended both by the Charter (Articles 103, 25) and the ICC Statute (Article 16). Nevertheless, the primacy should not be unlimited, but exists only within legal bounds. Contrary to the ILC proposal, which contained an automatic bar for prosecutions relating to situations under Council review, Article 16

⁵⁰ Similarly von Hebel and Robinson, *supra* note 4, at 123.

⁵¹ Yee, *supra* note 44, at 149; see also Kirsch and Robinson, *supra* note 4, at 82.

⁵² Yee, *supra* note 44, at 152 n. 31.

⁵³ On this matter, see Frowein and Krisch, in B. Simma (ed.), *Charter of the United Nations: A Commentary* (2nd ed., 2002), Introduction to Chapter VII, MN 25 (determinations are only binding 'if supported by the member States in general'); but see Delbrück, *ibid.*, Art. 25 MN 18 (no right of members to examine substantive lawfulness of binding SC decisions), with further references.

⁵⁴ Bergsmo and Pejić, in Trifflerer Commentary, Article 16 MN 7.

of the Statute only grants a temporary stay of proceedings. Accordingly, in the Triffterer Commentary, Bergsmo and Pejić insist that Article 16 applies only after charges have been brought. Hence, the Security Council cannot block the collection of information or a ‘preliminary explanation’ before the Pre-Trial Chamber’s authorization of an investigation (cf. Article 61 ICC Statute).⁵⁵ Even after the Security Council has invoked Article 16, they maintain that the Prosecutor may preserve evidence.⁵⁶ In addition, to invoke Article 16, the Council must act under Chapter VII of the Charter. What Bergsma and Pejić fail to address is the question of who is to assess whether the Council has acted within the legal limits established by Article 39 of the Charter and Article 16 of the Statute. One may also ask whether the Council may take advantage of its primacy under the Charter to circumvent the Statute.

In the Cassese/Gaeta/Jones Commentary, Luigi Condorelli and Santiago Villalpando argue that the Security Council cannot in any way affect the Statute, not by invoking Chapter VII powers, nor by referring situations to the Court under Article 13(b) which are otherwise not under its jurisdiction.⁵⁷ However, this position is far from being self-evident or required by legal logic.⁵⁸ The authors’ invocation of the principle of speciality amounts to little more than a *petitio principii*, because it disregards the primacy of the UN Charter over the Statute. Even if the Court was not by any means intended to serve as a subsidiary organ of the Council, it should be available to the Council as alternative to *ad hoc* tribunals.⁵⁹ Condorelli and Villalpando are correct to stress the latitude of the political discretion of the Council in referring situations to the Court,⁶⁰ an argument which can be extended to the deferral power under Article 16. Of course, a deferral would have to respect not only the preconditions of Chapter VII — and therefore be limited to specific instances of a threat to international peace and security or aggression⁶¹ — but also the basic principles of the jurisdiction of the Court, including its limitation to the most serious crimes affecting the international community as a whole. Condorelli and Villalpando argue that by assessing whether the Council acted *ultra vires* in deferring a case, the Court

⁵⁵ *Ibid.*, at MN 14–15.

⁵⁶ *Ibid.*, at MN 20.

⁵⁷ Condorelli and Villalpando, ‘Can the Security Council Extend the ICC’s Jurisdiction’, Cassese/Gaeta/Jones Commentary, 571, at 575 *et passim*.

⁵⁸ But see *ibid.*, at 575.

⁵⁹ But see *ibid.*, at 581, arguing that certain obligations of member States regarding enforcement may be altered or strengthened by the Council. Concerning a referral, they also argue that the Security Council powers derive from Chapter VII of the Charter, Condorelli and Villalpando, ‘Referral and Deferral by the Security Council’, in Cassese/Gaeta/Jones Commentary, 627, at 630.

⁶⁰ Condorelli and Villalpando, *supra* note 59, at 630–633. However, this argument seems to be at odds with their view that the conditions for admissibility in Articles 17 and 18 are, at least in principle, applicable to SC referrals. Condorelli and Villalpando, *supra* note 59, 627, at 637–640. Article 18, para. 1, rather points in the opposite direction.

⁶¹ By claiming that the SC has to follow international law, Condorelli and Villalpando seem to suggest that the Council cannot put aside any rule of international law, see *supra* note 57, at 579. But Articles 24 and 25 of the Charter bind the SC only to the observance of the principles of the Charter, which carefully balance the requirements of international law, on the one hand, and those of peace and security, on the other. For a thorough discussion, see, Frowein and Krisch, *supra* note 53, Intro. to Ch. VII, MN 21 *et seq.*

will have some measure of control over the Council.⁶² While this approach upholds international legality, it does not solve the difficult question of what states will do in light of the primacy of the Council pursuant to Charter Articles 25 and 103. In this regard, an involvement of the other Court in the Hague, the International Court of Justice, might be helpful.⁶³ The authors' hope that the Relationship Agreement would solve some of the issues involved⁶⁴ was never very realistic, nor is such a solution legally required.

The complicated interrelationship between the Court and Council should have led to a reciprocal reluctance to test the limits of the tension between law and politics. Regrettably, at least one Council member seems to have chosen the opposite path, not even shying away from blackmailing the rest of the international community into adopting resolutions of dubious legality.⁶⁵ The fear that Council deferral would become a threat to the judicial independence of the Court, which was expressed by the Board of Editors of the Cassese/Gaeta/Jones Commentary,⁶⁶ has thus been realized even before the Court has tried its first case.

The role of the Security Council constitutes a further limit to the founding vision of the Court, namely the idea of a criminal court which would remove certain options from the political equation by criminalizing them. This particular kind of legalization of international relations, however, would require a degree of centralization and deference to legality which seem not to be present in the international realm; the reluctance of states to use the 'permanent clause' of consent to the ICJ jurisdiction has long demonstrated this point. For the founders, however, political obstacles are there to be overcome; legality primes reality even when legality risks its prospects of implementation into reality. The response of the founders as present in these volumes to these challenges may be characterized as 'malign neglect': the law of the Rome Statute is analysed as though the untenability of the legal arguments advanced against it renders them politically irrelevant.

C From Immunity to Impunity?

According to Article 27 of the ICC Statute, the official capacity of an accused does not exempt him from responsibility, whereas Article 98 endorses existing immunities under customary and treaty law. In Lee's book, Saland explains this contradiction by pointing to the drafting history: Articles 98 and 27 were drafted in different working groups, with apparently no cooperation with each other.⁶⁷ In his commentary, Triffterer provides a (lengthy) history of the exclusion of immunity for Heads of State,

⁶² Condorelli and Villalpando, *supra* note 59, at 648–653.

⁶³ The ICJ could be seized either by request of the General Assembly or the Security Council (Article 96 of the Charter) or by request of the Assembly of state parties to the ICC Statute, Art. 119, the latter in an admittedly innovative interpretation of that provision.

⁶⁴ Condorelli/Villalpando, *supra* note 10, at 230.

⁶⁵ For details, see Stahn, 'The Ambiguities of Security Council Resolution 1422', 14 *EJIL* (2003) 85.

⁶⁶ Board of Editors, *supra* note 7, at 1907.

⁶⁷ Saland, 'International Criminal Law Principles', in Lee, *ICC*, 189, at 202 n. 25.

which omits however examples to the contrary, in particular before national courts. As Paola Gaeta rightly insists in the Cassese/Gaeta/Jones Commentary, the ‘old Act of State doctrine’⁶⁸ is very much alive,⁶⁹ and the exclusion of immunity for core crimes constitutes the exception rather than the rule. In view of Article 98, Triffterer is forced to admit that, in practice, Article 98 may indeed ‘bar the Court from exercising its jurisdiction over such a person’, contrary to Article 27 paragraph 2 of the Statute.

Nevertheless, Article 98 remains unclear as to whether customary or treaty law may shield accused non-party nationals from prosecution by the Court. Under paragraph 1, the ‘Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third State’, without the third state’s cooperation. But it remains silent on when international law thus provides. In the same vein, paragraph 2 does not specify whether its requirement that the Court respect ‘international agreements pursuant to which the consent of a sending state is required to surrender a person of that State’ is limited to agreements entered into force before the Statute came into effect, or whether it also extends to agreements concluded after the entry into force of the Statute, such as the Article 98 agreements presently sought by the US, which intend to exclude all US citizens from the eventual territorial jurisdiction of the Court. In *Arrest Warrant*, the ICJ argues — if only *obiter* — that sitting Heads of State or governments and foreign ministers are protected by customary international law from prosecution by domestic courts, regardless of their lack of immunity before international courts.⁷⁰ In *Pinochet*, the Law Lords explicitly endorsed immunity for serving Heads of State.⁷¹ Article 98 seems only to make sense if one considers the immunities before domestic courts applicable to accused nationals of a non-party. Thus, Prost and Schlunck are correct when they maintain, in the Triffterer Commentary, that Article 98 requires the Court to seek an agreement of a third state to prosecute certain persons.⁷² However, they are almost completely silent on when this is the case.

In her contribution to the Cassese/Gaeta/Jones Commentary, Paola Gaeta reproduces the division between personal and material immunity (immunity *ratione personae* and immunity *ratione materiae*),⁷³ notwithstanding the criticism voiced against this theory by more conservative international lawyers,⁷⁴ but also its

⁶⁸ Triffterer, in Triffterer Commentary, Article 27 MN 13.

⁶⁹ Gaeta, ‘Official Capacity and Immunity’, in Cassese/Gaeta/Jones Commentary, 975, at 976 n. 2.

⁷⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, 41 ILM (2002) 536, at 551, paras 61 *et seq.*

⁷¹ See, e.g., *R. v Bow Street Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)*, 24 Mar. 1999, 38 ILM (1999) 581, at 592 (Browne-Wilkinson).

⁷² Prost and Schlunck, in Triffterer Commentary, Article 98 MN 4, 6.

⁷³ Gaeta, *supra* note 69, at 975–978. Cf. Cassese, ‘When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case’, 13 EJIL (2002) 853; Wirth, ‘Immunity for Core Crimes? The ICJ’s Judgment in the *Congo v Belgium* Case’, 13 EJIL (2002) 877.

⁷⁴ Fox, ‘The Pinochet Case No. 3’, 48 ICLQ (1999) 687, at 694–696.

non-application by the International Court of Justice in *Arrest Warrant*.⁷⁵ Whereas, pursuant to general international law, national courts must respect personal immunities (such as that of sitting Heads of State) and may override material immunity, the ICC Statute excludes, in principle, any immunity, be it under international or domestic law (Article 27). While Triffterer seems to recognize only one rationale, namely the prosecution of crimes of concern to the international community as a whole, Gaeta speaks of two sets of conflicting values:⁷⁶ prosecution of the most serious crimes, on the one hand, *and* the protection of state sovereignty and inter-state relations, on the other. She pleads for the precedence of the latter, arguing that personal immunities are not of a permanent nature but cease at the end of such office, whereas the quashing of personal immunities would be extremely dangerous for inter-state relations.⁷⁷ However, it is doubtful that Gaeta is right in arguing that the opposite conclusion would render the right of prosecution *jus cogens*: in the event of a clash of two norms expressing divergent values, any balance struck will result in the partial disregard of a norm or even both norms — but that does not result in one of the norms gaining the status of *jus cogens*. Again, the perils of the ever-frequent use of the concept of *jus cogens* become visible.

Gaeta also claims that in general there exists no immunity for crimes for which the state of nationality does not possess jurisdiction. She wishes to recognize exceptions only for Heads of State. Such a narrow view of personal immunities is not customary, nor does it make much sense: it would equally hamper the very *raison d'être* of personal immunity, namely the protection of inter-state relations. For that purpose, however, heads of government, foreign ministers and diplomats are of an importance comparable to Heads of State.⁷⁸ Hence, the ICJ was right to accord immunity to a Congolese foreign minister against Belgian prosecution while he was in office, but probably not when it seemed to discard any distinction between personal and material immunity.

Gaeta correctly points to the true rationale behind Article 27 of the ICC Statute. In vertical relationships, for instance those between international courts and tribunals *vis-à-vis* state parties, there is no room for immunity.⁷⁹ Gaeta rightly rejects a construction of Article 98 according to which state parties were entitled to grant immunity to the nationals of other state parties.⁸⁰ Otherwise, Article 27 paragraph 2 would be rendered meaningless. Accordingly, Article 98 paragraph 1 is only applicable to states non-parties — an interpretation which is apparently in accordance with the British implementing legislation.⁸¹ However, Article 27 is only

⁷⁵ But see Cassese, *supra* note 73, at 862–866.

⁷⁶ Gaeta, *supra* note 69, at 985–986.

⁷⁷ *Ibid.*, at 986.

⁷⁸ In a footnote, Gaeta considers extending her rationale to Heads of Government and Foreign Ministers (*ibid.*, at 988 n. 40). However, the uncertainty on who should be included only demonstrates that there is no basis in customary law for the exclusion of other beneficiaries of personal immunity such as diplomats.

⁷⁹ Gaeta, *supra* note 69, at 989 and 991.

⁸⁰ *Ibid.*, at 993.

⁸¹ *Ibid.*, at 994.

valid before the ICC itself. Articles 27 and 98 did not in any way derogate from general international law as far as domestic prosecutions are concerned — and that means absolute personal immunity, even in relations between state members.⁸² Gaeta also makes clear that, in line with Article 88, states are to amend their national laws in order to provide for surrender to the Court of persons not enjoying immunities.⁸³

In the Cassese/Gaeta/Jones Commentary, John Dugard deals with possible conflicts of jurisdiction of the Court with Truth Commissions, insofar as the latter may be combined with an amnesty, as in the South African case.⁸⁴ Dugard establishes a distinction between procedures which are intended to shield officials from accountability and those where, under (quasi-)judicial control, the applicant is required to make a full disclosure of his or her involvement in international crimes. Only in the latter case does he argue in favour of the exercise of prosecutorial discretion not to prosecute, as contemplated by Article 53 (2)(c) of the Statute, according to which the Prosecutor can decide not to prosecute if the prosecution ‘is not in the interest of justice’. Although this article includes some criteria, and the Prosecutor acts under the control of the Pre-Trial Chamber, the issue raises many difficult questions concerning the role of prosecutorial discretion and the requirements for ‘justified’ amnesties. Dugard’s remarks offer a preliminary argument which can be built upon.

It is not surprising that the contributors to the volumes under review rather err on the side of the effective functioning of the Court than on the side of state sovereignty as protected by classical international law. Nevertheless, when international law does not act according to the maxim *fiat justitia pereat mundus*, this natural penchant towards prosecuting international crimes must be balanced by considerations of inter-state order.

4 Conclusion

In his brief introduction to the Triffterer Commentary, Philippe Kirsch summarizes the achievements and also the failures of the Rome Statute in a remarkably apt fashion — from the inclusion of ‘automatic jurisdiction’ by means of the independence of the prosecutor under the legal control by a Pre-Trial Chamber, to the regulation of war crimes in internal armed conflict, the recognition of sexual violence and the enlistment of child soldiers, the limitation of the role of the Security Council, to the exclusion of reservations except an exemption of seven years from the applicability of the war crimes provisions. He also discusses the limits of jurisdiction and the absence of a definition of the crime of aggression.⁸⁵

⁸² *Ibid.*, at 996. But see Danilenko, ‘ICC Statute and Third States’, in Cassese/Gaeta/Jones Commentary, 1871, at 1886–1887.

⁸³ *Ibid.*, at 999.

⁸⁴ Dugard, ‘Possible Conflicts of Jurisdiction with Truth Commissions’, in Cassese/Gaeta/Jones Commentary, 693, at 702–703; similarly Van den Wyngaert and Ongena, ‘*Ne bis in idem* Principle, Including the Issue of Amnesty’, in Cassese/Gaeta/Jones Commentary, 705, at 726–726, who justly speak of ‘a serious lacuna’.

⁸⁵ Kirsch, ‘Introduction’, in Triffterer Commentary, MN 13–15.

The question remains whether the International Criminal Court will be able to function like any domestic criminal court — and how it deals with the specific kind of criminal law entrusted to it. In his ‘Preliminary Remarks’ to Part I, Otto Triffterer poses the question of the transferability of criminal law concepts to the international sphere, but avoids giving an answer by turning the question around: Why not?⁸⁶ Maybe this is typical of the generation of the ‘founders’: they are proud of their achievements, and it is not so much their job to ask the difficult questions, let alone to answer them. Triffterer is not entirely clear about the relationship of the ICC Statute to classical international criminal law, which was concerned with extraterritorial jurisdiction and obligations to extradite or prosecute, rather than the definition of crimes.⁸⁷ Under these circumstances, it is not surprising that it proved difficult to fit the grave breaches of the Geneva Conventions into a criminal law framework and to develop the general principles of international criminal law (in Triffterer’s terms, borrowed from German criminal law, the so-called ‘general part’ of criminal law).⁸⁸ Triffterer rightly argues that, strictly speaking, the Rome Statute merely defines the jurisdiction *ratione materiae* of the Court and not the substantive law, but that some of the provisions do not quite fit into this scheme.⁸⁹ Nevertheless, a further development of international criminal norms beyond the Statute is explicitly not excluded by the Statute (Articles 10 and 22, paragraph 3). Triffterer seems to dismiss the whole body of traditional international law when he claims that law can never work if not applied by an independent ‘jurisdiction’.⁹⁰ Even if each international lawyer is aware of the problematique involved in auto-interpretation, such dismissal of most ‘ordinary’ norms of international law misses the mark. And yet, once the Court has established itself, it will be rather difficult to move beyond the Statute’s codification of international criminal law. In other words, the moment an ‘independent’ judiciary exists, the law not under its control might easily fall into oblivion.

In their balanced assessment of the Statute, the editors of the Cassese/Gaeta/Jones commentary argue for realistic assessments of the Rome Statute in view of the absence until the present time of any such court.⁹¹ Indeed, the Statute constitutes a compromise between the strength of its rules and its universality. Thus, the editors defend the preconditions for the exercise of jurisdiction as contained in Article 12, in spite of the serious shortcomings in the event of crimes committed on the territory of a state non-party.⁹² With the United States remaining absent from the Court, one might tend to the conclusion that the drafters should have tried harder to reach universal

⁸⁶ Triffterer, in Triffterer Commentary, Preliminary Remarks to Art. 1, MN 15.

⁸⁷ *Ibid.*, at MN 16–18.

⁸⁸ *Ibid.*, MN 34. Cf. *ibid.*, MN 36, where Triffterer interprets Art. 49 para. 2 of Geneva Convention IV as a ‘defence’ of a criminal law variety. However, it is inherently problematic to view international humanitarian law as incomplete criminal law instead of a set of primary rules to protect non-combatants and combatants *hors de combat*.

⁸⁹ *Ibid.*, at MN 62.

⁹⁰ *Ibid.*, at MN 38.

⁹¹ Board of Editors, *supra* note 7, at 1902.

⁹² *Ibid.*, at 1911.

participation. On the other hand, one may doubt that a court depending on the consent of the Security Council would have better served the interests of justice. The editors display a justified reserve towards the non-inclusion of biological and chemical weapons in the list of prohibited weapons⁹³ and have particular scorn for the, albeit limited, defence of superior orders for war crimes.⁹⁴ In the end, however, the Cassese/Gaeta/Jones editors are as convinced of the Statute as the contributors to the Triffterer volume, calling the Statute a ‘striking achievement’ and a ‘moral imperative’.⁹⁵ Such enthusiasm is certainly not overstated; and it could hardly be expected from the founding generation to reject their own creature.

In his Preface to the Triffterer volume, Cherif Bassiouni gives a rendition of his speech at the Signature Ceremony at Rome, quoting Churchill: ‘Never have so many, owed so much, to so few.’ In many accounts of the founding generation, the road to the ICC is considered a historical necessity. In the words of now-President Philippe Kirsch: ‘At the end of the bloodiest century in history, we cannot just *hope* that the ICC will fulfil its historic promise. It must.’⁹⁶ And yet, the most recent Iraq war demonstrates anew — if demonstration were necessary — that there is a long way to go before international relations become ‘legalized’. Contrary to the assumption behind the volumes at hand, the US hostility shows that a rollback is an ever-present possibility.⁹⁷ As the inter-ethnic warfare on the territory of a state party, the Congo, exemplifies, it is by no means certain that the International Criminal Court will contribute decisively to the goal of preventing the commission of atrocities on a grand scale. And yet, the Commentaries prepare the legalist groundwork for a Court worthy of that name — a Court which strives to apply the existing body of law according to established legal norms and standards. This is by no means sufficient to make the Court a success. But the commentaries are indispensable tools to this end.

⁹³ *Ibid.*, at 1904.

⁹⁴ *Ibid.*, at 1905.

⁹⁵ *Ibid.*, at 1913.

⁹⁶ Kirsch, in Triffterer Commentary, Introduction MN 20.

⁹⁷ Similarly Mégret, ‘The Politics of International Criminal Justice’, 13 *EJIL* (2002) 1261, at 1282.