treated as comfortably as Lt Calley after his conviction for the My Lai massacre (see pp. 191–2). In any such event, international justice would be powerless to intervene.

These complementarity provisions determine the 'admissibility' of any particular case. In references by Security Council resolution it will be for defendants to raise any double jeopardy issue at the outset of their trial. But there are special provisions for state references or *proprio motu* investigations: the prosecutor is obliged to notify *all* state parties, together with other, non-party states which could exercise jurisdiction. The notification may be confidential, but when made to a state anxious to protect suspects (who may, indeed, lead the government of that state) it will serve to tip off criminals and permit destruction of evidence and intimidation of witnesses. States which are hostile to a prosecution may also (whether or not they have signed the Treaty) have the investigation suspended by challenging the Court's jurisdiction over, or the admissibility of, the case – at first in pre-trial chambers, and then by way of appeal. These provisions in Articles 18 and 19 mean that pariah states will have numerous legal opportunities to derail a prosecution, or to delay it for years through appellate manoeuvres, especially in cases which are not referred by the Security Council. These dangers emphasize how important it will be for the ICC judges to place a heavy evidential burden of proof on states which claim that the complementarity provisions operate to deny ICC jurisdiction over nationals or residents who are plainly guilty of international crimes, especially if they are still at liberty despite a pretended 'investigation' or other legal process.[10]

COMPOSITION

The viability of the ICC will ultimately depend more on the calibre and experience of its judges and prosecutors than on the fine print of its statute. International appointments systems are prone to throw up mediocrities trusted to toe the line of their nominating government: usually they are appointed from within government departments or are in other ways beholden to the State. Often missing are persons of real independence with first-class minds and imagination. Yet one of the main reasons why Nuremberg worked was that the English, French

and American judges had experience as criminal *defenders* and not merely as prosecutors; from that experience developed a sense of fairness that infused the proceedings. So what the ICC needed was an appointments system independent of governments, and a set of statutory qualifications which gave weight to those with careers characterized by some criminal defence work. In this respect, the statutory arrangements for appointing the Court's eighteen full-time judges leave much to be desired. They are to be elected by an assembly of the state parties – a recipe for political caucusing – and nominated by respective governments with an eye to such matters as 'equitable geographical representation' and 'a fair representation of female and male judges'. At least half the judges must have 'relevant' criminal law experience, although this may be entirely prosecutorial. Defence experience is not specifically mentioned as a qualification, although nominating states must take into account 'legal expertise on violence against women and children' – a qualification calling, quite arbitrarily, for judges who were formerly prosecutors of rapists and child molesters.

Article 40 requires the judges to be 'independent in the performance of their functions' (their salaries, fixed at €180,000 p.a., may for this reason not be reduced during their nine-year tenure of office) and there are appropriate provisions for disqualification (by decision of all the other judges) in the event of reasonably apprehended bias. This issue is given a certain piquancy by the problems encountered by the House of Lords in the *Pinochet Case* after discovering that one judge was director of an Amnesty charity. (Interestingly enough, none of the Pinochet judges had the sort of criminal law or human rights experience required to qualify for the ICC.) On principle, ICC judges should not be disqualified by virtue of connections with human rights organizations unless they are actually parties to the case. All the judges and, more importantly, the senior prosecutors – shall be accorded full diplomatic immunity by state parties, which can only be waived by a decision of the majority of judges of the court. The judges shall themselves elect a president, who will chair the five-judge Appeals Division and be responsible for the administration of the Court. The other judges will be divided between trial divisions, which will comprise three judges, and pre-trial divisions, which may be constituted by a

single judge. The prosecutor and deputy prosecutors (also elected by the Assembly of State Parties) shall be elected for a nine-year term, and must have extensive practical experience of criminal trials.

Rule 103 of the ICC Rules of Procedure and Evidence makes provision for *amicus* briefs. Judges of the Hague Tribunal have sometimes found it helpful to have written submissions from third parties (often human rights NGOs or university law departments) when considering novel points of law. A different role was found for *amici* – friends of the court – in the Milošević proceedings. Before the trial began, when the defendant was refusing to recognize the court, three experienced lawyers (two had been Tadić defenders) were appointed to take on his behalf any legal points that might arise. This adds to the fairness of the trial when the defendant refuses himself to engage with the court, although it is important to confine *amici* to arguing questions of law. They are friends of the court, not of the defendant, and it is wrong to invite them to participate further by cross-examining witnesses or making submissions of fact. (This was proposed by the Milošević trial judges, until the defendant showed himself perfectly capable of the task.)

THE TRIAL

PROSECUTION POWERS

Much of the debate prior to the Rome Treaty concerned the power of the prosecutor. As already noted, the US (its president caught at the time in the coils of Kenneth Starr) feared a 'superprosecutor' who might choose to flex legal muscles or play to the non-aligned gallery by investigating as crimes against humanity American attacks on its enemies (such as its cruise missile onslaught being planned at the time on the bases of Osama bin Laden in Sudan and Afghanistan). The NGO lobby and the 'like-minded' nations foresaw the need for a prosecutor with a plenitude of powers, at arms length from the Security Council. The compromise was to establish a prosecutor whose initiatives would be closely monitored by the judges. Instead of fashioning a true adversary system, with an entirely independent

judiciary deciding between a prosecutor with whom they have no close connection and the defence, they gave to the judges sitting in the Pre-trial Division excessive powers to interfere with a prosecution, either by reigning it in or unleashing it.

The prosecutor may begin an investigation on his own initiative, or as the result of a referral by the Security Council or a state party (see above). If there is insufficient evidence, then obviously no prosecution will ensue. Even where there is 'a case' there may be good public interest reasons not to proceed: victims may be too traumatized to give evidence; the defendant may have a terminal illness; and so forth. The prosecutor's decision not to proceed in such cases will only be effective if it is approved by a three-judge Pre-trial Division which can, by withdrawing approval, actually force the prosecutor to bring what he regards as unfair or oppressive proceedings.[11] The judges are required in other ways to encroach on the routine investigative work of the prosecutor's office. Under Article 56 (3), for example, the prosecutor must apply to them for permission to take a 'unique investigative opportunity' (such as a statement from a potential witness who is about to die) and the judges may even take such measures on their own initiative, against the prosecutor's wishes. These provisions are misguided because they invite the judiciary to take over the job of prosecuting, in the inquisitorial role (familiar in Continental systems) which is incompatible with the Anglo-American adversarial model upon which the Court is principally based.

In one important respect, the Rome Statute corrects an unfair and prejudicial provision in Rule 61 of the Hague International Criminal Tribunal for the Former Yugoslavia, criticized at pp. 323–4. The ICC will have a Pre-trial Division which issues arrest warrants and in due course holds a committal hearing (at which defendants and lawyers are present) to determine whether there is sufficient evidence to justify the defendant being put on trial. If defendants flee or evade arrest, however, there is no 'Rule 61 hearing': under Article 61, the Court simply confirms that the prosecutor has sufficient evidence to justify his charges, and at this hearing the Court may permit the absentee to be represented by counsel (who will not, therefore, be exiled to the public gallery, like the counsel for Karadžić and Mladić).

State parties are bound to co-operate with the prosecutor, although

the very fact that a state has ratified the Treaty means that it is unlikely to harbour many war criminals, so the Court will have to try to make *ad hoc* agreements with non-party states. Requests to state parties must be made by the Court (presumably by the registrar, as directed by a Pre-trial Division) and made through 'diplomatic channels'. This is cumbersome and lacking in confidentiality. It would be better for the prosecutor's office to be represented in the law enforcement apparatus of every state party, and be permitted to make co-operation arrangements directly, rather than by application to ICC judges who then pass the request on through the registrar to diplomats at The Hague. State parties are obliged to ensure that their local law procedures permit effective co-operation: by arranging for the execution of ICC warrants; by requiring suspects and witnesses to attend for questioning; by permitting ICC prosecutors to inspect sites and execute searches and seize records and documents and freeze assets. A state party may attach a condition of confidentiality to the security-sensitive information it provides: in such cases the prosecutor cannot turn the information over to the defence, so may use it only as a *lead* to gathering additional evidence, rather than as evidence to be placed secretly before the Court.

The ICC can issue a warrant for arrest if the prosecutor demonstrates 'reasonable grounds to believe' complicity in crime. Suspects who are apprehended in co-operating countries must be transported to The Hague and surrendered into the custody of the Court. Their basic rights throughout the investigation stage are protected under Article 55: they must be informed, prior to questioning, of their rights to remain silent and to have legal assistance free of charge and a competent interpreter if necessary. Article 101 contains the rule of speciality, familiar from extradition law, whereby a person who has been arrested and surrendered to the ICC cannot be proceeded against for conduct other than that referred to in the arrest warrant. In its strict form the rule would tie the prosecutor's hands in the common situation where further and more compelling evidence of involvement in other crimes comes to light after the arrest. For this reason the rule is watered down by a provision which encourages state parties to waive it, at the request of the Court, once notified of the additional evidence. The ordinary costs of co-operating with court requests for

evidence gathering and surrender of suspects are to be borne by the state party, although the Court must fund all expenses related to its own personnel and witnesses. There is no provision for prosecution costs to be awarded against convicted defendants, although such a rule would not be unreasonable in the case of wealthy defendants who have profited from their crimes, such as tyrants and high officials who have maintained their positions through oppression. It would be just and appropriate in some cases to order the states in whose name they have committed their crimes to pay for their prosecution.

THE HEARING

The trial will take place at The Hague, although Article 3 gives the Court power to sit elsewhere if this is desirable. There can be no trials *in absentia*: the accused must be present, although if disruptive may be removed to a cell video-linked to the courtroom. The trial shall be in public, although Article 68 empowers the Court to move into camera if such a measure is not inconsistent with the fair trial rights of the accused and is necessary 'to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'.

There is no reference in the Statute to televising the trials – a commonplace in America and Europe which is stoutly resisted in the British Commonwealth. The principle that justice must be seen to be done, and the educative force of the medium, argues in favour. In the case of war crimes, the argument is exceptionally strong. There is a special need for truth-telling, for the sake of victims and to combat sanitizing myths gaining credence among the vanquished and to rebut charges of 'victor's justice'. The other side of the coin, of course, is that criminal trials are occasions for lying, and defendants may exploit television coverage to justify their polemic from the dock or witness box. This was Churchill's great fear about Nuremberg, and it was echoed by many in the early days of the Milošević trial, when the defendant was given his platform (an opening speech) which impressed many when shown on Serbian television. But this is a risk that any system of public justice must take in putting a political leader on trial. Milošević may be less convincing at the end of the evidence than he was at the beginning. The Hague Tribunal allows most of its

proceedings to be televised without damage to their fairness. It offers victims some satisfaction in seeing at least a few representative perpetrators brought to justice. In fact, such coverage is essential to give the truth an airing in places like *Republica Srpska*, where, as Lawrence Wechsler has commented, the media remains controlled by 'the same parties and mafias whose hyper-nationalist exhortations back in the early nineties had set the stage for war in the first place'.[12] Although George Soros's Open Society Institute beamed in full satellite coverage of the Tadić trial, few could afford the necessary satellite dish and so the transmissions did little to confound local propaganda lies about the trial and indeed about the war.[13] Another problem is that hearings in this class of case are not often dramatic – the proceedings are lengthy, slowed down by simultaneous translation and plodding advocacy that has no jury to impress. (The American cable channel Court TV planned to show in its entirety the Tadić trial – advertised as 'the real trial of the century' – but it hardly compared to O. J. Simpson and viewers soon lost interest.) The ICC should certainly use its inherent powers to permit broadcasting (except for the evidence of witnesses who reasonably object to reliving their experiences of degradation before an international audience), but further thought should be given to producing comprehensible edited versions and encouraging them to be broadcast through media outlets in the defendant's country.

Article 67 enshrines the basic rights of the accused, drawn from the 'fair trial' provisions common to all human rights treaties. The accused must have all proceedings translated into a language he understands and speaks, and is entitled to have lawyers of his choice (assigned by the court if he is indigent) and to communicate with them confidentially.[14] He has a right to trial 'without undue delay', but must also have adequate time and facilities to prepare his defence and to cross-examine all witnesses against him and to obtain the attendance of witnesses capable of giving relevant evidence on his behalf. He has a right to remain silent, without having this refusal to explain the prosecution evidence taken as an indication of guilt. It is remarkable how the 'right to silence' is being entrenched in human rights law at the very time it is being rejected by some advanced legal systems where the view is taken, not unreasonably, that a person confronted with substantial evidence of serious crime has a basic human duty to

explain himself, and that failure to do so in these circumstances at trial (as distinct from at the time of arrest) permits a rebuttable inference of guilt. It is always wrong to *compel* defendants to answer questions, although the gravity of the charge of a crime against humanity, and above all the interests of victims and relatives to know the truth, would surely justify an incentive to tell it once the prosecution evidence is held sufficient to require an answer. However, the Rome Statute entrenches the right to silence in absolute terms, and goes even further by permitting an accused who declines to testify and undergo cross-examination 'to make an unsworn oral or written statement in his or her defence'. This is a relic of the 'dock statement' permitted to defendants in England in the nineteenth century, when they were not allowed to enter the witness box. It has been abolished in England and in some Commonwealth jurisdictions, and has no rational justification, other than to permit a defendant to provide an explanation when he is afraid to go into the witness box for fear of cross-examination. At any event, the Trial Division will have three judges with experience of criminal trials: an accused's failure to explain away convincingly a compelling case will in practice be seen as indicating his inability to refute the case against him rather than a judgement that it is so weak it is not worth answering.

The Rome Statute's provisions on evidence are prefaced by a general power in the Court to admit all evidence which is 'relevant and necessary' – a refreshing change from the complex evidentiary provisions of Anglo/American law which are designed to protect a lay jury from prejudice. The assumption is that experienced judges will not be unduly influenced by learning that the accused has previous convictions, can be trusted to hear hearsay, do not need a corroboration rule in rape cases, and so on. Criticism of this approach by some advocates is misplaced: in deciding liability for crimes against humanity, judges must have available all the information sources a historian would use – they are, in a sense, writing history. What matters, to the jurist as much as to the historian, is reliability – a quality which the Hague Tribunal has described as 'the invisible golden thread which runs through all the components of admissibility'.[15] The reliability of any particular item of relevant evidence will depend upon the circumstances: what matters is the court's ability to

test and weigh it, rather than reliance upon any generalized rule for its admission or rejection. The Prepcoms which followed the Rome Treaty have provided some draft rules which unnecessarily interfere with judicial discretion in this respect – for example, by according a special privilege to former employees of the Red Cross to withhold evidence from the Court. Customary international law recognizes that Red Cross and Red Crescent officials need to operate under conditions of confidentiality, but duties of confidence must in some specific instances be overridden in the public interest.[16] It would be unconscionable, for example, for the Red Cross to object to an ex-employee offering evidence which could establish the innocence of a defendant.

The ICC is directed by Article 68 to take 'appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses' who are given the valuable right of separate legal representation to allow their own views to be canvassed. If there is 'grave danger' apprehended to a witness or his or her family, the prosecutor may withhold details of identification or evidence at any pre-trial stage. However, come the trial itself, any measures to withhold identification 'shall not be prejudicial to or inconsistent with the rights of the accused' (Article 69 (2)). This formula should ensure that the correct dissenting opinion of Sir Ninian Stephen in the *Tadić Case* is adopted by the ICC, so that we will never have the spectacle of a defendant convicted of a monstrous crime on the word of an accuser whose identity he is not permitted to know.

The defendant is entitled to examine all the evidence upon which the prosecution relies, but this it will have selected from a large body of material collected in the course of the investigation, some of which may point the other way or be helpful to the defence team in its own investigations. The right to disclosure of such material follows from the overriding guarantee of fair trial, and the European Court of Human Rights has ruled that the 'equality of arms' principle requires full defence access.[17] There can be limited exceptions – for example, to protect the names of police informers – but if the information is likely to be relevant to the defence, then refusal to disclose means, in European law, that the trial cannot be fair and must be abandoned. The Statute addresses these difficulties in Article 67 (2) by imposing a limited duty on the prosecutor to disclose evidence which 'he or she

believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence'.[18] This approach is unsatisfactory. Disclosure should not hinge on the 'belief' of an adversary party, which will inevitably be coloured by its commitment to prove guilt. Only the defence can judge what will be helpful to the defence, and for that reason it deserves full access to prosecution files, subject to the removal or redaction of documents which are judged (by the court, and not the prosecutor) to be both sensitive and of no significance for the resolution of the charges. Where material which the prosecution cannot or will not disclose creates a real possibility that the defendant is innocent, then the charge should be withdrawn rather than expose the accused to a trial which carries a real prospect of unfairness.

The prosecutor will, it must be hoped, have access to material collected by states through secretive diplomatic channels, and by surveillance and intercept systems which in the interests of their national security they may not wish the prosecutor to divulge to defenders linked with enemy forces. The availability of such material will in any event be known to the prosecutor, who may seek it (as may the defence) under the provisions for state party co-operation. The prosecutor may request evidence from an intelligence officer or security chief of a state which refuses the request on grounds of national security. All such cases can be brought to the Court for resolution, if possible, under Article 72 which provides for every kind of compromise on disclosure. If a state decides to withhold its 'humint' (human intelligence) or 'sigint' (signal intelligence – i.e. intercepts) on national security grounds, then there is not much the Court can do, except report the unco-operative state to the Security Council. In the meantime, however, the trial will still continue and the Court 'may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances'. This is a curiously permissive power: since important evidence is being withheld the Court should be precluded from drawing any inference adverse to the defence about a fact which hinges on the missing evidence.

Article 69(7) attempts to grapple with a problem litigated more than any other in adversary systems of criminal trial, namely whether

and to what extent evidence obtained by unlawful or unfair means should be admitted and used to prove guilt. This is the 'fruit of the poisoned tree' doctrine which relates (for example) to evidence elicited by *agents provocateurs* and confessions obtained by threats or tricks or torture: methods which are objectionable both because such confessions are prone to be unreliable, and because a court's approval of evidence of this sort would only serve to countenance or encourage the ugly behaviour which produced it. The Statute frames the exclusory rule as follows:

> Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
> (a) The violation casts substantial doubt on the reliability of the evidence; or
> (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

This paragraph is taken, almost verbatim, from Rule 95 of the Hague Tribunal, and its decisions will provide precedents for the ICC (see p. 321). The formulation is less favourable to the defendant than in some domestic laws: it means that minor breaches of defendants' rights will not lead to exclusion of evidence, and even serious breaches (a confession obtained at gunpoint) may be countenanced unless there is 'substantial doubt' about its reliability, e.g. if part of it can be proved untrue. The curious phrasing of the alternative part of the rule will call for a value judgement on whether the Court's integrity is likely to be publicly affected by the spectacle of a defendant being convicted on evidence collected in breach of his fundamental rights. If the crime would not have been committed but for the activities of *agents provocateur*, or the evidence comprised a confession obtained by torture, this would certainly be the case.

PUNISHMENTS

Article 70 gives the Court a special power to punish, by imprisonment for up to five years, witnesses, lawyers and defendants who deliberately perjure themselves or forge documents for presentation in evidence. State parties must extend their domestic perjury laws to include attempts to pervert justice at the ICC. This provision is necessary:

there are notable examples of attempts to frame defendants charged with crimes against humanity. Armand Hammer advanced his commercial interests by presenting Israel with forged documents to secure the wrongful conviction of Ivan Demjanjuk (see pp. 257–8) and perjury was committed against Duško Tadić (it is a wise witness who knows his own father – see p. 332) but the first lawyer to disgrace himself before an international criminal court was a Tadić defender, Milun Vujin, who was fined $10,000.

The gravest crimes call for the gravest penalties compatible with human rights treaties: Article 77 provides that for the worst offences a term of life imprisonment which means life is appropriate. In other cases sentences may have a length of up to thirty years, and sentences imposed consecutively for multiple crimes may not exceed this maximum. Convicts may additionally be fined, and have property or assets which represent profits from their crimes forfeited. Article 109 requires state parties to co-operate in freezing and seizing assets within their jurisdiction, so whether these financial penalties have any purpose will very much depend on whether Switzerland, Liechtenstein and other havens for 'dirty money' become parties to the treaty.

The most notable achievement of the penalty provisions is to eschew the death sentence, following the UN's lead with the Hague and Arusha Tribunals. The provisions of the Rome Statute provide further evidence of the movement of international law towards the abolition of capital punishment. States which cling resolutely to it, however, insisted on the insertion of a clause to ensure that the absence of the death penalty from the Rome Statute would not commit them to halting executions of persons convicted of equivalent offences under their national laws. This will have the ironic effect that perpetrators with no place to hide will do their utmost to be tried by the ICC, rather than face execution in their home state. Such a phenomenon has already been witnessed by the Arusha Tribunal, as Hutu leaders are prepared to plead guilty to genocide and suffer lengthy imprisonment rather than face the prospect of trial for the same crime at a makeshift court in Rwanda, swiftly followed by public execution.

There are provisions for ordering reparations to victims of crimes, following the lead in this respect of the Inter-American Court. After any conviction, the Trial Division may hear representations on behalf

of victims and their families, and make an order against the convict requiring compensation or restitution of stolen property. Where the convict has no assets, the award will be made out of a trust fund set up by the state parties for this purpose. This is welcome, especially if the trust fund attracts wealthy private individual benefactors, for the prospects of making convicts like Tadić 'pay' for their crimes against humanity are remote. The Court may in time deal with a few fallen dictators with millions salted away in Swiss bank accounts, but its focus on individual rather than state responsibility means that the countries and the peoples for whose benefit and in whose service most crimes against humanity are committed will be spared all financial consequences. The Treaty makes no provision for reparations from countries where international crimes have popular support. Were another Hitler to be convicted of genocide, his six million victims would look forlornly for compensation from his personal assets, despite the fact that the collective (or at least governmental) responsibility for the Holocaust would justify reparations. Germany, indeed, has paid out US$60 billion over the last half-century to Holocaust victims, and in February 1999 Chancellor Schröder announced a further US$6 billion in compensation for surviving slave labourers, half contributed by guilty corporations. The scandalous failure of the Japanese government and its courts in 1998 to provide reparations to English and Australian prisoners-of-war treated barbarically in its camps provided a topical example for diplomats in Rome: it was precisely because they feared the ICC could embarrass states suffering from human rights amnesia that they declined to allow the Court to order reparations against governments. This omission reflects one of the key weaknesses in the current philosophy behind the international justice movement, which denies the existence of collective responsibility in order to fasten upon the blameworthy individual. Where crimes against humanity are concerned, the two are not mutually exclusive.

APPEALS

The right of a convicted defendant to have both the verdict and the sentence reviewed on appeal – a right notably denied at Nuremberg – is vouchsafed by Article 81, and will take the form of a hearing by a

five-judge Appeals Division. Commendably, there is also provision for a prisoner or (after his death) his relatives to make a later application to review the conviction on the ground that fresh evidence, unavailable at the time of trial through no fault of the defence, has been uncovered which might have resulted in an acquittal if it had been presented at the trial. Victims of a miscarriage of justice may be compensated by the Court, and anyone who has been unlawfully arrested or detained under its process shall have an enforceable right to compensation. The necessity for such provision was demonstrated in 1998 by the case of two Bosnian Serb brothers who were forcibly snatched by NATO forces and immediately transported to prison in the Netherlands, where it turned out, to everyone's embarrassment, that they were not the individuals referred to in the arrest warrant.

Unnecessarily, and indeed oppressively, the prosecution is also given a right of appeal against an acquittal, and the defendant may even be imprisoned pending such an appeal. If the burden of proof 'beyond reasonable doubt' has any meaning, then an acquittal by all or a majority of the experienced judges in the Trial Division, who have had the benefit of seeing and hearing all the witnesses, means as a matter of logic that reasonable doubt *must* exist, whatever the Appeals Division may say (see p. 324). This right of the prosecution to appeal against an acquittal on the facts is a feature of inquisitorial systems, where the trial judge will often have been involved in the investigation and justice may require that an appeal tribunal take a fresh and impartial look at the facts. But the delegations which insisted upon prosecutorial appeal failed to understand the adversary system, and the logical consequence of having a standard of proof 'beyond reasonable doubt'.

When the Treaty is ratified by sixty states, the Court will be set up by an assembly of these state parties. Thereafter, the assembly will meet annually to review the Court's progress and ensure its funding, which will come from contributions the state parties levy upon themselves, funds provided by the UN and voluntary contributions from anyone else (Ted Turner's lavish contribution to the UN has given encouragement to the soliciting of private benefaction, and the ICC offers a unique opportunity for arms corporation conscience money). Any disputes between state parties over interpretation of the Rome

Statute may, under Article 119, be referred to the International Court of Justice. A conference to review the Statute and consider amendments to it shall be convened by the UN Secretary-General seven years after it enters into force. Regrettably, there can be no amendment to any substantive provision until the Review Conference, which will not be held until the end of the first decade of the twenty-first century.

There are two last concessions to state sovereignty. There are no reservations allowed to this Treaty, but Article 124 permits a state party to ratify, but in doing so to make a declaration which exempts it for seven years from the Court's jurisdiction over war crimes committed by its citizens or on its territory. It follows that any state party contemplating an aggressive war in the near future would be well advised to make an Article 124 declaration. (It was a measure of America's hostility to international justice that it wanted the opt-out to include crimes against humanity as well, and to last for ten years.) A state which has thus exempted its leaders from responsibility for war crimes may still be concerned about their prosecution for genocide: in this event it should exercise its right to withdraw, under Article 127, a year or more before the genocide is scheduled to begin. Such action – by a letter to the UN Secretary-General – will pull the jurisdictional rug from under the Court in respect to any investigation commenced more than a year after he receives the letter.

THE FUTURE

Much of the support for an International Criminal Court was governed by the wish to see the great villains of the late twentieth century behind bars. Pol Pot was alive and well through most of the preparatory sessions, with 1.7 million deaths to his discredit. Idi Amin had retired to Saudi Arabia and 'Baby Doc' Duvalier to the south of France; the torturers and death squad leaders of Latin America clung to the amnesties they had extracted and General Pinochet was preparing to fly first-class to take tea with Mrs Thatcher and have his spinal problems attended to by top surgeons in Harley Street. Newspaper articles about the Rome Conference were illustrated by their mug shots – unpaid endorsements of the ideal of international justice. But

as the diplomats well knew (even if the journalists did not) these malefactors would all be allowed to escape: the governments of the world would never countenance a court with the power to reach back into history, or even to feel the collars of leaders who were currently in power. The UN insisted from the outset that the Court was a futuristic project, for a 'future generation' of criminals. So obsessed were the diplomats with the need to cast a veil over the past, and indeed the present, that *two* articles of the Rome Statute say so, in terms. Their headings both lapse into Latin, as if trying to cloak their embarrassment. Article 11 (headed 'Jurisdiction *ratione temporis*') emphasizes that 'The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.' Article 24 (headed 'Non-retroactivity *ratione personae*') repeats that 'No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.' The Statute, be it remembered, entered into force in 2002, sixty days after it had been ratified by sixty nations. On 17 July 1998, the torturers of the twentieth century must have thought they were safe for ever from international justice.

This global cop-out is dressed up disingenuously as an application of the well-recognized rule against retrospective criminal prosecutions. It is nothing of the kind: genocide, war crimes and crimes against humanity were established in customary international law long before 1998, and if there *were* any question as to whether a charge brought at the ICC over atrocities in the 1970s had by that time crystallized as an international offence, then the defendants could be given the benefit of the doubt. In principle, the ICC should have been as little bothered by the rule against retroactivity as the courts which tried Eichmann or Barbie or any of the more recently captured Nazis. Why should Nazis be treated as a special case, when people like Mengistu and Amin and Khieu Samphan and Pinochet are actually *more* culpable because their crimes were not committed in a world war and they were well aware of the Nuremberg judgment and the Conventions which made their actions criminal at the time they were committed? By the devices of Articles 11 and 24, they may escape justice.

This support for impunity was another victory for diplomacy over law, for state sovereignty over human rights. The nations of the