PANEL DISCUSSION

ASSOCIATION OF AMERICAN LAW SCHOOLS PANEL
ON THE INTERNATIONAL CRIMINAL COURT

JANUARY 9, 1999
NEW ORLEANS, LOUISIANA

Panelists: Professors Christopher L. Blakesley, Malvina Halberstam, Dorean Marguerite Koenig, Leila Sadat Wexler, and Edward M. Wise. Moderated by Professors John E. Noyes and Ellen S. Podgor

PROFESSOR JOHN E. NOYES:* Welcome to the AALS Panel on the International Criminal Court (ICC, or the Court), jointly sponsored by the Sections on International Law and Criminal Justice. I want to take a few minutes to place the Court, whose Statute took final shape at a diplomatic conference in Rome in July 1998,¹ in historical context. Professor Ellen Podgor, the Chair of the Criminal Justice Section, will highlight some significant features of the Court’s Statute, and then our panelists, who are experts in international law and U.S. criminal law and procedure, will discuss questions about the Court.

I. FROM THE HAGUE TO ROME: THE INTERNATIONAL CRIMINAL COURT IN HISTORICAL CONTEXT

PROFESSOR NOYES: This year, 1999, is the centennial of the first Hague Peace Conference, which was convened on the initiative of Nicholas II, Czar of Russia.² The Hague Peace Conference is not usually the event one thinks of first when thinking about the development of international criminal law or international criminal courts.³ But three features of that 1899 Conference provide a useful point

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2. The Czar’s overwhelming desire was to control the increase of armaments, which the Russian Minister of Foreign Affairs described as a "grave problem." WILLIAM I. HULL, THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW 3 (Garland Pub. 1972) (1908). See id. at 52-54.

3. More typical starting places are either the work of the 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties, or the Nuremberg and Tokyo ad hoc military Tribunals established after World War II. For historical surveys and collections of documents, see BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE (1980); M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 HARV. HUM.
of reference. In particular, it is useful to contrast the nature of the conduct outlawed at the Hague with the conduct that falls within the jurisdiction of the ICC. It is also worth noting what the Hague Conference contributed to the development of formal international dispute settlement bodies, and to consider some of the changes over the last hundred years in the ways international law and institutions are created.

First, note the nature of the conduct that the delegates addressed at the Hague in 1899. The Conference adopted rules on land warfare, specifying, for example, how prisoners of war are to be treated and prohibiting certain means of injuring enemies. States were to implement these rules, and states were to be responsible when their own armed forces violated the rules in their conduct toward foreigners. The conceptual contrast between these Hague rules and the conduct that may be prosecuted under the ICC Statute is dramatic. International law has moved away from its strong nineteenth-century and early twentieth-century emphasis on state centrism. One legacy of the Nuremberg Trials after World War II is the notion that individual government officials, and not just their states, could be responsible under international law for certain gross abuses. The ICC will in fact address only individual responsibility, not state responsibility.

There are other contrasts between the nature of the conduct regulated by the Hague Rules and the conduct that international law now considers criminal. Not only does international law now accept individual responsibility, but gross abuses committed against individuals are no longer deemed illegal only if, as was true under the Hague rules, such abuses occur during wartime and are directed toward an enemy. Thus, today, codifying treaties and customary international law provide that responsibility may exist when states or government officials injure their own citizens. Furthermore, international law also now condemns as criminal some, but not all, gross abuses occurring during peacetime. The Rome Statute, for example, defines acts of slavery and torture, if part of a widespread or systematic attack, as crimes against humanity within the Court’s jurisdiction. Such crimes against humanity may occur in peacetime as well as wartime, and may occur when the


4. Convention (No. II) with Respect to the Laws and Customs of War on Land, Annex to the Convention, July 29, 1899, 32 Stat. 1803, 1 Bevans 247. See also Convention (No. IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.


6. See Rome Statute, supra note 1, art. 25. In other respects, however, states’ concerns and importance are reflected throughout the Rome Statute. For example, the notion of complementarity requires deference to state decisions to exercise jurisdiction, see id. art. 17; the Court’s jurisdiction over individuals will require links of territoriality or nationality with states that have accepted the Statute, see id. art. 12(2); and states may opt out of the Statute’s provisions on war crimes for seven years, see id. art. 124.

victim and the accused are nationals of the same state.\textsuperscript{8}

Second, the Hague Conference contributed to the development of international courts and arbitral tribunals authorized to render binding decisions in a wide range of disputes. The 1899 Hague Convention on the Peaceful Settlement of International Disputes\textsuperscript{9} provides for a range of dispute settlement options from which states may choose. The Conference also established the Permanent Court of Arbitration (PCA)—an arrangement involving a list of qualified arbitrators, an administrative structure, and rules of procedure—although recourse to arbitration remained optional and was not made obligatory on parties to any general treaty.\textsuperscript{10} The PCA is the precursor of the Permanent Court of International Justice and its successor, the International Court of Justice. Since World War II, over a dozen regional and global international courts and tribunals, not including ad hoc arbitral tribunals, have been established, many of them allowing individual access.\textsuperscript{11} These international courts and tribunals are authorized to render binding judgments, and some of the courts and tribunals have proved to be remarkably efficacious.\textsuperscript{12} With respect to international criminal courts in particular, the ICC has four predecessors, although none of them are global in scope: the Tokyo and Nuremberg Tribunals established after World War II, and the Yugoslav and Rwandan International Criminal Tribunals established earlier this decade.\textsuperscript{13} The ICC negotiators certainly faced many difficult, new questions—questions, for example, concerning the Court’s jurisdiction, mode of operation, and intersection with national legal systems. But the negotiators were at least working in a legal and political environment in which international courts were familiar, and were perceived as having the potential for making positive contributions to settling disputes and redressing illegal conduct.

Third, the span of a century reveals some significant changes in the process of international lawmaking. Although the conventions that emerged from the 1899 Hague Conference were not the first multilateral treaties, multilateral treaty-making conferences were not nearly as common then as they are today. The twentieth century has seen an explosion in the number and variety of such treaties.

\textsuperscript{8} See Rome Statute, supra note 1, arts. 7-8.

\textsuperscript{9} Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, 1 Bevans 230.

\textsuperscript{10} Id. arts. 15-57. Eight years later, the Second Hague Peace Conference also adopted a treaty for an International Prize Court. Hague Convention (No. XII) Relative to the Creation of an International Prize Court, Oct. 18, 1907, 2 AM. J. INT’L L. 174 (1908). The Prize Court garnered insufficient acceptances to enter into force.

\textsuperscript{11} For a list of international courts and formal dispute settlement bodies, see Jonathan I. Charney, Third Party Dispute Settlement and International Law, 36 COLUM. J. TRANSNAT’L L. 65, 69-70 (1997).


States have used multilateral treaty-making conferences to create international institutions as well as to develop substantive rules of international law. The increase in the number and diversity of states during the twentieth century has posed challenges for developing international law and institutions in a manner that is efficient and that insures consideration of diverse viewpoints.\(^\text{14}\) Although international institutions have sometimes been formed through more efficient means than cumbersome multilateral negotiations—the Yugoslav and Rwandan International Criminal Tribunals were created by the UN Security Council acting under Chapter VII of the UN Charter—multilateral negotiations were deemed necessary for the development of a global international criminal court. The techniques developed to help prepare for treaty-making conferences include the use of international expert bodies. For example, the International Law Commission prepared a draft ICC statute that served as the basis for negotiating sessions and was important to the completion of work on the Rome Statute.\(^\text{15}\)

The passage of a hundred years also provides a useful perspective on the roles of non-state actors in the international lawmakersing process. The Hague Conference and its committees originally planned to conduct their proceedings in secret.\(^\text{16}\) Non-governmental organizations (NGOs), including active peace societies, publicized the content of sessions and lobbied states’ delegates.\(^\text{17}\) Modern NGOs have been actively involved—in person, in print, and over the Internet—in promoting an International Criminal Court, and their work has significant implications for the creation of networks of civic engagement and governance. NGOs lobby, educate, and conduct sophisticated cross-disciplinary studies.\(^\text{18}\) The efforts of NGOs to promote shared cross-cultural viewpoints is, in my view, an important part of the international lawmakersing process.

In the time available, I can only highlight in the most general fashion some of the broad features of the changing international legal landscape within which we should situate the Rome Statute. Certainly, changes during the past century—changes concerning the role of the individual in international law, the willingness of states to develop international courts and tribunals, and the ways in which international law is made—have been dramatic. In a general sense, these changes help us to understand the development of the International Criminal Court.

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17. See id. at 22-23.

II. OVERVIEW OF THE ICC STATUTE

PROFESSOR ELLEN S. PODGOR:* A Statute creating an International Criminal Court was adopted on July 17, 1998 at the United Nations Diplomatic Conference held in Rome.19 There were 120 delegations in favor, seven opposed, and twenty-one abstentions.20 Although it was a non-recorded vote,21 the United States was one of the seven opposing the Statute.22 The Statute requires sixty ratifications to take effect.23

The Statute commences with a Preamble followed by 128 Articles that are contained within thirteen Parts. The Preamble sets the stage for the document by providing historical context for the establishment of an International Criminal Court.24 The Statute provides for “international cooperation and judicial assistance,” including, for example, the procedures for “surrender of persons to the Court.”25

The four Articles that comprise Part One create the Court as a “permanent institution,” noting its jurisdiction “over persons for the most serious crimes of international concern,” and specifying its existence as “complementary to national criminal jurisdictions.”26 The Court seat is at the Hague, although it may sit elsewhere.27 In addition to having “international legal personality,” the Statute provides that the “Court may exercise its functions and powers . . . on the territory of any State Party and, by special agreement, on the territory of any other State.”28

The “most serious crimes of international concern” comprise the Court’s jurisdiction, the four categories being genocide, crimes against humanity, war

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23. Rome Statute, supra note 1, art. 126.

24. Id. preamble. ("Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, . . .").

25. Id. art. 89.

26. Id. art. 1.

27. Id. art. 3 ("The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.").

28. Id. art. 4.
crimes, and the crime of aggression.\textsuperscript{29} The Statute provides definitions for genocide,\textsuperscript{30} crimes against humanity,\textsuperscript{31} and war crimes.\textsuperscript{32} The crime of aggression, however, is within the Court’s jurisdiction after the crime is defined.\textsuperscript{33} The Statute provides the methodology for the adoption of Elements of Crimes and amendments to the Elements,\textsuperscript{34} the general basis for jurisdiction,\textsuperscript{35} referral of cases,\textsuperscript{36} the role of the Prosecutor,\textsuperscript{37} and issues regarding acceptance by the Court of a case.\textsuperscript{38}

General principles of criminal law form the substance of Part 3 of the Statute. For example, one finds here: a rule of lenity,\textsuperscript{39} jurisdiction limited to those over eighteen years old,\textsuperscript{40} an Article providing for equal treatment irrespective of one’s official capacity,\textsuperscript{41} and criminal culpability of military commanders for certain acts of their subordinates.\textsuperscript{42} Although there is no statute of limitations,\textsuperscript{43} “[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”\textsuperscript{44} Part 3 also includes the applicable mens rea which is, in essence, a requirement that material elements be committed “with intent and knowledge.”\textsuperscript{45} There are Articles pertaining to insanity, intoxication, duress, mistake of fact, and mistake of law. “Orders to commit genocide or crimes against humanity are manifestly unlawful,”\textsuperscript{46} and one committing these acts under an order of a government or a supervisor will not be relieved of criminal responsibility.\textsuperscript{47}

\textsuperscript{29} \textit{Id.} art. 5.
\textsuperscript{30} \textit{Id.} art. 6.
\textsuperscript{31} \textit{Id.} art. 7.
\textsuperscript{32} \textit{Id.} art. 8. Article 124, however, states:

Notwithstanding article 12 paragraph 1, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

\textit{Id.} art. 124.

\textsuperscript{33} \textit{Id.} art. 5(2); see Podgers, \textit{supra} note 22, at 65 (“The most important substantive task ahead is to develop a definition of the crime of aggression, which the diplomatic conference agreed to put off.”).

\textsuperscript{34} Rome Statute, \textit{supra} note 1, art. 9.

\textsuperscript{35} \textit{Id.} arts. 11-14.

\textsuperscript{36} \textit{Id.} art. 14.

\textsuperscript{37} \textit{Id.} art. 15.

\textsuperscript{38} \textit{Id.} arts. 17-20.

\textsuperscript{39} \textit{Id.} art. 22 (“In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”).

\textsuperscript{40} \textit{Id.} art. 26.

\textsuperscript{41} \textit{Id.} art. 27.

\textsuperscript{42} \textit{Id.} art. 28.

\textsuperscript{43} \textit{Id.} art. 29.

\textsuperscript{44} \textit{Id.} art. 24. \textit{See also} \textit{id.} art. 11.

\textsuperscript{45} \textit{Id.} art. 30.

\textsuperscript{46} \textit{Id.} art. 33(2).

\textsuperscript{47} \textit{Id.} art. 33.
The Court will include eighteen judges who will serve in an Appeals Division, a Trial Division, and a Pre-Trial Division. A President and First and Second Vice-Presidents will be "elected by an absolute majority of the judges," to be responsible for the "proper administration of the Court." A Registry will be "responsible for the non-judicial aspects of the administration and servicing of the Court." The Prosecutor's Office, however, will act "independently as a separate organ of the Court."

The Statute sets forth the procedure for investigation and prosecution. For example, it authorizes the Prosecutor to "collect and examine evidence," and also provides the procedure for a "warrant of arrest or a summons to appear." The Statute provides for the rights of an accused, including a provision that a person "shall not be compelled to incriminate himself or herself or to confess guilt." In describing the trial procedure, the Statute provides that "the accused shall be present during the trial" and enjoys a presumption of innocence until proved guilty. Obstruction of the judicial process is considered with an Article on "offences against the administration of justice."

The Statute provides for penalties of imprisonment, fines, and forfeiture. "A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons." Factors such as "nationality of the sentenced person" will be considered by the Court in exercising its discretion in designating where the sentence will be served. The Statute also includes a procedure for appeal and revision of conviction and sentencing. "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation."

In addition to examining this Statute for its global jurisdiction, it also offers models for comparison in criminal law and criminal procedure classes. Adding this new dimension can enhance the class discussion. Our Panel of experts will now examine the Statute in detail.

48. Id. arts. 34-37.
49. Id. art. 38.
50. Id.
51. Id. art. 43.
52. Id. art. 42.
53. See id. pt. 5.
54. Id. art. 54(3)(a).
55. Id. arts. 58-59.
56. Id. art. 55(1)(a).
57. Id. art. 63.
58. Id. art. 66.
59. Id. art. 70. The Statute, in Article 68, also provides for protection of victims and witnesses, and in Article 71, for "sanctions for misconduct before the Court."
60. See id. pt. 7, arts. 77-80. Sentencing is provided for in Part 6, Article 76.
61. Id. art. 103(1)(a).
62. Id. art. 103(3) (delineating five factors that are considered in making a designation).
63. These procedures are found within Part 8 of the Statute. Id. arts. 81-84.
64. Id. art. 85(1).
respond to questions concerning issues surrounding the Statute. The panelists are Professor Christopher L. Blakesley, Professor Malvina Halberstam, Professor Dorean Marguerite Koenig, Professor Leila Sadat Wexler, and Professor Edward M. Wise.

III. PANEL DISCUSSION

PROFESSOR PODGOR: What are the advantages and disadvantages of the International Criminal Court? Are the disadvantages based upon particular details in the Statute or fundamental conceptual concerns?

PROFESSOR WISE:* It depends on one’s point of view. For better or for worse, the Rome Statute does mark a significant step in the movement, begun at the end of the Second World War, which has displaced states as the sole subjects of the international law and moved concern with individual human rights to what Hersch Lauterpacht called the moral “center of the constitution of the world.” 65 For those for whom the nation-state remains the fundamental form of political organization on this planet, this is a distressing development; it is positively pernicious insofar as the Statute can be applied to nationals of non-parties without their states’ consent. Further, the Statute permits amendments by a two-thirds majority of the states-parties; and, while that may look democratic, if you tote up who is likely to be the two-thirds majority, the so-called “democratic deficit” in the Assembly of States-Parties may be even larger than the “democratic deficit” in the Security Council, about which there is a good deal of complaint.

On the other hand, for those who think that it is about time we put some teeth into long-standing prohibitions of genocide and crimes against humanity, the big advantage of the International Criminal Court is that it holds out some promise that people who commit crimes deserving damnation, as well as condemnation, will actually be brought to trial for their misdeeds. The most important function of the Court, if it works, is likely to be the function Emile Durkheim attributed to criminal law generally: that is, the strengthening of social cohesion which occurs when the rest of us close ranks against criminals. 66 The big disadvantage is that,

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except in cases referred by the Security Council, the Court’s jurisdiction depends on the consent of the state on whose territory the crimes took place or the state of which the accused is a national, which effectively deprives the Court of jurisdiction over the people who are likely to be the most obvious suspects, the future Pol Pots who massacre their own people on their own territory.

PROFESSOR HALBERSTAM:* I have long supported establishing an International Criminal Court. I believe the establishment of such a Court is very important for the development of international law. For centuries, international law focused almost exclusively on states, not individuals. International law did not protect individuals, and, with the notable exception of piracy, it did not criminalize acts by individuals. That has changed dramatically in the last fifty years. There are now a number of treaties—such as the Covenant on Civil and Political Rights, the Racial Convention, the Convention on the Elimination of Discrimination Against Women, and the Convention on Torture—ratified by a large number of states, that are designed to protect individual rights. There are also a number of treaties that impose criminal responsibility on individuals for certain conduct: the Genocide Convention, the Geneva Conventions on the Laws of War, and treaties

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72. Four conventions were adopted at Geneva on August 12, 1949 and entered into force on October 21, 1950.
dealing with specific terrorist acts, such as airplane hijacking,\textsuperscript{73} sabotage,\textsuperscript{74} hostage taking,\textsuperscript{75} attacks on internationally protected persons,\textsuperscript{76} and seizures of ships on the high seas,\textsuperscript{77} many of which have also been ratified by substantial numbers of states. These treaties mark an important phase in the development of international law. They establish that individuals have rights under international law—rights even against their own states—and that individuals are accountable under international law.

But there is a major gap; there are no meaningful remedies under international law.\textsuperscript{78} The next phase in the development of international law must be the creation of enforcement mechanisms—the establishment of tribunals in which those who are denied fundamental human rights can obtain redress, and tribunals in which those who are guilty of the most egregious crimes can be brought to justice. An International Criminal Court would be such a mechanism. It would make it possible to bring to justice those who engage in the most heinous crimes—genocide, crimes against humanity, war crimes, and terrorism—even if the

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\textsuperscript{78} There are some exceptions to that; the European Convention on Human Rights is an example of a treaty that not only established rights but also mechanisms for their implementation.
perpetrator is a national of a state that condones, encourages, or supports the conduct.

For me personally, the establishment of an International Criminal Court would also bring together two areas of law in which I have always had a great interest and which I have taught for almost thirty years: international law, and criminal law and procedure. I was delighted when Professor Noyes invited me to participate on this Panel several months ago. I expected to speak in support of the Treaty that was adopted, as I had in support of an earlier draft at an ABA Conference. It is, therefore, with great sadness that I find myself unable to support the establishment of an International Criminal Court as provided for by the Convention adopted in Rome.

The establishment of an International Criminal Court is a momentous step in the development of international law. A treaty establishing the Court should deal with the structure of the Court, procedure before the Court, and jurisdiction. In order to gain wide ratification, which is essential for the success of the Court, the Court’s jurisdiction, at least at the initial stages, should be limited to crimes that have been defined by existing treaties that have been widely ratified. The treaty establishing the Court should not change the definition of crimes that have been well established, add new crimes over which there is no consensus, or be used for political purposes.

Unfortunately, the Rome Statute does exactly that. It is both too broad and too narrow. It does not include within the Court’s jurisdiction crimes that have been defined by existing treaties that have been ratified by most states of the world. It redefines crimes that have well established definitions in treaties that have been widely ratified to include conduct that was not and should not be included in the definition. And it gives the Court jurisdiction over a crime which is not defined by any treaty and which has long eluded definition. Thus, the Court does not have jurisdiction over such crimes as airplane hijacking, sabotage, attacks on internationally protected persons, or hostage taking, even though these acts are crimes under existing treaties, some of which have been ratified by more than 150 states. The Statute gives the Court jurisdiction over “aggression,” even though no generally accepted definition of aggression exists. The International Law Commission has tried unsuccessfully for many years to reach agreement on a definition of aggression. Finally, the Statute includes within the definition of war crimes the bringing of a civilian population into occupied territory. Under this provision,
Jews living in Jerusalem, the ancient capital of the Jewish people,\textsuperscript{83} or in Hebron, the site of the tombs of the Matriarchs and Patriarchs of the Jewish people, could be charged with war crimes. Are these the “unimaginable atrocities which deeply shock the conscience of humanity,” “the most serious crimes of international concern,” for which the Court was established?\textsuperscript{84} Surely not.

These problems are exacerbated by the fact that the Statute does not permit reservations,\textsuperscript{85} thus making it impossible for states to accept the Court’s jurisdiction with respect to some crimes and not others.

The prohibition on reservations will make it impossible for the U.S. to ratify the Statute in its present form, quite apart from any policy considerations. The Statute makes it a crime to “directly and publicly incite others to commit genocide.”\textsuperscript{86} Under the First Amendment to the U.S. Constitution, as interpreted by the U.S. Supreme Court, advocacy cannot be made a crime unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”\textsuperscript{87} When the United States ratified the Genocide Convention,

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principally against Israel. . . . [T]he proposed formulation, which had been transcribed from Additional Protocol I to the Geneva Convention, with various adaptation, neither represented a grave breach of the Fourth Geneva Convention, nor did it reflect customary international law. In fact, it had been cynically adapted and proposed in order to advance a political viewpoint maintained by certain states.


83. It is the policy of the United States that “Jerusalem shall remain an undivided city in which the rights of every ethnic and religious group are protected.” The Jerusalem Embassy Act of 1995, 104 Pub. L. No. 45, § 3(a)(1), 109 Stat. 398 (1995); that “Jerusalem should be recognized as the capital of Israel,” id. § 3(a)(2); and that “the United States embassy in Israel should be established in Jerusalem no later than May 31, 1999,” id. § 3(a)(3). For a discussion of the Jerusalem Embassy Act, see Malvina Halberstam, The Jerusalem Embassy Act, 19 FORDHAM INT’L L. J. 1379 (1996).

84. The Statute’s Preamble states, “Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.” Rome Statute, supra note 1, preamble. A later paragraph states, “Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.” Id. Article I states, “An International Criminal Court (‘the [C]ourt’) is hereby established. It shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern to the international community as a whole.” Id. art. 1.

85. Rome Statute, supra note 1, art. 120 (“No reservation may be made to this statute.”).

86. See id. art. 25(e).

87. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Professor Koenig takes exception to my position. See infra note 96. She argues that the First Amendment does not prohibit penalizing “the direct and public incitement of such crimes when done with the intent to kill.” I cannot agree with her, for two reasons. The Rome Statute provision on incitement to genocide makes no reference to intent. Article 25(3)(e) provides that a person is criminally responsible and liable for punishment if that person “directly and publicly incites others to commit genocide.” Rome Statute, supra note 1, art. 25(3)(e). The reference to “intentional” conduct and to the commission or attempted commission by “a group of persons acting with a common purpose,” quoted by Professor Koenig, see infra note 32, is found in subsection (d). Rome Statute, supra note 1, art. 25(3)(d). But, even if subsection (e) is interpreted to require intent, I do not believe that intent replaces the requirement of imminent lawless action for First Amendment purposes; that is, even if the speaker intends his listeners to act, his speech cannot be criminalized if there is no likelihood of imminent lawless action. Indeed, the language in Brandenburg
it dealt with that problem by a reservation, but, under this Treaty, a reservation is not permitted.

I view what happened in Rome as a tragic setback for the development of international law. We were very close to establishing, for the first time in history, a court that would be a permanent international court dealing with individuals. Now, a court may not be established; states may not ratify the Rome Statute. Or if a court is established, major powers, such as the U.S., will not support it. What started out as a treaty to establish an international court has been transformed into a treaty defining crimes and establishing a super-legislature with power to define additional crimes in the future, and which can be changed, as Professor Wise already pointed out, by amendment by a two-thirds majority. That is a very different thing from establishing a court to try individuals for crimes on which there is general consensus under existing treaties. Had we established a court to deal with crimes over which there exists consensus and then, as consensus developed for new crimes, added them to the court’s jurisdiction, the court would have had a much better chance of being widely accepted and of succeeding.

PROFESSOR BLAKESLEY:* I think I will just take one second to list some of the basic advantages and disadvantages that I see. Several of each have already been mentioned, but I want to raise a couple again and some others of interest to me. This will be brief, and I will try to get into specifics in my next turn. First of all, the drafters attempted to create a hybrid tribunal—and it is a tribunal in the Continental sense, not a court—mixing or merging aspects of the Continental paradigm with those of the common law. Merging or harmonizing aspects of legal systems

makes clear that both intent and likelihood of imminent lawless action are required. The Court said,

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg, 395 U.S. at 447 (emphasis added).

88. The Senate Resolution Giving Advice and Consent to Ratification of the Genocide Convention included a reservation: “that nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.” 132 Cong. Rec. S1355-01 (1986) (giving advice and consent to the ratification of the Genocide Convention).

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89. Cherif Bassiouini has properly pointed out that the Tribunal is inappropriately named. See M. CHERIF
is certainly something that inherently makes some sense, but only if it is done right. Doing it right is quite difficult. It is my sense that this ICC admixture is a bit deficient, if not actually based on a caricature of each model, rather than reality or any deep application. This harmonization by caricature poses many problems for me. I'll address some of these problems in my upcoming presentation.  

Problems relating to the definition of crimes have already been mentioned. Some of the definitions in the ICC Statute are too vague, obviously posing a bit of a problem. I will not spend much time on that, but will leave it to others. I am asked to address problems, especially regarding the rights and protections for those accused of committing relevant crimes. I will address issues relating to rights and protections at trial and pre-trial investigation. I will consider first the Pre-Trial Chamber, and then the trial itself.

The ICC Statute actually provides some elaboration of the defendant's rights, but actually often does so only by negative implication drawn from the statute's articulation of the power of the Prosecutor. There is much less relating to the defense, except for sometimes platitudinous statements that really are simple adoptions of language from international treaties. This language is often deficient and vague, because the treaties often have not been promulgated or written by experts in criminal law and procedure, but rather by diplomats and experts in basic public international law. This is not true for all of the rights and protections in the ICC Statute, but it is for some. This causes problems for me.  

BASSIOUNI, STATUTE OF THE ICC: A DOCUMENTARY HISTORY 14-19 (1999). The "Tribunal" has several additional parts: Pre-Trial Chamber; Trial Chamber; and Appellate Chamber. Thus, it is truly a Tribunal in the Continental Sense. See id. Also, the Prosecutor has powers that make him or her a bit like the juge d'instruction in France. For discussion of the juge d'instruction, see generally JEAN PRADEL, LE JUGE D' INSTRUCTION (1996).


91. It is true that even the language of the U.S. Constitution and Bill of Rights is vague and sometimes
need to talk in any depth on this for now; we'll consider it more specifically later. Let me just very briefly mention some of the defense weaknesses—popping them off: one, two, three.

It has been mentioned that the ICC Statute provides a right not to be compelled to testify against oneself. It is not clear, however, at what point defense counsel can be present with the defendant to protect that interest. The right certainly is available at the trial stage, and counsel's role appears to be fairly significant. The right seems to be available after one is arrested, although the exact nature and extent of that right is not clear. On the other hand, at what point before actual arrest is the right available, operative, and functional? Thus, the Statute mentions the right not to be compelled to be a witness against oneself and the right to the presence of counsel, but the scope of these rights is not clear, including at what points they are available and at what points they are not. In addition, you will find nothing at all in the Statute relating to what we in the United States would consider Fourth Amendment interests. This is a bit shocking to me, especially when one realizes that the Prosecutor's investigations may take place in one of the state-particles or even a third state.

So the Statute has several weaknesses relating to fundamental rights of those who are eventually accused of statutory crimes, even if these crimes are deemed to be defined properly. My instinct is that we had, and may still have, a great opportunity to do something very good in establishing an ICC that is both efficient and fair. Both of these elements need to be developed in the Rules of Procedure and Evidence.

An absolutely pathetic element of potential opportunity lost is that the United States participated in promoting and developing many of these deficiencies, and then backed out on the court. The U.S. cut and ran. I find that pathetic, to be quite amorphous. See, e.g., Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 353-54 (1974) (characterizing the language of the Fourth Amendment as being "brief, vague, general, [and] unilluminating . . . "). See also JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES & PERSPECTIVES 62-63 (1998). This vagueness has presented difficulty for the U.S. Supreme Court and other U.S. courts and has developed inconsistent jurisprudence. But two centuries of judicial and academic debate has at least resolved some points and has at least put some meat on those bare linguistic bones. If not consistent over time, the material is available at least for debate and decision. One of the problems with the ICC Statute is that it is so new and so vague, in parts at least, that one struggles for meaning. Perhaps either jus cogens principles, customary international law, or judicial decisions on some of these rights as articulated in the precursor treaties will provide some light. One must hope so. And judges, counsel, and scholars need to present evidence of any clarity. For more of my thoughts on this issue, see Christopher L. Blakesley, L'Impact, supra note 90, at 201-313; Blakesley, The Impact of a Mixed-Jurisdiction on Legal Education, supra note 90; Blakesley & White, supra note 90.

92. There is an important distinction between when an arrest occurs, and what an arrest triggers in a "civilian," as opposed to an "adversarial," system. Continentals are always shocked at how early a defendant is "arrested" in the U.S. system, for example. They fail to realize, however, that the arrest may be the trigger for rights for the arrestee, for example, the right to the presence of counsel in a custodial interrogation. See, e.g., L'Impact, supra note 90, at 287-90, 281-83 and authority cited therein. On the other hand, on the Continent, defendants' rights are ostensibly being protected by the Prosecutor prior to arrest.
blunt. The reasons given for cutting and running seem to me to be essentially ideological—and often the wrong ones even ideologically. Moreover, the U.S. helped create a tribunal with problems relating to the defense and then used this as one of the excuses for not participating.\footnote{See, e.g., Development of Rules of International Criminal Procedure Applicable to the International Adjudication Process: Arriving at a Body of Criminal Procedure Law for the ICC, Section V, of Monograph: LES SYSTÈMES COMPARÉS DE JUSTICE PENALE, supra note 90, at 389 (1998) (presenting the views of Kenneth Harris, one of the U.S. representatives of the Department of Justice).}

Sadly, there was an opportunity to do something right—to create a tribunal that is fair and just. Maybe there still is a chance to do so. Some opportunity still remains at the point of developing the Rules of Procedure and Evidence. Some other opportunities may arise down the road perhaps, which may allow resolution of some of these difficulties, and the perfection of the rights of accused individuals during the investigative, pre-trial, and trial phases.\footnote{See authority and discussion in my work, supra note 90.} But I see these difficulties as posing the very same problem that Justice Jackson raised at the Nuremberg Trials in his opening statement. That is: if we are going to create an international tribunal that has the power to put people in prison for life, we’d better do it right; and we’d better not only have the appearance of fairness. The tribunal must actually be fair. If we are going to create one merely to pretend we are good, rather than paying the price actually to be good, ultimately we are going to make a mockery of the Court itself—of international law itself.\footnote{Justice Jackson summed up the importance of this point in his opening statement during the Nuremberg Trials:}

\begin{quote}
Before I discuss the particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate.

Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes . . . . We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.
\end{quote}

\begin{itemize}
\end{itemize}
here, and criticize and nit-pick the work on the Rome Statute done at the Plenipotentiary Conference in Rome last summer.\textsuperscript{96} We pretend that we have one system, but in reality, we have a system where ninety to ninety-five percent of the defendants make plea bargains.\textsuperscript{97} And they have no trial and only whatever grace is given in court rule or statute to the plea bargaining system. The system has been extensively criticized.\textsuperscript{98}

We have one of the worst death penalty systems in the world.\textsuperscript{99} I say this particularly because this was one of the areas that I worked on in Rome—the penalties phase both with the International Law Association project\textsuperscript{100} and with the Coalition for an International Criminal Court (CICC) NGO Penalties Team in

\begin{quote}
Interviewer Philip Gourevitch: "What other concrete proposals did you come up with?"

Marley: "At one point I had recommended that in response to the hate propaganda radio . . . that the U.S. could use military radio jamming equipment . . . . Another possible step would have been using regional . . . broadcast facilities to broadcast a counter message calling on people . . . to stop the killing . . . . [O]ne lawyer from the Pentagon made the argument that that would be contrary to the U.S. Constitutional protection of freedom of . . . speech."

\textit{Id.}
\end{quote}

\textit{Id.}

\textsuperscript{96} I take exception to Professor Halberstam's criticism that the Rome Statute violates the First Amendment of the United States Constitution. Article 25 penalizes an individual who \textit{intentionally} contributes to the commission or attempted commission of genocide by "a group of persons acting with a common purpose" when he or she "directly and publicly incites others to commit genocide." Rome Statute, \textit{supra} note 1, arts. 25(d)-(e), 30 (emphasis added). However one may feel about either conspiracy law or aiding and abetting statutes upheld under both United States federal and state law, this is exactly the type of conduct which this Statute prohibits. The First Amendment has never been held to be a defense to the direct and public incitement of such crimes when done with the intent to kill—and in some jurisdictions in the U.S., mere knowledge rather than intent is sufficient. It was shameful that some U.S. Pentagon officials raised this defense to the incitement to genocide in Rwanda. Interview with Tony Marley, a Political and Military Adviser for the U.S. State Department from 1992-1995, \textit{Frontline: The Triumph of Evil} (television broadcast Dec. 29, 1998) <http://www.pbs.org/wgbh/pages/frontline/shows/evil/interviews/marley.html>. An excerpt follows:

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\textit{Id.}
\end{quote}

\textit{Id.}

\textsuperscript{97} See Brady v. United States, 397 U.S. 742, 752 n. 10 (1970).


\textsuperscript{99} More than half of the world's nations have either abolished or no longer practice the death penalty. See Dorean Koenig, \textit{Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?}, Materials distributed at American Bar Association Annual Meeting (1998). \textit{See also} Report of the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Bacre Wally Ndiaye <http://www.unhchr.ch/html/menu4/chrep/198chr68a.html>. The author of the report visited the United States in the fall of 1997, based on "persistent reports suggesting that the guarantees and safeguards set forth in international instruments relating to fair trial procedures and specific restrictions on the death penalty were not being fully observed." \textit{Id.}

Rome.\textsuperscript{101} We were able, after some difficulty, to have the death penalty eliminated in the Rome Statute.\textsuperscript{102} So there is no death penalty. And not only is there no death penalty, but life sentences are only possible for extraordinary crimes; and it is only in the unusual situation that someone may be punished by life imprisonment,\textsuperscript{103} and even if someone is given a life sentence, there is a mandatory review after twenty-five years.\textsuperscript{104} And so, in many ways, this Statute offers much more protection for defendants than is offered most defendants in the United States.

But I wanted to talk about an article I ran across by Paul Lewis that was in the \textit{New York Times} on January 2 of this year.\textsuperscript{105} Professor Wise, in fact, talked about the displacement of the nation-state as the sole subject of international law and its relationship to the Rome Statute. I am not sure if I agree with him that the Rome Statute displaces anything. I think it may be filling a vacuum instead. Paul Lewis’s article states:

Some twenty years have passed since the late Hedley Bull, then Professor of International Relations at Oxford, suggested the existing system of nation-states might be replaced by a modern and secular equivalent of the kind of universal political organization that existed in western Christendom in the Middle Ages.\textsuperscript{106}

So we might be moving towards the Middle Ages. And he pointed out a lot of the reasons why this might be so, which you are all familiar with: the “Euro” [currency], cyberspace, and multinational corporations. All of these things show that the nation-states’ traditional monopoly of coercive power is waning. This is what caught my eye. The article continued: “Increasingly nation-states are surrendering sovereignty by joining together in international organizations, recognizing that many of their aspirations can be achieved only through concerted action.”\textsuperscript{107} And indeed, that is what we are doing with the Rome Statute. In fact, Stephen Koblin said, “[v]irtually every intergovernmental organization in existence today was created after World War II.”\textsuperscript{108} So multinational development is relatively recent. Comparing this to the Middle Ages, it has a dark side, and it has a

\textsuperscript{101} The CICC divided into teams. Part 7: Penalties was headed by the government coordinator, Rolf Fife, while the NGO team was headed by William Schabas.

\textsuperscript{102} Applicable penalties are found in Article 77 which is ordinarily limited to a maximum of 30 years. Rome Statute, supra note 1, art. 77. The Court may also order a fine under criteria provided for in the Rules of Procedure and Evidence, and may order forfeiture of proceeds, property, and assets derived directly or indirectly from that crime.

\textsuperscript{103} Article 77(1)(b) allows for a term of life imprisonment “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” \textit{Id.} art. 77(1)(b).

\textsuperscript{104} \textit{Id.} pt. 10 (Enforcement). Under Article 110(3), the Court shall review the sentence when the person has served two-thirds of the sentence, or 25 years in the case of life imprisonment, to determine whether it should be reduced; however, such a review shall not be conducted before that time. \textit{Id.} art. 110(3).


\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.}
bright side. The dark side is that we are perhaps witnessing the conflicts which result from the collapse of civilized society because of the decline of the nation-state. The world is in very grave danger. We have seen this in Rwanda, the former Yugoslavia, and in many other countries around the world. We see the development of shantytowns; we see regionalism; and we see all kinds of international conflicts, and conflicts not of an international character. So perhaps the breakdown of the traditional nation-state leaves us without an organizing framework for modern civilization. But the bright side is found in efforts such as the Rome Statute. Because, even if some of the diplomats did take pot shots at one nation or another, to give credence to what Professor Halberstam has said, it points to a concerted effort to goodness, the goodness to work against great wrongs. These are among the advantages of having an International Criminal Court. The Court seeks to make universal that seeking after justice that we as individuals aspire to, and to end the impunity that has existed for so long and which now, like in the Middle Ages, is occurring with some frequency. The fragility of children, or men and women, when the nation-state loses its strength, is sobering. We really had no way to combat that in the past, and so we relied on the nation-state. And this is a very strong attempt to combat impunity. We are witnessing a turning point in history. Rolfe Fife, head of the Norwegian delegation, when the Rome Statute was completed, said, "[a]bsolutely, we are at an important moment in history." And Ben Ferencz, whom many of you know, also said the same thing: "It's a great historical event." I want to read to you just a little bit from the Preamble of the Rome Statute:

Conscious that all people are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world, . . .

Emphasizing that the international criminal court established under this statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for the enforcement of international justice,

[the Parties] have agreed as follows: . . .

And I think that the Preamble reflects what this Rome Statute is all about. I am aware that it has problems, but I think that those problems are surmountable. Over

109. Although, it should be pointed out that the new Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute. Rome Statute, supra note 1, art. 11.
111. Id.
seventy countries of the world have already signed this document. I do not think that there has been ratification by any country yet, but the very fact that over seventy countries have signed on to it shows the power that this Statute has engendered, and this reflects that the citizens of many nations of the world in large numbers stand behind it. I consider it extremely unfortunate that the United States has set itself in opposition to it.

PROFESSOR WEXLER:* As many of you have guessed, I am not Professor Cherif Bassiouni, whose name appears on the printed program. Professor Bassiouni asked me to step in today, and I am honored to do so. I also find myself on a panel with four friends and colleagues, all of whom have been working in this field for longer than I and who have been most gracious to share their expertise with me. However, I am going to disagree with one of them vehemently now in terms of how I feel about the Rome Statute.

Professor Koenig and I were present in Rome. We were privileged to be at the Diplomatic Conference, observe the negotiations, and actually partake in some of what was taking place. Based on my firsthand experience, both in Rome and in following the work of the Preparatory Committee leading up to Rome, I have become a strong proponent of the Court.

The Court is obviously not a perfect institution. It could not be. It was created by a committee of state governments. There were 160 countries and 250 NGOs in Rome. Most of the people doing the negotiations were diplomats. The United States had one of the largest delegations in Rome—between forty and sixty people. We could spend hours discussing how the United States comported itself in Rome, which I think was not a particular credit to our country, although the delegates worked extremely hard and were very talented. But what was interesting is that

* Professor of Law, Washington University in St. Louis. J.D., summa cum laude, Tulane Law School, 1985; LL.M., Columbia University Law School, 1987; D.E.A., University of Paris I—Sorbonne, 1988. Executive Committee Member and Chair, Committee on the ICC, American Branch, International Law Association; Vice-President, American Branch, International Association of Penal Law; Member: Louisiana, American, and International Bar Associations; Board of Directors, International Law Students Association; Board of Editors, American Journal of Comparative Law; Board of Editors, Revue Québécoise de Droit International; and the French Société de Législation Comparée. A leading expert in international criminal law, Professor Wexler’s study of the Barbie, Touvier, and Papon prosecutions and their significance both for France and the international community has been the subject of several articles and book chapters, and her work on crimes against humanity was cited by the International Criminal Tribunal for the Former Yugoslavia in the **Tadić** decision. She received a Treiman Fellowship from the Law School to pursue her work on the three prosecutions, and her work on the Permanent International Criminal Court. Professor Wexler has chaired the Committee on a Permanent International Criminal Court of the International Law Association’s American Branch, and has authored or edited several articles and monographs on the ICC. In addition, she attended meetings of the Preparatory Committee at the United Nations and was an NGO delegate to the Diplomatic Conference of Plenipotentiaries in Rome this past summer. She has also published various articles, book chapters, and occasional papers on topics relating to European and international law. Professor Wexler began teaching at Washington University School of Law in the Fall of 1992 after practicing international commercial law in Paris for several years. She teaches courses on topics involving both private and public international law, including European Union Law, International Criminal Law, International Business Transactions, and Civil Procedure.
there were no criminal law experts on the United States’ delegation, although there were representatives from the Justice Department. There were no comparative law experts on the United States’ delegation. There was one academic international law expert. And I think the United States’ response to much of what is in the Statute, and the negotiations that led up to what was finally adopted, is reflected in the lack of expertise, not in terms of talent, but in terms of perspective, that the members of our delegation had.

In discussing the Statute, I would build on what my colleagues said. In Richard Falk’s words, I would call this Statute’s adoption, in a sense, taking advantage of a “Grotian moment” in international law. The Rome Conference and the adoption of the ICC Statute were truly extraordinary. When you look at the Statute, one of the things that bothers the United States is the tremendous erosion in U.S. power that it potentially represents, because the Assembly of states-parties, which is the oversight body established by the Treaty, will make decisions by a two-thirds majority with no veto by Security Council members. Now, for the United States, that’s pretty depressing. But virtually all our allies signed the Statute. Every one of the Permanent Five did, except for China. All fifteen members of the European Union voted for the Statute and have signed the Statute. The seven countries that voted against the Statute were the United States, Libya, Israel, Quatar, Yemen, Algeria, and China—an interesting group of allies—not what one would normally envisage. Thus, the United States stands largely isolated and alone.

The first thing one observes in glancing at the Statute is how complicated it is.\textsuperscript{112} The Nuremberg Charter had thirteen Articles. The International Law Commission’s draft, which was adopted in 1994, had sixty Articles. The ILC’s draft wasn’t too bad. You could get a handle on the Statute pretty easily, and it was particularly convenient that it did not define any of the crimes. In Rome, they adopted a 128-Article Statute. It is extremely complex. It is full of \textit{renvoi} from provision to provision. If you try to figure out what you need to bring an indictment, not only do you have to look at Article 12, Article 13, and Article 17, you have to flip forward to Articles 53 and 56, which do not conveniently define anything in the earlier Articles.

Professor Bassiouni was the Chair of the Drafting Committee, and it would have been wonderful to have had him here. However, I was privileged to speak with him as the drafting was taking place. The Drafting Committee, which sat by linguistic groups, was drafting simultaneously in six languages—an extraordinary feat. Thus, as you can imagine, the Arabic, the Chinese, and the Russian versions of this Statute are not yet available in final form. The English version finally came out

\textsuperscript{112} This can be seen from the paper distributed at this meeting, which outlines the jurisdiction, structure, and basic operation of the Court. See Leila Sadat Wexler & S. Richard Carden, \textit{A First Look at the 1998 Rome Statute for a Permanent International Criminal Court: Jurisdiction, Definition of Crimes, Structure and Referrals to the Court}, Washington University School of Law Working Paper No. 98-10-1, III \textit{INTERNATIONAL CRIMINAL LAW} (M. Cherif Bassiouni ed., Transnational 2d ed. forthcoming 1999).
with corrections. When last I checked, the French version was not available in final form. This was a tremendously complex and difficult undertaking, and I think the drafters did a remarkably good job. Indeed, we owe them our thanks for their tireless work in Rome and in the Preparatory Committee meetings prior to Rome.

As for the Court’s advantages, I will defer to my colleagues, who have so eloquently stated their views, but I will speak to some of the disadvantages. The concern I have is not that Rome went too far—I will respond a little bit to Professor Halberstam’s points about some of the crimes when I talk about complementarity—but rather, that it did not go far enough. I think when you understand the complex procedural regime to which the bringing of all cases before this Court is subjected, you’ll realize that, rather than this being a Court in which you are going to get a lot of political and frivolous claims, in fact this is a Court that is very much fettered by a procedural regime designed to preserve the sovereignty of states.

Moreover, even though the Court appears to be quite strong when you look at the definitions of crimes, in fact, each crime is subject to five governing principles, not even counting the threshold requirements within the chapeau of each definition. So rather than being a Court in which cases are going to be easy to bring, to litigate, and to prove, it is, in fact, going to be quite difficult, I think, to bring cases to the Court, because of the complementarity system, the system of checks on the Court’s jurisdiction, and the restrictive definitions of crimes in the Court’s Statute. The ICC is not likely to be a rogue institution in which many cases are going to be brought for political reasons. Rather, it is more probable that the Court will ultimately fail to thrive, due to a lack of political will. That remains to be seen.

State governments are going to spend more time this year working in a Preparatory Commission in order to prepare Rules of Procedure and Evidence, the budget for the Court, and the agreement governing the relationship of the Court to the United Nations (the Court is not a UN organ). Finally, the Court has to obtain funding from the United Nations, as well as states-parties. In short, this Court has a long way to go from Rome to the Hague.

PROFESSOR NOYES: Thank you. We have several particular questions that the panelists will address. These questions concern the definition of crimes, how cases are initiated, the principle of complementarity, the conduct of the trial, and some of the concerns that the United States has expressed with the Rome Statute. Turning first to the definition of crimes, let me ask Professor Wise to say a bit more about this issue and, in particular, to address whether the Statute defines crimes with sufficient precision.

PROFESSOR WISE: One has to distinguish here between aggression and the three so-called “core crimes:” genocide, crimes against humanity, and war crimes. Although the Statute gives the Court jurisdiction over the crime of aggression, that jurisdiction cannot be exercised unless and until an amendment to the Statute is
adopted defining the crime of aggression. Amendments can’t even be proposed until seven years after the Statute comes into force, at which time there is supposed to be a Review Conference which will consider amendments to the Statute anyway. Those amendments, remember, will require a two-thirds vote of the parties who have ratified the Statute. A separate resolution adopted at the last minute at the end of the Rome Conference, and opposed by the United States, adopted Professor Halberstam’s proposal that the Review Conference consider adding terrorism and also drug trafficking to the Court’s jurisdiction.\(^{113}\) So that will come up seven years after the Statute comes into force. And even if aggression or other crimes are added to the Statute, states who are parties will be able to refuse to accept those amendments as to crimes committed on their own territory and by their own nationals.

As to the three “core crimes,” the definition of genocide tracks the Genocide Convention and in itself is uncontroversial. The definition of crimes against humanity goes beyond Nuremberg and other previous definitions: not only mass murder, but also systematic torture, rape, and forced disappearances constitute crimes against humanity. I’m not worried about that. The definitions of war crimes contained in Article 8 are largely drawn from the Hague Rules, the Geneva Conventions, the Geneva Protocol II, and so forth, but with controversial additions like the one Professor Halberstam mentioned, prohibiting an occupying power from transferring its own people into the occupied territory.

The Rome Conference itself apparently concluded that the definitions of the three “core crimes” in Articles 6 to 8 are not sufficiently precise and detailed, because Article 9 then calls for the authoritative elaboration of so-called “Elements of Crimes” to assist the Court in interpreting the definitions contained in the Statute. The idea was proposed by the United States in order to protect the parties against unexpected interpretations by the Court. Although Article 9, providing for “Elements of Crime,” speaks as if these Elements were limited to elaboration of the definitions of genocide, crimes against humanity, and war crimes, it seems likely—it seems almost inevitable—that those Elements will have to elaborate also on the so-called “General Principles of Criminal Law” contained in Part 3 of the Statute, which Professor Podgor described.

Part 3 is a sort of mini-general part of a criminal code. Teachers of substantive criminal law may find it especially interesting to look at Part 3. It’s better than I expected it would be on the basis of the preliminary drafts, but it is still a pastiche put together by people without particular expertise in criminal law; so you get some very odd things. Let me give just one example. The Statute wreaks havoc with the traditional definition of genocide. In the general part it says that crimes require “intent and knowledge,” although then “intent” is defined as if it were knowledge. There is no specialized term for “specific intent”—or the Model Penal

\(^{113}\) See Rome Statute, supra note 1, annex I, resolution E.
Code’s “purpose.” Genocide has always been understood as requiring a “specific intent” or purpose. But the way the Statute is constructed, that will no longer be the case, unless the problem is cleared up, contrary to what the Statute says, in the Elements of Crimes.

PROFESSOR PODGOR: Professor Koenig, could you tell us a little bit about the initiation of cases, how a case is initiated, to what extent the ICC Prosecutor has discretion to proceed or not to proceed with the case, and what checks are placed on that Prosecutor?

PROFESSOR KOENIG: There are three triggers to jurisdiction, and I will start with the easiest one. The first is the broadest. It’s the fast track, and it has the fewest impediments. The Security Council of the United Nations, acting under Chapter VII of the Charter, the peacekeeping function, can refer a case to the Prosecutor. The only limitation that is placed on this trigger is that the Security Council has to be responding to a situation in which at least one of the core crimes “appears to have been committed.” So the basic standard for Security Council referral is that a core crime appears to have been committed.

The second trigger for jurisdiction concerns a referral by a state-party to the Prosecutor, or by referral to the Prosecutor by a consenting state—that is, a state that has accepted jurisdiction. Again, the situation has to be one in which at least one of the core crimes “appears to have been committed.” So that is the basic standard. There has to be some evidence that one of those crimes has been committed, and the Prosecutor has to determine that “there would be a reasonable basis to commence an investigation.”

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114. Id. art. 13(b).
115. The crimes over which the ICC will have jurisdiction are found in Article 5(1). They are genocide, crimes against humanity, war crimes, and the crime of aggression. The Court may not exercise jurisdiction over the crime of aggression until a provision is adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Id. art. 5(2).
116. Id. art. 13(b).
117. It would appear that ordinarily the Security Council would refer a case to the Court by a resolution. Although this is not specifically mentioned in Article 13 or elsewhere, the deferral process under Article 16, in which an investigation can be deferred for 12 months upon request of the Security Council, contains a specific reference to the method involved. There it states that the Security Council must act “in a resolution adopted under Chapter VII of the Charter of the United Nations” when requesting the Court to defer an investigation or prosecution. Id. art. 16.
118. A state which becomes a party to the Statute thereby accepts the jurisdiction of the Court as to the core crimes. Id. art. 12(1).
119. A State accepts the jurisdiction of the Court by declaration lodged with the Registrar with respect to the crime in question. Id. art. 12(3).
120. Id. art. 13(a).
121. Id. art. 18(1). This may be more a question of admissibility than of jurisdiction, but the procedure is quite clear in that the Prosecutor has to have determined that there would be a reasonable basis to commence an investigation. Article 18, relative to preliminary rulings regarding admissibility, states that the state-party refers a situation to the Court pursuant to Article 13(a). Note here that Article 13(a) indicates that the state-party is referring the situation to the Prosecutor and doing so “in accordance with article 14.” Id. art. 13(a).
In addition, when a state-party refers a case, the state-party, or the consenting state, that refers it has to have a tie-in based either on the crime occurring on their territory or the crime having been committed by one of their nationals. As to the first, territory, the crime has to have occurred either on the territory of that state, or aboard a vessel or aircraft registered to that state-party. Or, as stated, the accused must be a national of the referring state-party.

Another condition is found under one of the Articles on Admissibility. Frankly, I am not quite sure it really refers to jurisdiction, because it is found under Admissibility. (Professor Wexler and I have had a conversation about this.) But one of the questions I was asked to respond to was how much discretion the Prosecutor had whether to continue an investigation. The Prosecutor has to take the next step when a case is referred by a state-party, or a consenting state. Here, I think we are talking about how much right the Prosecutor has to start or stop a prosecution—how much discretion. I think there is quite a bit of discretion here. Among the reasons why the Court might determine that a case is inadmissible is where the case "is not of sufficient gravity to justify further action by the court." Certainly, the Prosecutor could indicate this to the Court. Also, the jurisdiction of the Court is limited to "the most serious crimes of concern to the international community as a whole." The next step, however, has to deal with complementarity, which I will leave to Professor Wexler.

The third trigger is the most complicated one, and that is where the Prosecutor has independent authority to initiate an investigation. This trigger is found in Articles 12, 13, and 15 of the Statute. There was a real fear that the Prosecutor might become too independent and the fear of what that all might mean. The first hurdle that the Prosecutor has to get over is that the Prosecutor is again limited to crimes where a state-party, or a consenting state, is the state of the accused national, or where the crime has occurred on such state's territory. So again you must have the link of territory or nationality. The second hurdle is that the Prosecutor is authorized to initiate an investigation only on the basis of information. So there has to be some information, and the Prosecutor has to analyze the seriousness of the information received. The Prosecutor then has to conclude

122. Id. art. 12(2)(a).
123. Id. art. 12(2)(b).
124. Id. art. 17.
125. Id. art. 5.
126. Needless to say, one must carefully analyze Articles 13(a), 14, 17, and 18 to view the totality of circumstances which the Prosecutor need consider.
127. Rome Statute, supra note 1, arts. 12(2), 13(c).
128. This includes, as discussed earlier, if the crime was committed aboard a vessel or aircraft, and the state-party or consenting state is the state of registration of the vessel or aircraft. Id. art. 12(2)(a).
129. Id. arts. 13, 15. The Prosecutor must initiate the investigation with respect to the crime in accordance with Article 15. Article 15 states that the Prosecutor "may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court." Id. art. 15.
130. Id. art. 15(2).
that there is a reasonable basis to proceed with an investigation.\footnote{Id. art. 15(3).}

At this point, the Prosecutor must submit a request for authorization of an investigation, together with any supporting material collected, to the Pre-Trial Chamber. In other words, the Prosecutor has to stop and go to court, and the language of Article 15 states that she or he "shall" submit to the Pre-Trial Chamber a request for authorization of an investigation, and give the supporting materials to the Court. It is clearly going to be the Court, and not the Prosecutor, that makes this decision. Victims can also make representations to the Pre-Trial Chamber in accordance with the Rules of Procedure and Evidence.\footnote{Id. art. 15(4).} But the Pre-Trial Chamber has to authorize the commencement of the investigation before it can go forward. This the Court can only do if the case appears to fall within the jurisdiction of the Court.\footnote{Id. art. 15(5).} Again, the Court may dismiss a case if it is not of sufficient gravity to justify further action.

If the Prosecutor doesn't succeed the first time, she or he can make a subsequent request, but if they make a subsequent request, it has to be based on new facts or evidence.\footnote{Id. art. 16.} There are several other preconditions. I'll mention one of them. The Prosecutor cannot act, commence, or proceed if the Security Council by resolution asks for twelve months deferral, and the Security Council can renew that deferral.\footnote{Id. art. 16.}

PROFESSOR NOYES: The ICC is billed as a criminal court that will exercise jurisdiction only when states themselves are unable to, or do not, appropriately handle a crime that has occurred. Professor Wexler will address issues relating to the so-called issue of complementarity, and the relationship between the International Criminal Court and national court systems.

PROFESSOR WEXLER: Complementarity is not a word that my spellchecker recognizes. You will find it used, but not defined, in the Rome Statute. It is a word that was essentially invented after the International Law Commission published its draft statute in 1994, although there were earlier incarnations of it. It embodies the premise that the International Criminal Court should, in the words of the Preamble, "complement" national court systems. "Complement" became "complementarity," and there we have it. Complementarity has a substantive aspect, a procedural aspect, and an aspect that I will call "political," or "prudential," for lack of a better term.

Substantively, what does it mean that the ICC will function on the basis of something called complementarity? This aspect of complementarity is "quasi-jurisdictional," both as a matter of international law and with respect to state
sovereignty, for it essentially provides a method of defining what kind of cases this Court ought to hear. In that sense, I think it is responding to the vacuum idea. The International Criminal Court needs to determine, as a matter of its jurisdiction, what kind of cases the international legal regime can legitimately hear. These are cases in which international crimes are committed and in which the international community has an interest in proceeding. Those cases have been deemed, by the drafters in Rome, to be cases in which national courts are unwilling, or unable, to proceed.

Complementarity, as the governing principle upon which the ICC’s operation is premised, had its origin with Nuremberg. The International Military Tribunal (IMT) at Nuremberg tried only the major war criminals, not minor offenders, who were tried locally where their crimes had occurred. This is consistent with the ICC conception. In addition, the IMT at Nuremberg also posited essentially the supremacy of international law over national law, particularly in the crimes against humanity area where clearly it was saying, I think it is undisputed, that international law was supplanting national law. It was no defense for the Nazis to argue that what they were doing was legal under German law. This is also true of the ICC Statute. But what is not true of the ICC Statute—that was true at Nuremberg—is that not only was there a vertical, hierarchical relationship posited between international and national law, there was a vertical, hierarchical relationship posited between the International Military Tribunal at Nuremberg and national courts. That is a subtext of the IMT’s judgment; there was no explicit discussion of it, but it seems clear that, not only was the law substantively thought to be supreme, but there was a supremacy idea about the International Military Tribunal itself.

The ad hoc Tribunals for the former Yugoslavia and Rwanda work on a similar premise, which we call “primacy” jurisdiction. So again, not only is international law thought to be “supreme” (we could have a long conversation about this, and obviously I’m shortening my discussion considerably), but the two ad hoc Tribunals function on the basis of vertical primacy. If they want a defendant, they have the right to require a state to surrender the defendant. Tadić was such a case. Germany had him; the Yugoslavia Tribunal wanted him; and the International Criminal Tribunal for the Former Yugoslavia (ICTFY) issued an order. Although it took a while for Germany’s implementing legislation to kick in, Germany ultimately handed over Tadić to the ICTFY for trial. This is primacy jurisdiction, based essentially on the Security Council’s referral of the case and power to order state compliance when using its Chapter VII authority.

The ICC, by way of contrast, has been established by multilateral treaty to cover future cases only. It will potentially hear cases involving nationals of any country in the world, which makes states very nervous. So states definitely did not want a court with primacy jurisdiction. The ILC draft suggested that complementarity, substantively, might have meant concurrent jurisdiction. That is, the ICC and
national courts would concurrently have jurisdiction, and it might be a question of
"who gets the defendant first" that would decide whether the state or the ICC
heard a particular case. By the time two years of Preparatory Committee meetings
had passed and 160 states had worked on the Statute at Rome, complementarity
came to mean, in my view, that the ICC is essentially a subordinate jurisdiction—a
default jurisdiction. The ICC only gets the case if national courts are unwilling or
unable to prosecute.

The Statute accomplishes this procedurally through a regime of admissibility. In
order for a case to come within the Court’s jurisdiction, not only must the Court
have subject matter jurisdiction, but the case must be admissible. The procedural
regime governing admissibility is different from the procedural regime governing
jurisdiction. You can see that subject matter jurisdiction, conceptually—I am not
sure the delegates really thought about this conceptually, but at least some of the
drafters did—is akin to our subject matter jurisdiction in federal courts. It goes to
the fundamental power of the ICC to hear that case. If subject matter jurisdiction is
lacking at any stage, you can pull the plug on a case. The Court must raise it sua
sponte; the Prosecutor must investigate it; and the Court, the accused, a state with
jurisdiction, a state from which acceptance of jurisdiction is required, or the
Prosecutor, himself or herself, may all challenge it. That is jurisdiction.

Admissibility is somewhat different, and it covers the complementarity concept.
There are four ways by which a case is inadmissible. First, is the case being
investigated by a state with jurisdiction? Second, has a state investigated and
concluded that there is no basis to prosecute? Third, has the person already been
tried for this conduct? Finally, is the case of insufficient gravity to proceed? If the
answer to any of these questions is yes, the Court may, sua sponte, raise the issue of
admissibility. The Prosecutor must, sua sponte, raise the issue of admissibility.

The interesting question remains whether admissibility, based on complementa-
ity, is a waivable objection of states. That is, if nobody raises an objection because
everyone wants the case to go forward at the ICC level, even though it could have
been prosecuted by a state, is the objection waived? The answer is not clear, and
there are no real travaux préparatoires. But taking the Statute as a whole, as well
as some of the earlier drafts, it seems that states should be able to waive
admissibility objections based on complementarity, should they wish to do so, for
complementarity, although a fundamental feature of the Court’s operation, does
not go to the fundamental power of the Court to hear the case. It goes more to
prudential concerns about which cases are most appropriate for the ICC, concerns
that states themselves may raise on their own behalf.¹³⁶

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¹³⁶ This is a tricky point, however. First, it is not clear whether the accused could nevertheless raise the point. Second, suppose the Security Council refers a case that national courts could hear. It seems clear under the Statute that, although the regime governing preliminary rulings on admissibility governed by Article 18 is bypassed, the regime governing challenges to complementarity under Article 19 is still in effect, and challenges to complementarity could be brought that, if well-founded, would have to be sustained by the Court. Presumably, the Rules of Procedure and Evidence will clarify this.
In terms of how the decision as to whether the state is willing, or unwilling or unable to prosecute is made, the Statute is supranational, for it is the *Court* that has the last word on whether a case is admissible. For example, if the United States objects to a case being brought before the ICC, a U.S. decision that a case is inadmissible does not bind the ICC. On the other hand, the way the Statute is written, in order for a case to be taken away from the ICC, all a state has to do is open an investigation. The state does not actually have to prosecute the proposed defendant. The state has to open an investigation, and then the only debatable question is whether the investigation is *genuine*. This language is obviously vague and will need further explication, either in the Rules of Procedure and Evidence or from the judges. Given the tenor of the negotiations at Rome, however, I do not think the Preparatory Commission will leave very much up to the judges!

PROFESSOR PODGOR: Professor Blakesley, could you tell us a little bit about the concerns that were expressed by the United States Senate regarding the procedural guarantees, or insufficient guarantees, that are afforded to defendants under this Statute? Could you also tell us a little bit about the anticipated role of judges, and how that role may differ from judges in United States criminal cases?

PROFESSOR BLAKESLEY: First of all, let me just mention that I pretty much ignore what the Senate does, at least lately in this regard. But I do have some of my own concerns, and I think maybe some reflect aspects, or parts, of what has troubled the Senate. For me, there are a few significant problems; let me run through them quickly. I want to indicate some difficulties relating to protections for the defendant available at trial and at pre-trial phases. I am not sure whether all of you know the nature and structure of the Tribunal; it is really a Continental-type tribunal, not a court.\(^{137}\) The Tribunal’s Prosecutor is more like a Continental prosecutor (*prosecuteur*) than a prosecutor from an Anglo-American, adversarial-type system. It has both a Pre-Trial Chamber and a Trial Chamber. All three of these institutions (the Prosecutor, the Pre-Trial Chamber, and the Trial Chamber) are interrelated. You cannot understand how the Tribunal as a whole is going to work, unless you see how these parts interrelate with each other.\(^{138}\) Also, it is important to remember, as I noted before, that the Tribunal represents an attempt to mix systems. The mixture and the interrelationship of the Tribunal’s parts pose both benefits and problems, it seems to me. The Prosecutor first has powers that, in some ways, are quite similar to a French *juge d'instruction* (investigating judge). The Prosecutor is obligated, for example, to ensure—and this is a good thing obviously—that exculpatory evidence as well as inculpatory evidence is sought and, if existent, found and applied to the case. Then, it is the Prosecutor’s

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\(^{137}\) See *supra* note 89.

\(^{138}\) Most U.S. commentators focus only on the trial phase, ignoring all that occurs prior to that. This is clearly a mistake, as the fairness of the trial often depends on what occurs before. See discussion and authority *supra* notes 90-94.
responsibility to ensure that the relevant exculpatory and inculpatory evidence is eventually adduced at trial.

At the pre-trial stage, as Professor Wexler said, the Prosecutor must address the Pre-Trial Chamber, when the Prosecutor wishes to arrest or have a person arrested. In other words, the Prosecutor must obtain the assent of the Pre-Trial Chamber to go forward with a prosecution. Most of the problems I have with the Prosecutor’s power and with the pre-trial stage of the proceedings relate to the fact that there is nothing at all indicated in the Statute about how to ensure that the Prosecutor meets his or her responsibility to find and present exculpatory, as well as inculpatory, evidence. The only “assurance,” like in a rudimentary Continental model, is the trustworthiness and competence of the prosecution—and the police. I am sure that most of them will be trustworthy and competent. But it seems to me that one must face the real possibility that a few may not be trustworthy or competent. Not only that, but even for those who are both trustworthy and competent, a serious risk is presented. By the way, this risk is based on what I would argue is a natural human failing, which any and all of us would have. This failing is that, when one is presented with evidence, especially as that which will be presented to this Tribunal, of egregious wrongdoing, one tends to develop a theory of the case. That theory, one’s perception of what actually occurred, could place “blinders” on one’s eyes causing one’s understanding to become biased. One may just simply not see exculpatory evidence. This may not happen often or in a dishonest fashion, but it will certainly occur. That is a problem.

Frankly, that same problem obtains at both the pre-trial and the trial phases. There is no jury at the trial phase, of course, and the trial judges function somewhat like Continental judges. This is another interesting admixture, because there is a virtually adversarial-like opportunity for both prosecution and defense counsel to examine and to cross-examine, and generally to play a vigorous role at the trial itself. But also, the judges have very active roles to play, like in Continental systems. This hybrid merger of systems could possibly be very interesting and beneficial if it is done right and done well. The danger, of course, is that it may not be done well.

At the Pre-Trial Chamber level and possibly at the trial itself, the judges may be influenced by their tendency to trust the Prosecutor, who has the obligation and the interest to do what is right, and thus, ought to be trusted. Yet, as noted, the Prosecutor and judges may inadvertently be fit with the aforementioned blinders. Hence, one of the potentially interesting aspects, and potentially even an important breakthrough, is also the potential “Achilles’ heel.” What could be a boon could also be a bane.

As noted above, many of the important rights and protections of accused persons are articulated in the Statute. For example, a defendant has a right to a fair and public hearing. The Statute incorporates a presumption of innocence. This is all good, but, as noted, what these rights and protections actually and functionally
mean is not clear. The Statute does explain that the presumption of innocence means that the burden of proof at trial is on the Prosecutor. This burden cannot be transferred to the defendant. For me, the obviously important rights also pose interesting problems at the pre-trial phase, discussed above, and with regard to the dossier, discussed below. Also, it is not clear how the presumption of innocence applies to so-called affirmative defenses. In adversarial systems, certain defenses—for example, duress or insanity—are affirmative defenses. The defendant must prove to a certain degree that the defense obtains; that its elements are established by the evidence. How this will work in the Tribunal is not clear, even though the Statute does state that the burden does not shift to the defendant. The issue of affirmative defenses is not resolved.

The defendant also has the right to have adequate time and facilities for preparation of his defense. This right, however, focuses on the trial not the pre-trial phase. Most of the cost or damage to the right to a fair trial occurs in the preparation for trial. Failure at the pre-trial stage to protect a defendant’s interests may well mean that the trial is ultimately unfair. Nevertheless, the Statute has no indication of any funding whatsoever for the defense, either for the appointment of counsel or for counsel’s investigation. Thus, at the early stages, there is almost nothing to protect the defendant other than trusting the Prosecutor, and the Prosecutor’s staff. Now, if you were charged with a crime, would you trust that to the goodness of the Prosecutor? I would not. I generally trust that prosecutors are good, but I don’t want to base my whole faith in the system or my well-being solely on trust; nor should I.

It seems to me that the very reason for the Fourth, Fifth, and Sixth Amendments, and that we insist on a vigorous defense is that we do not leave our liberty interests solely to trust. We insist on having vigorous defense counsel available at an early stage of the proceedings—at any critical stage. A possibility exists under the Statute to have counsel available at quite an early stage, perhaps even at an earlier stage than exists in the United States under current Supreme Court jurisprudence on the right to counsel. The problem, however, is that the rule is not clear. Protections must be spelled out in the Statute; they are not. This problem can be resolved and the protections spelled out, as Professor Wexler said, in the development and promulgation of the Rules of Procedure and Evidence. This must be done with care and alacrity, or the entire experiment risks failure.

Finally, I will list a few more of the statutorily indicated rights of accused persons and comment briefly on them. A person accused of a statutory crime must have the opportunity to communicate with counsel and to have a trial without undue delay. The trial must take place in the defendant’s presence; that is to avoid trial in absentia.

A defendant has the right to examine prosecution witnesses. This latter right is obviously based on an adversarial model. It appears to me to be a good thing. Several European nations are experimenting with this. The question begged is:
How many attorneys around the world have the talent and the training to do a capable cross-examination? The ad hoc Tribunals for the former Yugoslavia and Rwanda have hired counsel from adversarial systems who have that talent to participate in trials and to train others; they have thus developed that capacity. They have also found folks from non-adversarial systems who have been trained in the adversarial systems. This is all clearly possible in the ICC, and needs to be developed and insured. The right to examine the Prosecutor's witnesses, and to obtain the attendance and examination of defense witnesses also is not spelled out. How, exactly, can this be done in the context of a mixed system or process? There is certainly a right to this protection, but what exactly this right means is open for question. Another funding issue is raised in relation to this. The Statute gives no indication of funding for searching out or obtaining access to witnesses. This will be vexing in most cases, as most witnesses will be in other nations, difficult to find and to interview. Defense counsel will have to learn of their existence and their whereabouts. They will have to be interviewed and finally will have to be brought to the trial. This not only poses problems for the defense, it poses problems for the protection of witnesses and witnesses' families. First, they will be reluctant because of well-founded fear for themselves and their families. Second, how one can pay for transport and housing of witnesses in this context is a serious matter. At any rate, let me stop here; although I have much more I wish I could say, I want to leave time for questions from the floor. I think we can elucidate some of these issues when you ask us questions.

PROFESSOR WISE: Let me just add a brief gloss to what Professor Blakesley has said. First, the Statute incorporates the procedural guarantees that are set out in the International Covenant on Civil and Political Rights, which obviously is neutral as between common law and civil law. Second, the Statute obviously does not provide for jury trial, Article III judges, and all those other guarantees that are dear to the heart of certain members of the U.S. Senate. The Statute does make provision for guilty pleas, which is taken from the common law. The provision for a Pre-Trial Chamber, supervising but not conducting the pre-trial investigation, is a concession to the civilians. Otherwise, we won't know exactly what the Court's procedures will be until the Rules of Procedure and Evidence are elaborated. The most important touchstone will be, I think, the question of whether the judges sitting at trial, like civilian judges, have access to the dossier containing the prosecution's evidence before it is actually introduced in court. And if the Yugoslav Tribunal is any example, we may not know that even when we have the Rules of Procedure and Evidence in hand. It may all depend on who the presiding judge happens to be.

PROFESSOR BLAKESLEY: Let me mention something about the dossier.\textsuperscript{139} Do

\textsuperscript{139} The dossier is the entire package of documentary evidence obtained during the investigation. It includes
you all know what the dossier is? It includes virtually everything that occurred at
the investigation and pre-trial stage, including all documentary evidence—
statements of witnesses, experts, police reports, evidence, etc.—obtained by the
police judiciaire or the juge d'instruction. 140 It includes evidence, or information-
reports, relating to the defendant's personality and past run-ins with the law, or
even bad relations with family or neighbors. 141 Oftentimes, much of that evidence
may not be adduced at trial and will not even be capable of being adduced under
current rules protecting defendants. Ostensibly, a judge who hears the case is not
supposed to take any evidence not actually adduced in open court into account in
deciding guilt or innocence. 142 But the judge, at least the Chief Judge, called Le
Président, knows it intimately. 143 The dossier is available to all the judges, and it is
the Président's job to know it. 144 There could be all sorts of evidence within that
dossier that was obtained way before this defendant was a defendant, including
that obtained during the time that defendant was a witness and required to give a

reports and records of all investigations, examinations, the statements of expert and other witnesses, and other
police reports. The dossier contains documentation of virtually every bit of evidence and information obtained
during the investigation. Much of it is in the form of police reports, simply as written by the investigating officer.
Much is admissible and, indeed, all of it is not only available to the Chief Judge, but heavily depended upon and
utilized by that Judge in running the trial and rendering the ultimate decision. The ultimate trial, therefore, is
generally very short in duration and, although the Judge allows the defendant to make a statement and will pose
questions, it would not be incorrect to say that in many instances, although not all, by the time the actual trial
begins, the conviction is virtually assured. This is not to denigrate the system, but to say that the essence of a
Continental trial, including the protections of the accused and the ultimate conclusion, the “objective truth” of
whether the accused committed the offense, take place at the pre-trial stage. See Christopher L. Blakesley,
d'instruction and the dossier); PRADEL, LE JUGE D'INSTRUCTION, supra note 89, at 1-17, 34-53 (discussing the
actions of officials that end up in the dossier); and JEAN PRADEL, PROCEDURE PENALE §§ 249-303, 412-45 (4th ed.

Of significance is the fashion of gathering evidence to put into the dossier, and the nature of that evidence.
Much of the evidence is obtained, in the usual case, without counsel being available to the defendant, until he or
she formally becomes a “suspect.” Please note that a prosecution in absentia provides none of the protections
normally afforded an accused person. Yet, as I discuss further here, the dossier remains available for any
subsequent trial. In the usual case there are virtually no restrictions on the type of evidence that is allowed into the
dossier and eventually into trial. See Gaston Stefani & Georges Levasseur, PROCEDURE PENALE §§ 357, 488,
511, 625, 626, 628, 651 (1990); Rudolf B. Slesenger et al., Comparative Law: Cases—Text—Materials
287-91, 508-38, 511-12 (6th ed. 1998); Mirjan Damaska, Evidentiary Barriers to Conviction and Two Models of
Criminal Procedure: A Comparative Study, 121 U. PA. L. REV. 506 (1973); Blakesley, Conditional Liberation
(Parole) in France, supra.

140. For example, the suspect may be taken out to the scene of the crime and asked to “act it out.” This is
called “le transport sur les lieux.” See generally Jean Pradel, Le Juge d'Instruction, supra note 89, at 42-43.
Or he may be sat down with witnesses in a “confrontation.” Id.; Stefani & Levasseur, supra note 139, § 555.

141. See, e.g., Pradel, Procedure Penale, supra note 139, at 347-403 (“sur la connaissance de la
personalié.”). For a literary example of this, see ALBERT CAMUS, L’ETRANGER.

142. This is the principle of immediacy, whereby nothing except that evidence presented in open court may be
considered for conviction. See, e.g., Pradel, Procedure Penale, supra note 139, ch. II (L’Instruction par la
Chambre d’Accusation); Damaska, Evidentiary Barriers, supra note 139 and accompanying text.

143. See, e.g., Damaska, Evidentiary Barriers, supra note 139.

144. Id.; Pradel, Procedure Penale, supra note 139, at ch. II.
statement to the police. Thus, if the system in the ICC works similarly, the dossier poses potentially a very serious problem that can bias the outcome.\textsuperscript{145} I think it is a very serious problem in France and other Continental systems.\textsuperscript{146} They pretend that it does not bias a judge, but what do you think?\textsuperscript{147} I mean it does or it might. In terms of a judge in the criminal trial itself, I listened to a judge in the Yugoslav Tribunal, who was a former \textit{juge d'instruction}, an investigating judge, who was not timid in voicing his outrage at the audacity of an Anglo-American defense counsel being picky with a prosecution witness. Frankly he said, "[w]hat business [do you] have asking so many vigorous questions about credibility." Thus, this and other aspects of an attempt to merge systems requires some careful thought.

PROFESSOR NOYES: The United States has signaled its reluctance even to sign the ICC Statute, arguing that its military personnel will be vulnerable to the jurisdiction of the ICC. The U.S. has also criticized the Statute because there is some risk that U.S. military personnel will be vulnerable even should the United States not accept the Statute. Professor Halberstam, are these concerns legitimate? What mechanisms in the Statute respond to these concerns? What are the prospects for an effective ICC should the United States not participate?

PROFESSOR HALBERSTAM: Before I address these questions, I would like to take a minute to respond to Professor Wexler’s defense of the Statute. I understand this to be that "it has problems; but after all, it is a very complex Statute; it has 128 Articles, and both defines crimes and creates a Court, and sets up all these procedures; and, moreover, it was all adopted very quickly at the end, and most of the delegations did not have representatives with criminal law expertise."

I agree with all those points, but I think that those are exactly the problems with the Statute. It should not be defining crimes. It started out as a Statute to establish a Court. Transforming it into a Statute that also defines crimes created unnecessary complexity. The Statute should not have added new crimes; it should have incorporated existing crimes by reference to treaties defining those crimes. Professor Wexler states that some of the problems were due to the absence of criminal law experts on the U.S. and other delegations. When I was Counselor on International Law in the State Department, I had the privilege of heading the U.S. delegation to negotiations on the Convention on Maritime Terrorism.\textsuperscript{148} For the negotiations on that Convention, many states’ delegations included both international law experts and criminal law experts, because they knew they were drafting a treaty that would be defining a crime. Here, initially the idea was not to define

\textsuperscript{145} See, e.g., Damaska, \textit{Evidentiary Barriers}, supra note 139.

\textsuperscript{146} This, of course, is not to pretend that the adversarial systems, especially that in the U.S., do not have their own very serious problems.

\textsuperscript{147} See, e.g., Damaska, \textit{Evidentiary Barriers}, supra note 139 (discussing the tendency to overstate the importance of the "rule of immediacy").

\textsuperscript{148} See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, supra note 77.
crimes, but to establish a court. That is a question of power, sovereignty, and diplomacy; that may explain why some states did not have criminal law experts. Though I believe that the U.S. did, in fact, have a criminal law expert, Minna Schrag, who is a former U.S. Attorney and a former prosecuting attorney at the Yugoslavia Tribunal. But maybe other states did not. Finally, I agree that it is a great moment in history. Therefore, we should not do it so quickly that it comes out to be a terribly flawed moment in history. As I understand it—and I was not there—not only was this Statute adopted very quickly, but states that wanted to vote on each of the provisions separately were told that there was not enough time to do that and that they had to vote the Statute up or down as a whole. That is no way to adopt a Statute that, we hope, will be creating the beginning of a new era in international law.

Turning to the question you asked about the U.S. position, I think it can be divided into three separate questions: (1) whether U.S. military personnel would be subject to the jurisdiction of the Court even if the U.S. does not ratify the Statute; (2) the existence of mechanisms that respond to these concerns; (3) and the prospects for an effective Court if the U.S. does not participate.

A. Jurisdiction over U.S. Citizens Even if the U.S. Does Not Ratify the Statute

The Statute provides that the Court may exercise jurisdiction if either the state of nationality of the accused or the state on whose territory the alleged conduct occurred is a party to the Statute or has accepted the exercise of jurisdiction by the Court with respect to the crime in question.\(^{149}\) Thus, U.S. military personnel who are sent abroad would be subject to the jurisdiction of the Court, even if the U.S. does not ratify the Treaty, if the state on whose territory they acted is either a party to the Treaty or consents to the Court's jurisdiction in the particular case. Paradoxically, the Court may not have jurisdiction over perpetrators of war crimes who are nationals of a state that is a party to the Statute. The Statute permits a state, on becoming a party, to declare that it does not accept the jurisdiction of the Court with respect to war crimes alleged to have been committed by its nationals or on its territory, for a period of seven years.\(^{150}\)

Ambassador David Scheffer, who headed the U.S. delegation to the Conference in Rome described the Rome Conference as follows:

Unfortunately, a small group of countries, meeting behind closed doors in the final days of the Rome conference, produced a seriously flawed take-it-or-leave-it text, one that provides a recipe for politicization of the Court and risks deterring responsible international action to promote peace and security. Most problematic is the extraordinary way the Court’s jurisdiction was framed at the last moment. A country whose forces commit war crimes could join the treaty

\(^{149}\) See Rome Statute, supra note 1, art. 12.

\(^{150}\) See id. art. 124.
but escape prosecution of its nationals by “opting out” of the Court’s jurisdiction over war crimes for seven years. By contrast, a country that does not join the treaty but deploys its soldiers abroad to restore international peace and security could be vulnerable to assertions that the Court has jurisdiction over acts of those soldiers.

Under the treaty, the Court may exercise jurisdiction over a crime if either the country of nationality of the accused or the country where the alleged crime took place is a party to the treaty or consents. Thus, with only the consent of a Saddam Hussein, even if Iraq does not join the treaty, the treaty text purports to provide the Court with jurisdiction over American or other troops involved in international humanitarian action in northern Iraq, but the Court could not on its own prosecute Saddam for massacring his own people. 151

In an address to the UN Sixth Committee, he said:

All of us in Rome shared a common goal that an international court should be able to prosecute tyrants who commit mass murder, mass rape, or mass torture against their own citizens, while at the same time not inhibiting States from contributing to efforts to help protect international peace and security. The irony of the Rome outcome on Article 12 is not lost on us. Consider the following. A State not a party to the treaty launches a campaign of terror against a dissident minority inside its territory. Thousands of innocent civilians are killed. International peace and security are imperiled. The United States participates in a coalition to use military force to intervene and stop the killing. Unfortunately, in so doing, bombs intended for military targets go astray. A hospital is hit. An apartment building is demolished. Some civilians being used as human shields are mistakenly shot by U.S. troops.

The State responsible for the atrocities demands that U.S. officials and commanders be prosecuted by the international criminal court. The demand is supported by a small group of other states. Under the terms of the Rome treaty, absent a Security Council referral, the court could not investigate those responsible for killing thousands, yet our senior officials, commanders, and soldiers could face an international investigation and even prosecution. 152

B. Mechanisms that Respond to These Concerns

I don’t think there is any mechanism in the Statute that responds to that concern. A possible way of dealing with the problem in certain situations might be found in Article 16 of the Statute. That Article provides:

No investigation or prosecution may be commenced or proceeded with under


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this Statute for a period of 12 months after the Security Council, in a resolution
adopted under Chapter VII of the Charter of the United Nations, has requested
the Court to that effect; that request may be renewed by the Council under the
same conditions.

There are several problems with using that Article as a shield, however. First, the
Security Council must act under Chapter VII. Chapter VII only applies if the
Security Council determines that there is "a threat to the peace, breach of the peace
or act of aggression."\(^{153}\) Secondly, a majority of the Security Council, including
all permanent members, must be in favor of the twelve-month postponement.

A cynic might suggest that the best way of dealing with the problem, if the
Statute comes into force, is to ratify the Statute and opt out of the war crimes
provision. That would at least avoid the problem for seven years.

C. Effectiveness of the Court Without U.S. Participation

It's very possible that the Statute will come into force, notwithstanding U.S.
opposition to it. There are some 185 states in the United Nations; sixty, the number
required to bring it into force, may well decide to ratify the Statute. But it's very
unlikely to be effective if the U.S. is not a party. The League of Nations failed
without U.S. participation at a time when the U.S. was a much less important
player in the world arena. Moreover, establishment of the Court under this Statute
may also have negative consequences for future peacekeeping operations. In his
testimony before the Senate Foreign Relations Committee, David Scheffer warned
that the treaty could "inhibit the ability of the United States to use its military to
meet alliance obligations and participate in multinational operations, including
humanitarian interventions to save civilian lives. Other contributors to peace-
keeping operations will be similarly exposed."\(^{154}\)

In addition to the jurisdictional problem just discussed, there were other
problems considered critical by the U.S.: the inclusion of aggression without a
definition and without linking individual responsibility to a prior Security Council
decision that the state had committed aggression; the way in which amendments to
crimes are adopted and applied; and the prohibition on reservations. In his
testimony before the Senate Foreign Relations Committee, Scheffer stressed the
importance of establishing an International Criminal Court and expressed hope
that the Statute would still be modified in a way that would make it possible for the
U.S. to participate.\(^{155}\)

PROFESSOR WISE: First, it is true the protective mechanisms in the Statute don't
entirely eliminate the risk that American soldiers will be subject to unwarranted

\(^{153}\) U.N. CHARTER art. 39. See id. art. 2.

\(^{154}\) David Scheffer, Testimony Before the Senate Foreign Relations Committee (July 23, 1998), <http://

\(^{155}\) Id.
prosecution, but they do go a good way toward minimizing it. Second, whatever
the Administration says, the essence of American objections emanating from the
Senate is rather that the United States alone among the countries of the world
shouldn't be required to submit itself to enforceable international standards. That,
it seems to me, is not a legitimate objection. Third, for the most part, then, the
Statute will apply between like-minded states. On a scale of usefulness ranging
from the World Trade Organization to Rotary International, I think it is going to
fall for a while closer to Rotary International. But it will, in the long run, provide a
valuable hedge against nasty turns of events in future regimes in states that are
parties to the Treaty.

PROFESSOR NOYES: The panelists have been extremely cooperative with our
efforts to touch on a range of complicated issues. Any one of the questions we have
asked could occupy a full one and one-half hour panel. I would like to thank all the
panelists. Are there questions from the audience?

QUESTIONER: Under the war crimes provisions, Professor Halberstam gave the
eexample of Israel possibly being a violator if its people were . . .

PROFESSOR HALBERSTAM: Not the state. The Statute does not apply to states;
it applies to individuals. It might apply to individuals living in Jerusalem or
Hebron, for example.

QUESTIONER: Wouldn't it follow that individuals who settled in the United
States, the colonists from England and France who later went west and transferred
people living there, could be liable?

PROFESSOR HALBERSTAM: No, because the Statute is not retroactive.

QUESTIONER: I understand that, but, hypothetically, what if it had been in
effect?

PROFESSOR HALBERSTAM: Yes. Had it been in effect, yes.

PROFESSOR WEXLER: May I respond to that? The language that is being
complained of is from Geneva Convention IV and Protocol I.156 It is an existing
provision of international law. What was objected to in Rome was the addition of
the words "directly or indirectly." If you look at Article 8(b)(viii) of the Statute, it
was not particularly controversial to include as a crime the transfer by an
occupying power of part of its own civilian population to an occupied territory,
because this is already a war crime. But the drafters added the words "directly or
indirectly," and so the concern became that you could have transfers of population

156. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 6 U.S.T. 3516, 75 U.N.T.S. 287, 318; Protocol Additional to the Geneva Conventions of 12 August 1949 and
Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, art.
85(4)(a), 1125 U.N.T.S. 3, 42.
that would fall within the ambit of the Statute that might not now be covered, but could be covered in the future. There were perfectly sound reasons for doing this that have nothing to do with Israel’s policies in the West Bank and elsewhere.\(^{157}\)

In addition, Professor Halberstam’s example takes the language completely out of context, because there are several restrictive provisions in the Statute that would prevent the cases she mentions from coming to the Court. For example, the Court is *only* to hear cases of the *most* serious concern to the international community as a whole. In addition, the war crimes chapeau requires the existence of an armed conflict—that is, uses of force or activities that violate one of the specific provisions in Article 8 do *not* fall within the jurisdiction of this Court unless there is, in fact, an armed conflict. Finally, the chapeau to Article 8 contains language about gravity that suggests that war crimes have to be part of a plan or policy, or committed on a “large-scale” to come within the purview of the Statute.

I would also raise a second point. There were many compromises made in drafting this Statute, as one might expect. For example, the text includes internal armed conflicts, which was controversial for some states. China, in particular, did not want internal armed conflicts in this Statute. The United States did. In addition, the Statute does not cover chemical and biological weapons, which disappointed the United States. But that was a trade-off we made, because we wanted nuclear weapons out of the Statute. These were difficult and protracted negotiations, and no one got everything they wanted. Almost every country lost something, as well as gained something.

Finally, my only reason for pointing out how complex the Statute is, at 128 Articles, is that it is not a document easily reduced to sound-bites, nor should it be in an academic setting. The Senate testimony referred to earlier, much of which I found disingenuous, was full of sound-bites that did not actually go to the merits of what was in the text.

**PROFESSOR HALBERSTAM:** On the specific question that you ask, the provision on transferring civilian populations into or out of occupied territories in the Geneva Convention of 1949\(^ {158}\) was adopted in response to what the Nazis had done to civilian populations under their control—deliberately moving vast groups of people for the purpose of destroying them.\(^{159}\) It has always been interpreted to

\(^{157}\) Although there was a great deal of rhetoric that was admittedly anti-Israeli at the time, there are many situations in which states might transfer population “indirectly” into occupied territories as a means of conquest. Moreover, the language of Convention IV and Protocol I seem to permit the amendments made. Finally, other changes were made to the Statute to bring new cases within its reach, such as the addition of various gender crimes, including forcible pregnancy—to which many Arab countries objected—to the long list of forbidden war crimes. To extrapolate from the inclusion of this language that the Statute is therefore “anti-Israeli” thus strikes me as a very distorted reading of the text.

\(^{158}\) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 156, art. 49.

\(^{159}\) See Julius Stone, *Israel and Palestine* 178-81 (1981). Stone says:

It is clear that in its drafting history, Article 49 as a whole was directed against the heinous practice
refer to the involuntary transfer of populations and would thus have no application to Jews voluntarily living in Jerusalem, Hebron, or anywhere else.\textsuperscript{160} The language of Protocol I of 1977 is somewhat less clear,\textsuperscript{161} but that Protocol has been very controversial and has not been ratified by the United States, several other major powers, or Israel.\textsuperscript{162} The Rome Statute goes even further than the Protocol, omitting the words "in violation of Article 49 of the Fourth Geneva Convention" and adding the words "directly or indirectly."\textsuperscript{163} We have thus gone from the Nazi type of forcible transfer of populations defined as a war crime by the Geneva Convention to voluntary movement of people, whether done "directly or indirectly"—whatever that means—as a war crime in the Rome Statute.

Nor is the possibility that the Statute would be applied to Jews living in Jerusalem or Hebron purely hypothetical. I had thought it was when I drafted my

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of the Nazi regime during the Nazi occupation of Europe in World War II, of forcibly transporting populations of which it wished to rid itself, into or out of occupied territories for the purpose of "liquidating" them with minimum disturbance of its metropolitan territory, or to provide slave labor or for other inhumane purposes. The genocidal objectives, of which Article 49 was concerned to prevent future repetitions against other peoples, were in part conceived by the Nazi authorities as a means of ridding the Nazi occupant's metropolitan territory of Jews—of making it, in Nazi terms, judenrein. Such practices were, of course, prominent among the offenses tried by war crimes tribunals after World War II.
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\textit{Id.} at 178.

\textsuperscript{160} Rejecting suggestions that this provision might apply to Jews living in the West Bank, Stone wrote:

As contrasted with this main evil at which Article 49 was aimed, the diversion of the meaning of paragraph 6 to justify prohibition of the voluntary settlement of Jews in Judea and Samaria (the West Bank) carries an irony bordering on the absurd. Ignoring the overall purpose of Article 49, which would \textit{inter alia} protect the population of the state of Israel from being removed against their will into the occupied territory, it is now sought to be interpreted so as to impose on the Israeli government a duty to prevent any Jewish individual from voluntarily taking up residence in that area...

To render them relevant, we would have to say that the effect of Article 49(6) is to impose an obligation on the state of Israel to ensure (by force if necessary) that these areas, despite their millennial association with Jewish life, shall be forever judenrein. Irony would then be pushed to the absurdity of claiming that Article 49(6), designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories \textit{judenrein}, has now come to mean that Judea and Samaria (the West Bank) must be made \textit{judenrein} and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants.

\textit{Id.} at 180.

\textsuperscript{161} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. Article 45, Section 4(a) reads:

\textit{[T]he following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol: (a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.}

\textit{Id.} art. 45, § 4(a).

\textsuperscript{162} See supra note 156.

\textsuperscript{163} Rome Statute, supra note 1, art. 8(b)(viii).
comments, but I have been informed by Professor Irwin Cotler that he has actually received copies of e-mails and faxes going from certain governments and organizations to lawyers asking them to draft indictments against Jews living in Jerusalem and Hebron.

Professor Wexler argues that there are other provisions in the Statute that would prevent these cases from coming to the Court. I am very glad that Professor Wexler, who has done a lot of work on earlier drafts of the Statute, thinks it would not apply to the examples I gave. We are, apparently, in agreement that it should not apply to those cases. I am not as persuaded, however, as she is apparently, that other provisions in the Statute would "prevent" these cases from coming to the Court. The language in the Preamble and Article I, that the Court will have jurisdiction "over the most serious crimes of concern to the international community as a whole," on which she relies, is, in my view, intended to be descriptive. Article 17 does provide that "the Court shall determine that a case is inadmissible" if it "is not of sufficient gravity to justify further action by the Court," and, it may well be, that the Court would find such cases inadmissible. But that would happen only after the case is brought to the Court—after investigations have been commenced and people have been charged, and possibly arrested. It would not prevent the case from being brought to the Court. Professor Wexler further argues that the Statute would not apply to these cases, because violation of the specific provisions in Article 8 do not fall within the jurisdiction of the Court unless there is an armed conflict. Unfortunately, several of the Arab states that attacked Israel in 1948 have still not signed peace treaties and are technically in a state of war with Israel, including: Iraq, Lebanon, Saudi Arabia, and Syria. Thus, it is at least arguable that an armed conflict exists. Finally, she urges compromise. One can compromise over whether conduct that is criminal under international law should or should not be within the jurisdiction of the Court. This is conduct that is not criminal under existing international law and should not be made criminal. It is an example of either poor drafting or deliberate misuse of the Court for political purposes.

I would like to make two other points briefly. First, prior to the Rome meeting, the Senate and the Congress were generally seen as the impediments to the establishment of a court. But it is the Executive, the Clinton Administration, which was in favor of an International Criminal Court, that is against this Statute. Second, I would like to note that in the Anti-Terrorism Act of 1986, Congress specifically included a provision asking the President to consider "establishing an international criminal tribunal for prosecuting terrorists." I think terrorist crimes

164. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 1201(d), 100 Stat. 853, 895-96 ("Consideration of an International Tribunal.—The President should also consider including on the agenda for these negotiations the possibility of eventually establishing an international tribunal for prosecuting terrorists."). These crimes were included in the Court's jurisdiction in the draft prepared by the International Law Commission. The U.S. objected to their inclusion. See supra note 15.
should be included within the jurisdiction of the Court; not in the way they have been included, as Professor Wise mentioned earlier—eventually and undefined—but the specific acts that have been defined by a treaty. In my view, if there is a treaty that has been ratified by 150 states that clearly defines a specific act as a crime, like airplane hijacking or sabotage, and no state is able or willing to deal with the perpetrators, the Court should have jurisdiction. Pan Am Flight 103 is a good example. We have not been able to bring the perpetrators to justice in all these years. Libya does not trust the United States or the United Kingdom to try the alleged perpetrators and the U.S. and the U.K. do not trust Libya to do so. If we have an International Criminal Court, leaving aside the retroactivity question, it should be able to try that kind of case.

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165. Under the principle of complementarity, the Court only has jurisdiction if the state is "unwilling or unable to prosecute." See Rome Statute, supra note 1, arts. 1, 17.