INTERNATIONAL CRIMES

The Court's jurisdiction extends to four offences: genocide, crimes against humanity, war crimes and the crime of 'aggression'. There will, however, be no prosecutions for 'aggression' until states agree on a definition, which will be an item on the agenda of their Review Conference, seven years after the Statute comes into force. These four categories are described as 'the most serious crimes of concern to the international community as a whole' and it is to be hoped that the test of 'seriousness' will be applied in deciding whether to prosecute in actual cases (which may not be serious examples of the crime in question). The Court will hardly fulfil its purpose if its targets are confined to footsoldiers like Duško Tadić, whose offences (while vicious enough) are comparatively minor beside those of the people who instigate or order the crimes defined in the Statute. The crimes within the jurisdiction of the ICC endlessly overlap: genocide, for example, is a crime in its own right as well as a crime against humanity and a war crime, and the latter category includes behaviour which in peace time would be classed as a crime against humanity. As the Appeals Chamber in the *Tadić Case* pointed out, there is now no good reason why the behaviour of nations at war should be judged by rules different from those for internecine conflicts: these legalistic distinctions have occupied the Hague Tribunal for much too long, and the same hairsplitting exercises are likely to be visited upon the ICC. It is difficult to understand why this court should not simply have jurisdiction over crimes against humanity, whether committed in war, in times of internecine struggle, in periods of riot and unrest, or at times of utter and seemingly blissful peace. The individuals responsible for any widespread pattern of barbarity, imposed or supported by the State (through its politicians or police or military) or by armed organizations fighting to attain some (or more) power, should be indictable and the charges against them should not depend on technical legal characterization of the nature of the background conflict.

GENOCIDE

This is the crime which was first to attract universal jurisdiction. Article 6 defines it in terms identical to the 1948 Genocide Convention (see p. 244). The essential element which must be proved is an 'intent to destroy in whole or part a national, ethnical, racial or religious group as such'. Acts of destruction other than by killing or maiming specifically include infliction of conditions of life causative of death and 'forcibly transferring children of the group to another group'. 'Group' does not include 'social' or 'political' groupings, so General Videla – who infamously ordered babies to be stolen from Argentina's disappeared left-wing mothers and farmed them out to loyal army families – could not be indicted for genocide. The Australian policy of taking babies and small children from their Aboriginal mothers and fostering them with white families has been alleged to be genocidal, but this would depend on whether force (rather than persuasion) was used and whether the purpose of the policy ('assimilation') was to destroy the group 'as such', as distinct from altering its culture. At the insistence of the Vatican, genocidal acts are defined to include 'imposing measures intended to prevent births within the group'. Birth control, even when imposed by law, is hardly a crime equivalent to mass murder – it can only count as genocide if it is imposed by discriminatory measures motivated not for health or population control, but as a means of extinguishing a racial group. Genocide is not an appropriate term to describe the behaviour of a sovereign state which goes to war with the purpose of annihilating the enemy nation, although this behaviour should be expressly included when the UN manages to define the crime of 'aggression'. When Yugoslavia activated the Genocide Convention in 1999 with its claim that NATO bombing amounted to genocide against Serbs, the ICJ pointed out that 'the threat or use of force against a State cannot in itself constitute an act of genocide'.[5] The intention must be to destroy human beings on account of their race – not to discipline, partition or even destroy the state which is persecuting them.

CRIMES AGAINST HUMANITY

Article 7 of the Rome Statute is set out in Appendix D: it contains the authoritative definition of crimes against humanity. The acts themselves are for the most part crimes which cause great and unnecessary suffering – murder, torture, rape and other forms of sexual violence, enslavement, false imprisonment and unlawful persecution or deportation. What gives them their abhorrent quality is that they are committed deliberately 'as part of a widespread or systematic attack [a course of conduct involving multiple acts] directed against any civilian population . . . pursuant to or in furtherance of State or organizational policy to commit such an attack'.[6]

This definition has been criticized as too narrow by NGOs, which preferred the broad sweep suggested by the International Law Commission ('any inhumane acts instigated or directed by Governments or by any organization or group'). The delegates in Rome were right to resist their pressure for such a dragnet definition, which would have tempted the world court to investigate the crimes of minions and footsoldiers. The definition at least ensures that the ICC should confine itself to the most heinous offences, carried out systematically rather than on the spur of the moment, and pursuant to a policy conceived either by a state instrumentality (such as the police or the army) or by an organized rebel force or terrorist network, as distinct from a criminal gang. The Article 7(1) definition makes clear that a prosecution may be brought in respect of a single act ('*any* of the following acts . . .') so long as it is known by the defendant to be part of a course of conduct involving multiple atrocities against civilians.

Just how 'organized' the perpetrating entity has to be in order for its members to be subjected to arrest is not, however, clear: there is no requirement that it should be invested with state power, so a structured opposition force, such as the IRA or the ANC in its freedom-fighting days, would seem to qualify. So would terrorist groups if organized on the scale of al-Qaida which, led by Osama bin Laden, trained thousands of adherents and was in 1998 responsible for the bombings at US embassies in Kenya and Tanzania which took hundreds of civilian lives, followed by its attack on the USS *Cole* and

its atrocity of 11 September. These multiple acts of murder were part of a systematic attack against a civilian population pursuant to an organizational policy to commit such attacks: in common parlance, the bombings were 'crimes against humanity'. Although the Rome Conference rejected jurisdiction over a specific crime of terrorism, that was for the stated reason that like drug-trafficking (the other suggested crime which failed to find sufficient consensus) they were not crimes 'as serious' as genocide and crimes against humanity, and were in any event the subject of other treaties.[7] This is not a sensible reason (see 11 September) and is not in any event a bar to ICC prosecution of a terrorist conspiracy which is so well organized and so atrocious as to fit the definition of a 'crime against humanity'. Although on 11 September the terrorists committed initial crimes of hijacking aircraft (covered by treaty and not 'as serious' as ICC crimes) this was transformed into a crime against humanity by their kamikaze mass-murder, in the cause of al-Qaida's politico-religious agenda for systematic racist attacks on American civilians.

It is now clear that crimes against humanity may be committed by non-state actors (paramilitaries in Yugoslavia; armed civilian bands in Rwanda) who have the characteristics of state actors either by affiliation to them or by the ability to carry out a policy through their dominion over territory or people or both. It requires no significant extension to treat members of an international organization like al-Qaida as capable of perpetrating such a crime by virtue of their policy to do so on a widespread or systematic basis: it is this underlying policy which provides international jurisdiction over an atrocity which would otherwise be triable only under the domestic law of the state in which it was perpetrated.[8] Similarly, although drug-trafficking was vetoed as an ICC crime, an organized criminal enterprise like the Medellin drugs cartel, in the days when it had a political agenda, might fall within the definition when pursuant to that agenda it systematically assassinated judges, journalists and politicians, and blew up civilian airliners on which prosecution witnesses were travelling.

Included among the acts which may, if carried out systematically, amount to a crime against humanity is the 'enforced disappearance of persons' – defined to mean the detention or abduction of people by or with the acquiescence of 'a State or a political organization', followed

by a refusal to acknowledge their whereabouts or fate, with 'the intention of removing them from the protection of the law for a prolonged period of time'. This clumsy wording (most disappearances remove people for ever, by secret execution) was intended to describe the behaviour of a number of South American governments which have allowed death squads to operate in conjunction with the military, and have made no attempt to trace victims. The definition would incriminate those in the squads, or ministers and officials who covered up their activities. Apartheid is re-categorized as a crime against humanity, but is much more carefully defined than in the Apartheid Convention (criticized on pp. 252–3). Henceforth, this crime will require commission of an inhumane offence with the purpose of maintaining the hegemony of a regime of systematic racial oppression.

There are a number of crimes against humanity, as defined in Article 7, which are appropriately charged against political or military leaders, because soldiers and civil servants may implement them without inhumane intent. 'Deportation or forcible transfer of population' is one example, where the object of the policymakers (but not necessarily of those ordered to carry out the policy on the ground) is to breach international law. The crime of 'persecution', defined as 'the intentional and severe deprivation of fundamental rights contrary to international law' committed against an identifiable group by reason of its politics, race or culture, can be deployed against those leaders whose 'ethnic cleansing' falls short of genocide. It will also be appropriate against those who help out – the drivers of the Ford Falcons used by death squads in Argentina; the doctors on hand to regulate the torture of 'subversives' at the Pinochet centres, the judges who take political instruction to refuse habeas corpus applications, and so on. It is an essential element of the crime of persecution that the act charged is known by the defendant to have a connection with a crime within the court's jurisdiction (such as genocide or torture or another crime against humanity). After this knowledge, there can be no forgiveness for the 'willing executioner' who prostitutes his or her profession in the service of barbarism. This crime of persecution (defined, confusingly, by overlapping sections 7 (1) (h) and 7 (2) (g)) will be an important new weapon in the prosecutor's armoury, for use against the lawyers, bankers, propagandists and parasites who use their

professional diplomas to wipe the blood of client regimes off their own hands.

The Hague International Criminal Tribunal for the Former Yugoslavia was the first court to recognize rape as a crime capable of political direction, at which point it can become a crime against humanity. The Rome Statute incorporates this advance – Article 7 duly lists rape, along with sexual slavery, forced pregnancy and enforced prostitution and sterilization, as capable of constituting a crime against humanity if carried out systematically. The idea of raping Muslim women in order that they produce 'Chetnik babies' was not a policy of the Serbian state, but a perverse notion which infected soldiers and their senior officers in a number of Serb battalions – and would therefore still count as an 'organizational policy' sufficient to fall within Article 7. The inclusion of 'sexual slavery' and 'enforced prostitution' provides a belated recognition that the Japanese army's enslavement of 'comfort women' from Taiwan and Korea to service its soldiers during the Second World War constituted a crime against humanity – one that the Allies did not dream of punishing in 1946 and which Japan did not think necessary even to apologize for until 1996. 'Forced pregnancy' means rape followed by 'unlawful confinement' for the purpose of 'affecting ethnic composition'. The Vatican was alarmed that making such monstrous pregnancies the subject of a crime against humanity might justify their termination by abortion, and insisted on the rider that 'this definition shall not in any way be interpreted as affecting national laws relating to pregnancy'. This religious enclave, wrongly elevated to statehood by an unthinking international community, was responsible for including as Article 7 (3) the most ridiculous clause in any international treaty ever devised. 'Persecution' had been defined in Article 7 (1) (h) to include persecution on grounds of gender. The Vatican, and other homophobic Catholic and Islamic states, insisted on appending clause 7 (3):

> For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

This means, presumably, that you can do what you like to transexuals. Persecution is a crime if directed against men as men, or women

because they are female, but homosexuals and lesbians may still suffer the thumbscrew and the rack, the 'intentional and severe deprivation of fundamental rights' when this is 'within the context of society', i.e. approved by a gay-bashing government or culture. The inclusion of Article 7 (3) is a distasteful but realistic reminder that a majority of states in 1998 favoured the withdrawal of human rights on grounds of sexual orientation.

Article 7, otherwise, must be hailed as the high point of the Rome Statute. It crystallizes the concept of a crime against humanity which nations of the world are obliged to punish, and distinguishes it from other crimes by reference to its genesis in the policy of a state or political organization. It is not defined by the gravity of the offence: the lone serial killer may do more widespread damage than the routine police torturer. What sets a crime against humanity apart both in wickedness and in the need for special measures of deterrence is the simple fact that it is an act of real brutality ordained by government – or at least by an organization exercising or asserting political power. It is not the mind of the torturer, but the fact that this individual is part of the apparatus of a state, which makes the crime so horrific and locates it in a different dimension from ordinary criminality. This is why individual responsibility and universal jurisdiction are necessary responses if any deterrence is to be achieved. Just as the eighteenth-century pirate and the slave trader used to be legally untouchable – because being on the high seas they were subject to no state's jurisdiction – so the twentieth-century politician and general were invulnerable while they exercised the sovereignty of the State. Now universal jurisdiction will attach to their crimes against humanity: Article 27 abolishes all immunities for heads of state and members of governments and parliaments. This will apply to states that are party to the ICC Treaty, but it will also have the effect of moving customary international law beyond the position it reached in the case of General Pinochet and in the ICJ decision in 2002 that the incumbent foreign minister of the Congo could not be subjected to a Belgian arrest warrant. Even if this immunity for foreign ministers and heads of states survives to protect them from legal action by other states, it will not save them from arrest on a warrant issued by the ICC.

WAR CRIMES

Article 8 of the Rome Statute contains a lengthy definition of the war crimes over which the ICC shall have jurisdiction, 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. These war crimes are defined in four categories, reflecting the historical evolution of the subject by distinguishing between crimes capable of commission at times of international conflict and at times of internal armed conflict. There is a substantial overlap and the distinction is no longer necessary, although apparently too embedded in the minds of international lawyers (where it gives rise to endless technical arguments) to be extirpated in the interests of simplicity and comprehensibility.

The first category – Article 8 (2) (a) – includes all 'grave breaches' of the 1949 Geneva Conventions (see p. 188). The second category – Article 8 (2) (b) – covers 'other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law'. Twenty-six such violations are spelled out, in a subsection which serves to update the limited horizons of 1949. Thus it now includes attacks on peacekeepers or others providing humanitarian assistance under UN auspices (subparagraph (ii)); attacks launched in the knowledge that they will cause disproportionate loss of civilian life or 'widespread long-term and severe damage to the national environment' excessive in relation to any military objective (iv); intentional attacks on non-military targets such as churches, schools, museums, hospitals and places of historical or cultural significance (ix); and the use of asphyxiating or poisonous gases (xviii). The behaviour of Bosnian Serbs in deploying captured UN peacekeepers as hostages against NATO aerial bombardment provides the rationale for a new war crime of 'utilizing the presence of civilians or other protected persons to render certain points, areas or military forces immune from military operations' (xxiii). There is another new offence of 'conscripting children under the age of fifteen years' to participate actively in hostilities – an indictment of the recruiters of the 'child armies' of Africa (xxvi). The Hague Tribunal's emphatic condemnation of systematic rape and sexual slavery is

repeated: under Article 7 they constitute crimes against humanity; during international hostilities they amount as well to war crimes under Article 8, whether committed as part of a policy or simply to demoralize the populace.

The delegates in Rome deliberately fudged the lawfulness of land mines and nuclear weapons as weapons of international law. The treaty banning anti-personnel mines, concluded in 1997, had been opposed by the United States and China (see p. 213). The International Court of Justice had delivered an abjectly confused decision over the legality of nuclear weaponry (see p. 200). So the ban in subparagraph (xx) on weapons and methods of warfare 'which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate' (all of which description applies to nuclear bombs and to anti-personnel mines) is expressed 'within the framework of international law' – which does not currently regard them as illegal *per se*. The ban will only apply to them – or to ballistic missiles or other weapons of mass destruction – if they subsequently become subject to a 'comprehensive prohibition' which is then incorporated in the Statute at its seven-year review. If, before that time, some deranged dictator launches a nuclear strike on a military target, or makes use of other modern weapons of mass destruction, he cannot be prosecuted at the ICC for a 'war crime' as presently defined by Article 8, unless his troops fire dum-dum bullets or poison arrows. This staggering omission provides a classic example of the deviousness of international diplomacy: at the Rome Conference, once the major powers had insisted on excluding any specific prohibition of land armies and nuclear weapons, non-nuclear states from the developing world rejected in turn a proposal to incriminate the use of chemical and biological weaponry. In this respect, Article 8 does not develop war law much beyond the nineteenth century.

Article 8 goes on, rather gingerly, to provide jurisdiction over two classes of war crime if committed in 'armed conflict not of an international character'. This class of conflict is clearly distinguished from 'situations of internal disturbances and tensions' such as riots or unrest characterized by 'isolated and sporadic acts of violence'. Crimes committed in the latter period are not 'war crimes' under Article 8, so they must qualify as genocide or crimes against humanity

if the ICC is to have any power to punish them. As a concession to states beset with internal security problems, the Statute provides that in respect to 'common Article 3 crimes' involving attacks on civilians, 'nothing shall affect the responsibility to maintain or establish law and order in the State or to defend the unity and territorial integrity of the State by all legitimate means'. This provides a wide, albeit question-begging, exculpation for governments fighting secessionist movements and other politically motivated armed groups.

Article 8(2)(c) extends jurisdiction over internecine armed conflicts in respect of all *serious* violations of common Article 3 of the 1949 Geneva Conventions, i.e. inhumane attacks on civilians or sick or surrendered soldiers including putting them on trials which lack the basic attributes of fairness. To these 'core' crimes Article 8(2)(e) adds a selection of some twelve of the war crimes listed in Article 8(2)(b) as arising in international conflict, notably the use of children as soldiers, or engaging in systematic sexual violence, or attacking UN peacekeepers or historic, cultural and humanitarian targets. These twelve crimes reflect customary international law as it has developed for internal conflicts, which are specially defined as 'armed conflicts that take place in the territory of a State where there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'. This makes it crystal clear that even if terrorist forces or liberation armies fall outside common Article 3 of the Geneva Conventions, their leaders can be brought before the ICC for specific atrocities against civilians. The aimless banditry of a murderous organization like Renamo in Mozambique (before an amnesty gave it a political status to which it had never previously aspired) would henceforth be caught, while the leaders of 'Shining Path' in Peru may yet have their moment in the international dock, where their indelibly vicious crimes against women (they have assassinated twelve leading feminists and encouraged widespread rape) would receive a fairer trial than from any court in Peru.

The worst war crime of all – declaring and waging aggressive wars in which millions of combatants and civilians may be killed – is absent from Article 8, because the Rome Conference could not agree on a definition. As a compromise, the ICC was given a provisional jurisdiction over the crime of aggression (by Article 5(1)(d)) which

only operates when a definition is approved at a subsequent review conference. This is unsatisfactory. Warlike acts of aggrandizement, like Saddam's occupation of Kuwait and Galtieri's invasion of the Falklands, should count as the gravest of crimes, given the multiplicity of international mechanisms available to prevent them through negotiation or arbitration. 'Just wars' in the future will mainly be fought by the side which intervenes to oppose such aggression, or which goes to war out of humanitarian necessity as the only way to stop a state committing crimes against humanity. The inability to agree on the definition of the crime of aggression – most commonly the prelude to international conflict – was a serious failure, given that this was addressed at Nuremberg and that drafts have been debated by the Human Rights Commission and the International Law Commission since 1948. The failure is only exacerbated by the device of pretending to include it, but postponing its operation until a definition is agreed at the seven-year review stage (i.e. in the year 2009). What was most required was the definition of a war crime which would have put leaders like Saddam Hussein and General Galtieri in jail for life. Sadly, the nations assembled at Rome missed the opportunity to outlaw war as an instrument of national policy.

CRIMINAL LAW PRINCIPLES

Part 3 of the Statute adopts basic principles found in most advanced legal systems. The prosecution must prove that the criminal acts are committed with *mens rea* (that is, intentionally, and with knowledge of the likely consequences). Defendants will be liable for crimes committed jointly or with a common purpose, for acts of assistance and for ordering, soliciting and inducing crimes and for attempting to commit a crime by taking a substantial step towards its completion. The Statute applies to heads of state, elected representatives and all others who have acted in an official capacity: the plea of 'act of state' will be heeded no longer. The criminal responsibility provisions (Article 25) spell out that guilt of genocide includes the public incitement of others to commit it – a recognition of the role of radio in encouraging the massacres in Rwanda, and an override of any free speech arguments in respect of this crime.

Jurisdiction is confined to natural persons – men and women, to the exclusion of governments or corporations or political parties. This was a mistake (as we shall see) because reparations cannot be ordered against parties which are not criminally responsible. Why should a multinational chemical corporation not be prosecuted (as well as its directors) for supplying poison gas in the knowledge that it will be used for a crime against humanity? Why should that company, if convicted, not be ordered to pay massive reparations to survivors and to victims' families? Another questionable exception (in Article 26) is for any person aged under eighteen at the time of the crime. Some appalling atrocities have been committed by 'boy soldiers' whose age should mitigate penalty rather than excuse their crime. Article 8 makes it a war crime to enlist persons under fifteen for an active part in hostilities: those of sixteen or seventeen, old enough to participate in war, should not be immune from prosecution.

The Rome delegates sensibly resisted the demands by Amnesty and other NGOs that they should deny to persons suspected of crimes against humanity some of the defences which these organizations had, in the past, urged should be available to political prisoners. Self-defence, duress, mistake which negates *mens rea*, insanity and even intoxication will exclude liability in a proper case. 'Command responsibility' is defined precisely in Article 28: military commanders will be responsible for atrocities committed by their forces if they knew, or should in the prevailing circumstances have known, of the unlawful behaviour of subordinates but failed to take reasonable measures to stop or to punish them. This is an endorsement of the *Yamashita* principle, upon which the Hague Tribunal indicted Karadžić and Mladić (see p. 222).

However, the Rome Statute does attenuate one great principle to emerge from Nuremberg, namely that 'superior orders' may mitigate punishment but can never amount to a defence. Article 33 provides that any order – by a military, police, governmental or civil authority – may indeed provide a defence to persons who were under a 'legal obligation' to obey orders (which soldiers and police invariably are) and who did not know the order was unlawful, where the order in question was not 'manifestly unlawful'. Although orders to commit genocide or crimes against humanity are deemed to be 'manifestly

unlawful' this will not be the case in respect of military operations amounting to war crimes. Indeed, a bomber crew ordered to drop a nuclear weapon would be under a legal obligation to obey, and that order – (thanks to the ICJ decision analysed in chapter 5) – is not 'manifestly unlawful'. Under Article 33, 'superior orders' may thus constitute a defence – another victory for the Pentagon lobby concerned that soldiers should not be emboldened to disobey military edicts of dubious legality.

Article 29 provides that the Court's jurisdiction must not be affected by any time bar or statute of limitations. This will ensure that complementarity cannot be invoked on behalf of persons suspected of crimes which fall outside time limits for prosecutions imposed by national legal systems. (Many Francophone countries, for example, bar prosecutions after a lapse of fifteen years, even for murder.) Crimes against humanity are of such seriousness that they should be amenable to prosecution for as long as their perpetrators remain alive. However, many national legal systems do provide their courts with power to abort long-delayed prosecutions, at least where the defendant has not been responsible for the delay by evading capture. The ICC has no equivalent power to rule a case inadmissible if there has been unconscionable and prejudicial delay by the prosecuting authorities in preparing it. It may be that the Trial Division can, however, dismiss the case in such circumstances: Article 64(2) mandates it to 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused', one of which is, under Article 67(c), 'to be tried without undue delay'. Where the delay is both unjustified and has arisen from prosecutorial incompetence a trial division will be tempted to throw out the case, as it was in *Barayagwiza* (see p. 341), but the better course is to inquire into the cause of the delay and to condemn publicly any incompetence by the prosecutor or Registrar, unless the delay has been so prejudicial that the defendant can no longer be fairly tried.

Article 66 enshrines the fundamental presumption of innocence, and places the burden on the prosecution to prove guilt beyond reasonable doubt. Article 67(1) guarantees that the onus of proof or even an 'onus of rebuttal' shall not be imposed on a defendant, although many of the defences adumbrated elsewhere in the Statute

(such as 'superior orders' and duress) place precisely such burdens – and reasonably enough – on the defendant. Questions of burden and standard of proof can be crucial in jury trials, although they tend to be academic when verdicts take the form of a reasoned judicial decision: in practice, once the prosecution proves beyond reasonable doubt complicity in a crime against humanity, the onerous task of establishing exculpatory circumstances such as duress or intoxication or mistake will shift to the defendant.

THE COURT

JURISDICTION

The most direct mechanism for triggering the power to investigate and try international crimes is provided under Article 13 (b), whereby a 'situation' is referred to the prosecutor by the Security Council acting pursuant to Chapter VII of the UN Charter. This is the method, it will be recalled, under which the Hague and Arusha Tribunals were established, by resolutions which asserted that the 'situations' in former Yugoslavia and in Rwanda constituted a threat to world peace (see p. 309). No longer need the UN establish *ad hoc* tribunals: when there is superpower agreement on the need to punish crimes against humanity, committed in peace or war, by or on the territory of any state (whether it is a party to the Treaty or not) then the Security Council may simply resolve to refer the matter to the ICC prosecutor. That action automatically attracts the jurisdiction of the Court over those whom the prosecutor chooses to indict.

In the event of Security Council disagreement or inaction, the position is more complicated. The Court cannot acquire jurisdiction without a Security Council resolution unless, for a start, the conduct in question occurred on the territory of a state which is party to the Statute, or else the suspect is a national of a state which is party to the Statute. Neither of these preconditions is likely to be fulfilled in the case of political and military leaders engaging in vicious repression of dissident civilians or ethnic groups, because it is inherently unrealistic to expect that states run by such persons would ratify the Statute.

This impasse results from a serious split at the Rome Conference. The US, it will be recalled, came to Rome wanting an ICC, but one which had a cast-iron guarantee that no American would ever be indicted. That could best be achieved by a court with jurisdiction triggered *only* by the Security Council, where the US would have a veto, although the US was prepared in addition to let state parties to the Statute have the option of allowing their nationals to be tried (since the US could always decline to agree). Its European allies, led on this issue by Germany, took the 'universal human rights' position: the ICC should have universal jurisdiction, over everyone everywhere, irrespective of their nationality or the state in which the crimes were committed. This position would make the Court a true instrument of international justice, insulated from the superpower politics of the Security Council. South Korea, in an attempt to placate the US, suggested that the Court might at least sidestep the Security Council in respect of crimes committed *on the territory* of a state which was party to the Treaty (so Kuwait, if such a party, could ask it to indict Saddam Hussein over some future invasion). Then it added a second possibility – jurisdiction if a state party happened to *capture a suspect who was a national of another state* (just possibly of the US) – and that was when the American delegation threatened both Germany and South Korea with a reduction in US forces unless they withdrew these proposals. The US, said delegation leader David Sheffer, would 'actively oppose' the Court, even if its jurisdiction was based only on the South Korean compromise. The conference was thus bullied into dropping the German proposal for true universal jurisdiction, as well as the second Korean proposal, but it retained a measure of self-respect by insisting the Court have jurisdiction over crimes committed on state party territory. It was partly over this act of defiance that the US, with a show of petulance, voted against the entire Statute. It is difficult to disagree with Kenneth Roth, director of Human Rights Watch, that 'in weakening the Korean proposal, the Rome delegates apparently felt the need to make concessions to Washington in the naive hope that the Clinton administration would at least tolerate the Court. Instead, they got the worst of both worlds: the Court has been considerably weakened and the US Government is still determined to destroy a historically important new institution."[9]

10. Ibid., Appeals Chamber, p. 451, para. 70.
11. *Nicaragua* v. *US* (1986), ICJ 4.
12. *Tadić Case*, *n.* 9 above, p. 458, paras. 96–7.
13. Ibid., p. 469, para. 141.
14. *The Kanyabashi Case* (18 June 1997), *HRLJ* 18 (1997), p. 343.
15. See Lyall S. Sunga, 'The First Indictments of the International Criminal Tribunal for Rwanda', *HRLJ* 18 (1997), p. 329.
16. 'When God was Absent', *Economist* (16 February 2002).
17. See Gary Bass, *Stay the Hand of Vengeance* (Princeton, 2000), pp. 217–18; Goldstone, pp. 20–23.
18. William W. Horne, 'The Real Trial of the Century', *The American Lawyer* (1996), p. 61.
19. 'Failure to Arrest War Crimes Suspects Marrs Talks', *The Times* (14 June 1996).
20. *Kupreskić Case*, AC ICTY 23 October 2001, para 41.
21. Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 21 (4) (d). See Judge Vorah's opinion in the *Tadić Case* (27 November 1996), importing the European Convention 'equality of arms' principle.
22. International Criminal Tribunal for the Former Yugoslavia, Rule 89 (c).
23. Ibid., Rule 93.
24. Opinion of Judge Sidhwa in *Rajić Decision* (13 September 1996), IT-95-12-R61.
25. The best example of an international court explaining the danger of convicting upon eyewitness evidence is the Privy Council in *Reid and Dennis* v. *R.* (1990), AC 363.
26. Lane and Shanker, *n.* 5 above, p. 10.
27. *Rajić Decision*, *n.* 24 above; *Nikolić Decision* (1998), IT-92-2-R61.
28. *Tadić Case*, *n.* 9 above, Denial of Defence Motion on Jurisdiction (Trial Chamber), para. 39.
29. Catherine Niarchos, 'Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia', *HRQ* 17 (1995), p. 649.
30. See Aryeh Neier, *War Crimes* (Random House, 1998).
31. The *Celebići Case*: *Prosecutor* v. *Zejnil Delalić and others*, IT-96-21-T (16 November 1998), para. 476.
32. *Tadić Case*, *n.* 9 above, Decision on the Prosecutor's Motion (10 August 1995), Protective Measures for Victims and Witnesses.
33. International UN War Crimes Tribunal for the Former Yugoslavia, Rule 75A.
34. For example, *Kostovski* v. *Austria* (1989), Series A no. 166; *Ludi* v. *Switzerland* (1992), 15 EHRR 173.

35. *Blaskić Case* (5 November 1996), IT-95-14-T.
36. *The Prosecutor* v. *Mile Mskić and others* (3 April 1996), Review of Indictment under Rule 61, Trial Chamber I (*Vukovar Hospital Decision*).
37. *Tadić* judgment (7 May 1997), para. 653. See also the Appeals Chamber judgment, *Tadić Case* (15 July 1999), and its sentencing judgment (26 January 2000).
38. International Law Commission Report (1991), p. 266 (Draft Code, Article 94).
39. *Mauthausen Case* (1946–7), Vol. XI Law Reports, 15.
40. *Gustav Becker and others* (1946–7), Vol. VII Law Reports, 67.
41. *Zyklon-B Case (Trial of Bruno Tesch and others)* (British Military Court, Hamburg, 1946), 1 War Crimes Reports, pp. 93, 103.
42. *The Justice Case (The Trial of Joseph Altstoetter and others)*, Vol. VI Law Reports, 88.
43. International Tribunal First Annual Report (28 July 1994); and see note by Secretary-General to the UN General Assembly (29 August 1994), A/49/342, para. 15.
44. See Carla del Ponte, Address to Security Council, 27 November 2001, p. 12.
45. 'Defiant Karadic in Suicide Pledge', *Sunday Times* (14 October 2001).
46. See Danesh Sarooshi, 'Command Responsibility and the *Blaskić Case*', 50 ICLQ (April 2001), p. 452.

9. THE INTERNATIONAL CRIMINAL COURT

1. Quotations in this paragraph are from Amnesty International, *The International Criminal Court – Making the Right Choices*, Part 1 (January 1997), pp. 76–7. The section on 'defences' continues until p. 88.
2. 'A New World Court', *Economist* (13 June 1998).
3. Jorgen Wouters, 'America v. Its Allies', *ABC World News* (17 July 1998).
4. A point well made by Ruth Wedgwood, 'Fiddling in Rome – America and the International Court', in *Foreign Affairs* 77 (November/December 1998), p. 20.
5. *Yugoslavia* v. *UK*, ICJ (2 June 1999), para. 40.
6. This definition combines the nub of paragraph 1 of Article 7 with subparagraph 2 (a), which clumsily adds to the essential elements of the crime.
7. William A. Schabas, *An Introduction to the International Court* (Cambridge UP, 2001), p. 32.
8. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd rev. edn., Kluwer Law International, 1999), pp. 273–5.

9. Kenneth Roth, 'The Court the US Doesn't Want', *New York Review of Books* (19 November 1998), p. 45.
10. This argument is forcefully made by Simon Young, 'Surrendering the accused to the International Criminal Court', BYIL (2000), p. 317.
11. Rome Statute of the International Criminal Court, Article 53(3)(b). Even more oddly, the prosecutor may be required to proceed by a chamber comprising only one judge: see Article 57(2).
12. Lawrence Wechsler, 'High Noon at Twin Peaks', *New Yorker* (18 August 1997).
13. See Payam Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia?', *HRQ* 20 (1998), p. 794.
14. The right to counsel of choice for an indigent accused may mean the right to choose from a list of counsel prepared to act for the moderate payment on offer from the registry. See the Rwanda Tribunal decision in the *Ntakirutimana Case* (1997), *HRLJ* 18 (1997), p. 340.
15. *Prosecutor* v. *Delalic* (Case No IT-98-21-T), 19 January 1998 (Trial Chamber), para 32.
16. *Prosecutor* v. *Simic et al* (Case No IT-95-9-PT). Decision under Rule 73 concerning witness testimony, 27 July 1999, decides that Red Cross privilege is a matter of customary international law. However, the privilege should be that of the witness, and capable of waiver as a matter of conscience or, in extreme cases, of being overridden for the public good.
17. *Edwards* v. *UK* (1992), 15 EHRR 417.
18. Rome Statute, Article 80: 'Nothing in this Part of the Statute affects the application by State Parties of penalties prescribed by their national laws.'
19. David J. Scheffer, 'A Treaty Bush Shouldn't "Unsign"' *New York Times* (6 April 2002), p. 27.

10. THE CASE OF GENERAL PINOCHET

1. DINA head Mañuel Contreras, seeking parole from his prison sentences for directing the Letelier bombing, has testified that Pinochet gave him verbal orders for this and other assassinations. This chimes with the American prosecutor's case against the DINA operatives who effected the bombing. Lawrence Barcella Jr, 'The Case We Made 22 Years Ago', *Washington Post* (6 December 1998); Richard J. Wilson, 'Prosecuting Pinochet: International Crimes in Spanish Domestic Law', *HRQ* 21 (1999).
2. See Inter-American Commission on Human Rights, Report 36/96 (15 October 1996) and Report 29/98 of 2 March 1998.
3. Judge Juan Guzmán, of the Santiago Appeals Court, seized with all cases

against Pinochet, stated, 'I am prevented from issuing any kind of arrest warrant' (*El Mercurio*, 5 August 1998). After Pinochet's arrest in London three months later, the Chilean government petitioned the pro-Pinochet Supreme Court to appoint one of its own justices to take the cases over from Judge Guzmán so that the military tribunals could not assert jurisdiction. The court refused, by 13 votes to 3, to permit even this distant possibility of Pinochet standing trial in Chile. According to Roberto Garretón (the distinguished lawyer who was chief human rights adviser to the government of Chile 1990–4) in his evidence for Human Rights Watch in *Ex parte Pinochet (No. 3)*, 'There is virtually no chance that Pinochet would be prosecuted in a Chilean court' (affidavit, 12 January 1999). However, in July 1999, shamed by international criticism, Chile's Supreme Court at least allowed that disappearances still unresolved could be characterized as the ongoing crime of 'kidnapping' which continues after, and therefore beyond and outside, the amnesty. Some twenty army torturers and one junta member (Humberto Gordon) were arrested in consequence.
4. Richard J. Wilson, *n.* 1 above, p. 927.
5. See Hugh O'Shaughnessy, *Pinochet: The Politics of Torture* (Latin American Bureau, 1999).
6. *R.* v. *Evans, ex parte Augusto Pinochet Ugarte* (28 October 1998), Divisional Court (Bingham CJ, Collins J (quoted) and Richards J).
7. *Ex parte Pinochet (No. 2)* (1999), 1 All ER 577.
8. Article 1, Montevideo Convention on the Rights and Duties of States (1933).
9. The Papal States were conquered in 1870 by Italy, which by the Treaty of Locarno recognized their traditional claim to sovereignty. There is no reason why any other state should recognize the Vatican, however, any more than the bantustans were recognized as states independent of South Africa.
10. See Malcolm Shaw, *International Law* (4th edn) (Cambridge, 1998), p. 143.
11. See *The South-west Africa Case*, ICJ Reports (1971), p. 16.
12. Borchard, 'Government Responsibility in Tort', *Yale Law Journal* 34 (1924), pp. 4–5.
13. See J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th edn, 1963), pp. 9–11, discussing J. Bodin, *De Republica* (1576).
14. As one of them, Vattel, memorably put it: '[A] Head of State who commits murder and other grave crimes in the course of war is chargeable with all the evils, all the horrors, of the war; all the effusions of blood, the desolation of families, the rapine, the violence, the revenge, the burnings, are his work and his crimes. He is guilty towards the enemy, of attacking, oppressing, massacring them without cause, guilty towards his people, of drawing them