

.....

The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?

Marten Zwanenburg*

Abstract

The traditional practice of reserving criminal jurisdiction over members of peacekeeping operations for troop contributing states has certain disadvantages. The drafting of the Statute for an International Criminal Court (ICC) provided an opportunity to re-evaluate this practice and devise an improved one. The Statute that was adopted in Rome in July 1998 has been criticized by the United States for allowing prosecution of its peacekeepers by the ICC, which the US fears may lead to politicized prosecutions. This article discusses what changes the Statute entails with regard to the prosecution of peacekeepers. It argues that the traditional practice largely remains unaffected because the Statute includes a number of safeguards, a principal one being the notion of complementarity. The article concludes that the content of the Statute does not justify US fears and that it does not address the problems connected with the traditional system of criminal jurisdiction over peacekeepers.

1 Introduction

Genocide, crimes against humanity and war crimes are not usually associated with peacekeeping forces. A commentator might state that these forces should play a decisive role in protecting potential victims from serious international crimes. But what if it is the peacekeepers who commit the crimes, what if potential victims need to be protected from their guardians? Peacekeeping doctrine has not yet developed a satisfactory answer to this question. There is no heterogeneous criminal justice system for members of a peacekeeping force. An International Criminal Court could

* Research associate at the E.M. Meijers Institute of Legal Studies, Leiden University, Witte Singel 103, 2313 AA Leiden, The Netherlands. The author would like to thank Prof. John Dugard, David Tolbert, Frans Nelissen, Juan Amaya-Castro, Hermine Wiersinga and Machteld Boot and Herman von Hebel for comments on previous drafts.

possibly fill part of this lacuna by providing for a uniform international criminal law regime. In July 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted a Statute for such a Court. This was the culmination of a process that started 50 years ago, when the United Nations General Assembly recognized the need for an international court to prosecute acts of genocide.¹ After initial efforts toward the realization of such a court in the 1950s, the idea was put on hold, only to be revived in 1989. In that year, the General Assembly requested the International Law Commission (ILC) to resume work on the Court.² In 1994, the ILC completed a draft Statute,³ which was subsequently reviewed by a General Assembly Ad Hoc Committee on the Establishment of an International Criminal Court and later by the Preparatory Committee on the Establishment of an International Criminal Court. The work of the ILC and these Committees formed the point of departure of the Rome Conference.

The Rome Statute of the International Criminal Court⁴ was ultimately adopted by the Conference with a vote of 120 for, 7 against and 21 abstentions. The United States was one of the states that voted against⁵ and did not sign the Statute.⁶

The Court to be established on the basis of this Statute is not a serious alternative for the present system of criminal jurisdiction over peacekeepers. Nevertheless, one of the arguments of the US for not signing the Statute concerned its implications for US peacekeepers. It is these implications which will be discussed, in the light of the relevant provisions of the Statute.

2 The Role and Objections of the US with regard to the Establishment of an International Criminal Court

The US was a driving force behind the establishment of the ad hoc Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), generally seen as important steps leading to the establishment of the ICC. It was similarly instrumental in the process which led to the Rome Conference. Observers who saw this as an indication of the potential role of the US during the negotiations concerning the Court's Statute were bitterly disappointed at Rome. The US adopted a very conservative attitude on a number of issues, opposing a Court with broad powers. As a result, it found itself

¹ By the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, GA Res. 260 (III) of 9 December 1948, reproduced in 78 UNTS 1021.

² In GA Res. 39 of 4 December 1989, UN Doc. A/RES/44/39.

³ The text of the Draft Statute and the ILC's commentary are found in the Report of the International Law Commission on the Work of its Forty-Sixth Session, 49 UN GAOR Supp. (No. 10), UN Doc. A/49/10, paras 23–91.

⁴ UN Doc. A/CONF.183/9 of 17 July 1998.

⁵ It is unclear which states voted against. The United States, China and Israel stated so openly. Other states often mentioned in this regard are India, Qatar, Indonesia, Bahrain, Iraq, Yemen and Libya.

⁶ As of 11 February 1999, 75 states had signed the Statute. On 2 February 1999, Senegal became the first to ratify it.

opposed to a group of approximately 60 so-called 'like-minded states' working for a strong Court.

One of the principal arguments adduced by the US for its position was the fear that US soldiers participating in peacekeeping operations might be subjected to politicized prosecutions before the Court.⁷ This fear was expressly stated as a reason for not signing the Statute.⁸

Other arguments were also introduced. Although they will not be discussed in this article, these included the claim that the Statute impinges on the sovereignty of (non-signatory) states.

The argument to be discussed here, however, is that concerning implications of the Statute for US peacekeeping efforts. It was asserted by the US that the Statute's provisions: 'could inhibit the ability of the United States to use its military to ... participate in multinational operations... Other contributors to peacekeeping operations will be similarly exposed.'⁹ During the Rome Conference, it was made clear that what was feared was exposure of US peacekeepers to politicized proceedings.¹⁰ In other words, that cases would be brought before the Court by a state or the prosecutor against US peacekeepers or their superiors on the basis of political rather than valid international criminal law considerations.

In this context, it is important to note that the US, as the sole remaining superpower, is central to multinational peacekeeping and peace enforcement efforts. As the head of the American delegation remarked, the US 'continues to have a significant responsibility for international peace and security. [It] is often called upon to execute a Security Council mandate'.¹¹ It contributes large numbers of troops to UN missions¹² as well as operations carried out by regional organizations such as SFOR in the former Yugoslavia. It also provides crucial logistics and other support for those operations that the armed forces of no other state are able or willing to muster. When the US withdrew its combat forces and the bulk of its logistics units from the United Nations Operation in Somalia (UNOSOM II) in 1994, for example, this seriously

⁷ See, e.g., the statement by Bill Richardson, United States Ambassador to the UN, to the Rome Conference: <<http://www.un.org/icc/speeches/617usa.htm>>.

⁸ D. Scheffer, Head of the US Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court, Testimony Before the Senate Foreign Relations Committee, 23 July 1998, <http://www.usia.gov/topical/pol/usandun/schef23.htm>.

⁹ *Ibid.*

¹⁰ See Statement by Richardson, *supra* note 7.

¹¹ D. Scheffer, US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference, Press Conference at the Foreign Press Center, Washington D.C., 31 July 1998.

¹² Of the 77 nations contributing troops to UN peacekeeping operations, the US, with 529 troops, was the 12th largest contributor as of 31 August 1998. See UN DPKO, Summary of Troop Contributors to Peacekeeping Operations of 31 August 1998, <http://www.un.org/Depts/dpko>.

undermined the operation. As the Secretary-General of the UN stated, 'UNOSOM II was particularly dependent on the forces of the United States'.¹³

The US also pays a large proportion of the bill for multinational peacekeeping. The US share of the expenses of UN peacekeeping operations for 1998 was estimated at 256,000 million dollars,¹⁴ roughly a quarter of the total costs for 1998.¹⁵

It is clear from this that without American troops and political support, the current level of peacekeeping operations would be difficult or even impossible to sustain.

In any peacekeeping operation, whether the US participates or not, the issue of the entity on which criminal jurisdiction over the troops is conferred is important. States see criminal jurisdiction over their nationals as an aspect of their hallowed sovereignty, especially when those nationals are outside of the state's borders and therefore more vulnerable to claims of criminal jurisdiction by other states or entities. Considerable national sensitivities are associated with participation in (UN) military operations.¹⁶

3 Criminal Jurisdiction Arrangements in Peacekeeping Operations before the Statute

A *United Nations Peacekeeping*

In United Nations operations agreements are usually concluded between the UN and troop contributing states (Participation Agreements), and between the UN and the host state (Status of Forces Agreements (SOFA)). These agreements exempt the members of the force, to a certain extent, from the criminal jurisdiction of the host state: they are 'immune from legal process'.¹⁷ The reason for this arrangement, in the words of the Secretary-General, is that: '[i]t is essential to the preservation of the independent exercise of the functions of the force'.¹⁸ These specific arrangements are supported by the provisions of the Convention on the Privileges and Immunities of the United Nations, which confer immunity from legal process on officials of the United Nations.¹⁹

In the absence of host state jurisdiction, however, it is not the UN that exercises jurisdiction. The UN does not have a court martial structure or other integrated penal

¹³ United Nations, *The UN and Somalia, 1992–1996* (1996), at 62.

¹⁴ Office of the Secretary of State, Summary and Highlights Fiscal Year 1999 International Affairs (Function 150) Budget Request. <http://www.state.gov/www/budget>.

¹⁵ United Nations, *UN Peacekeeping: Some Questions and Answers* (1998), <<http://www.un.org/Depts/dpko/faq.htm>>

¹⁶ McCoubrey, 'International Humanitarian Law and United Nations Military Action in the "New World Order"', in University of Nottingham, *International Law and Armed Conflict: Commentary* (1994) 36, at 45.

¹⁷ See, e.g., ONUC SOFA, reproduced in R. Higgins, *UN Peacekeeping 1946–1967 — Documents and Commentary, III Africa* (1980) 199–206, para. 9 and Model Status of Forces Agreement for Peacekeeping Operations, UN Doc. A/45/594 of 9 October 1990, para. 46.

¹⁸ Summary Study on the experience derived from the establishment of UNEF I, UN Doc. A/3943 of 9 October 1958, para. 136.

¹⁹ Convention on the Privileges and Immunities of the United Nations, UN Doc. A/64 of 1 July 1949, Art. V, Section 18(a).

system to deal with crimes committed by peacekeepers.²⁰ Instead, agreements between the contributing states and the UN provide that the troop contributing states exercise criminal jurisdiction over the troops they contribute.²¹ Thus, it is left to the state of nationality of a peacekeeper to prosecute crimes committed. National (military) criminal law is used to prosecute peacekeepers, and there is in principle no international jurisdiction. In certain cases states will have asserted universal jurisdiction over serious crimes committed by non-nationals. This is certainly not the case for all states and all the core crimes. For example, the Dutch War Crimes Act of 1952 establishes universal jurisdiction over war crimes, including breaches of common Article 3,²² but not in so many words over crimes against humanity. That the exercise of criminal jurisdiction is left to the troop contributing states is illustrated by practice. Belgian and Canadian peacekeepers have been brought before national courts for crimes committed during peace operations.

This arrangement has not remained uncriticized. It appears inconsequent that troop contributing states have criminal jurisdiction over forces for which the UN is responsible.²³ Also, different states may have different views on which, if any, crimes committed by their troops they want to prosecute.²⁴

Not surprisingly, the legal counsel of the UN predicted in 1995 that this matter would be discussed with renewed intensity in the context of the establishment of an international criminal court.²⁵

B *Non-UN Operations*

As with UN operations, there is no general framework regulating criminal jurisdiction in non-UN operations. For every operation, an *ad hoc* arrangement will be made. There are many different types of peacekeeping operations. Consequently, many different types of arrangements are possible. A common characteristic, however, will be the concern of troop contributing states for their sovereignty. This implies a strong presumption against any other criminal jurisdiction than that of the troop contributing state. This may be illustrated by the arrangement with regard to IFOR and SFOR in Bosnia and Herzegovina, laid down in Annex IA to the Dayton Agreement and

²⁰ McCoubrey, *supra* note 16, at 45.

²¹ See, e.g.: UNEF I SOFA, annex to the Report of the Secretary-General on arrangements concerning the status of the UN Emergency Force in Egypt of 8 February 1957, UN Doc. A/3526, para. 11 and Model Agreement between the United Nations and member states contributing personnel and equipment to United Nations peace-keeping operations, UN Doc. A/46/185 of 23 May 1991, para. 25.

²² The Dutch Supreme Court concluded that the Dutch War Crimes Act of 1952 provided for universal jurisdiction over violations of common Article 3 of the Geneva Conventions committed by a Bosnian Serb in Bosnia-Herzegovina; HR 11 November 1997, NJ 463 (1998). This was previously contested.

²³ See Gasser, 'Die Anwendbarkeit des humanitären Völkerrechts auf militärische Operationen der Vereinten Nationen', 4 *Schweizerische Zeitschrift für internationales und europäisches Recht* (1994) 443, at 454.

²⁴ See more generally Zwanenburg, 'Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces', 11 *Leiden Journal of International Law* (1998) 229.

²⁵ Corell, 'Nuremberg and the Development of an International Criminal Court', 149 *Military Law Review* (1995) 87, at 99.

Appendix B thereto. Article 7 of that Appendix B provides that: 'NATO military personnel shall under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements'.²⁶ Another example is the Multinational Forces and Observers (MFO). Article 11(a) of the Protocol regarding the MFO states that: 'military members of the MFO [...] shall be subject to the exclusive jurisdiction of their respective national states in respect of any criminal offences which may be committed by them in the Receiving State. Any such person who is charged with the commission of a crime will be brought to trial by the respective Participating State, in accordance with its laws.'²⁷

4 Criminal Jurisdiction after the Statute: What has Changed?

The US reaction to the Statute implies that the Statute makes politically motivated prosecution of peacekeepers possible, where this was not possible under the 'traditional' arrangement outlined above. The head of the US delegation to the Rome Conference stated that: 'we have to see a document that provides us with the assurance that this court will not be a politically motivated court — will not . . . create the bizarre consequence that our soldiers in multinational peacekeeping operations on the soil of a rogue state could be prosecuted.'²⁸

First, it has already been noted that the solution of leaving criminal jurisdiction to the troop contributing states — the 'traditional arrangement' — is not without disadvantages.²⁹ For various reasons, individual states may not be willing or able to punish peacekeepers' crimes that should and could be punished. Under the 'traditional arrangement', there is no remedy for these situations.

It is clear that the Statute does entail changes with regard to criminal jurisdiction over peacekeepers. It creates a novel international jurisdiction, next to the existing national jurisdiction which goes beyond accepted regimes of universal jurisdiction. Conceptually, this is an important development. In this regard, the Statute is only one manifestation of a wider trend toward the acceptance of international criminal jurisdiction for certain serious crimes. The establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda is another indication of this development.

It is not certain that the Statute's practical implications are as far-reaching as its conceptual implications, however. These practical implications are determined by the specific provisions of the Statute. It will be seen that they are clearly circumscribed.

²⁶ General Framework Agreement for Peace in Bosnia and Herzegovina, Annex IA, Appendix B, Art. 7.

²⁷ Appendix to the Annex to the Protocol between the Arab Republic of Egypt and the State of Israel, 3 August 1981, reproduced in: R. C. R. Siekmann (ed.), *Basic Documents on United Nations and Related Peace-keeping Forces* (1991) 292–305.

²⁸ D. Scheffer, US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference, Press Conference at the Foreign Press Center, *supra* note 11.

²⁹ See also McCoubrey, *supra* note 16, at 45 and Glick, 'Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces', 17 *Michigan Journal of International Law* (1995) 53.

A *The Principle of Complementarity*

The Preamble to the Statute states that the Court shall be complementary to national criminal jurisdictions.³⁰ Complementarity is a fundamental notion underlying the creation of the Court. It is the recognition that the primary responsibility for investigating, prosecuting and trying international crimes lies with national authorities. The International Criminal Court only acts as a complement to national courts and comes into operation when domestic prosecutors or courts fail to act. If national authorities of a state adequately investigate or prosecute, or if they decide on solid grounds not to prosecute, the case will be inadmissible before the Court. The principle of complementarity constitutes a deference to national sovereignty, which is contrary to a development in international law away from broader notions of sovereignty.³¹ The national sphere is given precedence over the international, unless the national sphere is not up to the task. Concerns of states relating to violations of their prerogatives in the field of criminal jurisdiction have been met by the Statute.

This is in sharp contrast to the ICTY and the ICTR, which have primacy over national courts. The ICTY and the ICTR Statutes provide that those Tribunals may formally request national courts to defer to the competence of the international Tribunals.³² In the case of the International Criminal Court, the primacy has almost been reversed in favour of national courts. The ad hoc Tribunals, however, have a different status than the ICC. They were established by Security Council resolutions as subsidiary organs of the Council under Chapter VII of the Charter. As such, they function in the framework of a Council decision binding on the Member States of the United Nations. This is underlined by the provision in the respective Statutes that '[s]tates shall cooperate with the International Tribunal . . . in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law'.³³

The ICC, however, does not derive its legal status from a Security Council resolution and it is not bolstered by the powerful language of Chapter VII of the United Nations Charter. The Court is established on the basis of a treaty, which is not a binding instrument for other states than those that ratify or accede to that treaty. Under these circumstances the drafters of the Statute did not consider it prudent to confer primacy

³⁰ ICC Statute, *supra* note 4, Preambular para. 10.

³¹ See e.g. *Prosecutor v. Tadić*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1-AR72, A. Ch., 2 October 1995, para. 58: 'It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.'

³² See Statute for the International Tribunal for the Former Yugoslavia, in the Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, UN Doc. S/25704 (3 May 1993), reproduced in 32 *ILM* (1993) 1159, Art. 9(2) and Statute for the International Tribunal for Rwanda, Annex to SC Res. 955 of 8 November 1994, UN Doc. S/RES/955 (1994) Annex, Art. 8(2).

³³ See: ICTY Statute, *supra* note 32, Art. 29(1) and ICTR Statute, *supra* note 32, Art. 28(1).

on the permanent Court. Indeed, it is likely that the insertion of the notion of complementarity in the Statute was instrumental in securing support for the Court.³⁴

The most important practical consequences of the principle of complementarity are spelt out in Articles 17 and 18 of the Statute. According to Article 17, a case is inadmissible before the Court if:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a state which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;³⁵

Article 17(2) specifies further criteria for determining unwillingness in a particular case:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring a person to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.³⁶

For a case against an American peacekeeper to be declared admissible before the Court, one of these three conditions would have to be satisfied. This is a highly unlikely possibility. The national criminal justice system of the US is very elaborate. In general it functions efficiently, independently and impartially. As a consequence, it would be difficult for an ICC prosecutor to dismiss a US prosecution as a sham.³⁷ This conclusion is reinforced by the fact that the criteria in Article 17(2) contain a subjective element: reference is made to the intent of the state. Such intent will be very difficult to prove for the Prosecutor.³⁸

Article 17(3) lays down as further criteria for determining inability in a particular case:

whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.³⁹

³⁴ See A. Bos, paper presented at the symposium on The International Criminal Court: A Critical Review of the Rome Conference, Erasmus University Rotterdam, 5 November 1998.

³⁵ ICC Statute, *supra* note 4, Art. 17(1).

³⁶ *Ibid.*, Art. 17(2).

³⁷ See Roth, 'The Court the US Doesn't Want', *NY Review of Books*, 19 November 1998.

³⁸ See Van Boven, 'Some Remarks on the Operation of the International Criminal Court and Procedural Aspects', address delivered at the Symposium on The International Criminal Court: A Critical Review of the Results of the Rome Conference, Erasmus University Rotterdam, 5 November 1998, at 5.

³⁹ ICC Statute, *supra* note 4, Art. 17(3).

In the case of the US, it is unimaginable that this criterion will ever be satisfied. In addition, the burden of proof rests on the Court to demonstrate the inability of the state to investigate or prosecute. Similarly to unwillingness, this may be difficult, since the state, and not the prosecutor, will normally be in possession of the relevant information.

Article 18 of the Statute is another manifestation of the principle of complementarity. It requires that before a case is taken up, the prosecutor notify all states parties as well as the states that would normally have jurisdiction.⁴⁰ Only in the case of referral by the Security Council under Article 13(b) is notification not required. In all other cases, any state party or state which would normally have jurisdiction (including non-state parties) may inform the Court that it is investigating or has investigated the case. At the request of that state, the prosecutor shall defer to that state's investigation, unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation. The provisions of this article again emphasize the primacy of national investigations and prosecutions, including investigations and prosecutions by non-state parties which have jurisdiction.

Article 19, finally, provides for challenges to the jurisdiction of the Court or the admissibility of a case by:

- (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
- (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
- (c) A State from which acceptance of jurisdiction is required under article 12.⁴¹

The last possibility refers to the state on the territory of which a crime has been committed or the state of nationality of the accused.

Similarly to Article 18, this article also leaves open the possibility for non-states parties to challenge the admissibility of a case. Normally only one such challenge is allowed, but in exceptional circumstances the Court may grant leave for a challenge to be brought more than once.⁴² The grounds for such a challenge are the same as those available to the Court when it considers jurisdiction and admissibility of its own accord. This means the difficulties for the Court associated with proving the intent of a state to escape the jurisdiction of the Court will also apply in these cases.

Taken together, Articles 17–19 are the result of a very strict concept of complementarity enshrined in the Statute. All these provisions tilt heavily towards the primacy of national jurisdiction.⁴³ If a decently operating national criminal justice system — such as the American one — has initiated an investigation of a crime falling within the jurisdiction of the Court, it will be difficult to declare a case admissible before the Court.

⁴⁰ *Ibid.*, Art. 18(1).

⁴¹ *Ibid.*, Art. 19(2).

⁴² *Ibid.*, Art. 19(4).

⁴³ Van Boven, *supra* note 38, at 4.

B Provisions on Jurisdiction Ratione Materiae in the ICC Statute

The Statute limits the jurisdiction of the Court to genocide, crimes against humanity, war crimes and aggression once aggression has been defined.⁴⁴ The definitions of these crimes for the purposes of the Statute are in some respects broader, and in other respects narrower than the definitions in other instruments of international law and customary law.

The Court will only have jurisdiction over aggression once this crime has been defined and conditions for jurisdiction set out in accordance with the Statute by the states parties.⁴⁵ This process promises to be an extremely long one, in view of the complex and time-consuming procedures provided for in the Statute and the controversies surrounding the definition of aggression.

Article 6 of the Statute on the crime of genocide is taken verbatim from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.⁴⁶ This definition is restrictive by the very nature of the crime: genocide is a particularly heinous crime, even in comparison with the other core crimes. In contrast to other international crimes, it requires a special intent (*dolus specialis*).⁴⁷ This special intent consists of the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. It is extremely difficult to imagine that a peacekeeper, who in certain situations has the specific task of protecting a certain group,⁴⁸ would have such special intent. Further, considering the particular gravity of the crime,⁴⁹ peacekeepers will not easily be accused of genocide.

To fall within the jurisdiction of the Court, crimes against humanity must be committed as 'part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.⁵⁰ In certain respects, this formulation is broader than that contained in the Statutes of the ICTY and ICTR. For example, the ICTR Statute requires an attack against any civilian population 'on national, political, ethnic, racial or religious grounds'.⁵¹ The ICTY Statute, to give another example, requires that the crimes be committed 'in armed conflict, whether international or internal in character'.⁵² This has been described as a very narrow definition,⁵³ a point

⁴⁴ ICC Statute, *supra* note 4, Art. 5.

⁴⁵ *Ibid.*, Art. 5(2).

⁴⁶ See *supra* note 1.

⁴⁷ In its judgment in the *Akayesu* case, the ICTR Trial Chamber I stressed that this special intent is difficult to determine: *Prosecutor v. Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, Tr. Ch. I, 2 September 1998, para. 321.

⁴⁸ This is what the protection of safe areas in Bosnia-Herzegovina meant in practice.

⁴⁹ Trial Chamber I of the ICTR considered genocide to be the 'crime of crimes': *Prosecutor v. Jean Kambanda*, Judgment and Sentence, Tr. Ch. I, Case No. ICTR97-23-S, 4 September 1998, para. 16.

⁵⁰ ICC Statute, *supra* note 4, Art. 7(1).

⁵¹ Statute of the ICTR, *supra* note 32, Art. 3.

⁵² Statute of the ICTY, *supra* note 32, Art. 5.

⁵³ L. S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997) 162.

of view subscribed to by the Appeals Chamber of the ICTY.⁵⁴ Under the ICC Statute, a nexus with armed conflict is not required. The ICC Statute further specifies that ‘attack directed against any civilian population’ means ‘a course of conduct involving the multiple commission of acts . . . , pursuant to or in furtherance of a State or organizational policy to commit such attack’.⁵⁵ In this way, ‘isolated’ crimes against humanity are excluded from jurisdiction, which constitutes an important limitation. This limitation is at the core of the concept of crimes against humanity. It is difficult to imagine that a peacekeeping force would have as a policy to commit an attack on the civilian population. On the contrary, peacekeeping forces are heavily dependent on the cooperation of the civilian population in the execution of their mandate. Where this cooperation is lacking, as it was in Somalia for example, it becomes extremely difficult for peacekeeping forces to function effectively.

The requirement in the Statute of ‘knowledge of the attack’ constitutes another threshold. It is not entirely clear what is to be understood precisely by this expression which is based on the ICTY Trial Chamber Judgment in the *Tadić* case.⁵⁶ The Trial Chamber held that for individual liability for crimes against humanity it is required that: ‘the perpetrator must know that there is an attack on the civilian population [and] know that his act fits in with the attack’.⁵⁷ In other words, the perpetrator must see the larger context in which his act occurs. The definitions of the ‘elements of crimes’, which the Preparatory Commission will address in February 1999, might further clarify the meaning of ‘knowledge’.

On the one hand, knowledge will be relatively easy to establish in the case of the US, due to the transparency of the American political and military decision-making process. In addition, there are many non-governmental organizations (NGO) in the US with much expertise, which scrutinize the government and military. It is important to note in this respect that the Statute explicitly empowers the prosecutor to seek information from NGOs and other reliable sources that he or she deems appropriate.⁵⁸

On the other hand, even though the ICTY Trial Chamber held that knowledge could be implied from the circumstances,⁵⁹ it will still remain difficult to prove in court. This is particularly the case in peacekeeping operations, which often operate in chaotic circumstances. Peacekeeping operations, composed of different contingents coming from different military cultures, often have unclear command and control structures⁶⁰ and lack of (compatible) communication lines. This advocates for a presumption

⁵⁴ *Prosecutor v. Duško Tadić a/k/a ‘Dule’*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A. Ch., 2 October 1995, para. 141.

⁵⁵ ICC Statute, *supra* note 4, Art. 7(2)(a).

⁵⁶ *Prosecutor v. Duško Tadić a/k/a ‘Dule’*, Opinion and Judgment, Case No. IT-94-1-T, T. Ch. II, 7 May 1997 (*Tadić* Judgment).

⁵⁷ *Ibid.*, para. 659.

⁵⁸ ICC Statute, *supra* note 4, Art. 15(2).

⁵⁹ *Tadić* Judgment, *supra* note 56, para. 657.

⁶⁰ See, e.g.: M. Berdahl, ‘Whither UN Peacekeeping? An Analysis of the Changing Military Requirements of UN Peacekeeping with Proposals for its Enhancement’, *Adelphi Paper* 281 (1993), at 39.

against individual members of an operation being aware of the general situation. Thus, in case of peacekeeping operations, knowledge might not easily be implied from circumstances.

In any case, allegations against peacekeepers typically do not involve large numbers of victims and perpetrators. Investigations routinely underline the isolated nature of peacekeepers' criminal conduct.⁶¹ Crimes committed by peacekeepers will therefore most likely not fall within the jurisdiction of the Court as crimes against humanity.

War crimes are covered by the Court's jurisdiction 'in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes'.⁶² This expression is again intended to ensure that the Court concentrates on the larger crimes instead of incidents, although it does not limit the Court's jurisdiction to larger crimes. It constitutes a compromise between proposals limiting the Court's jurisdiction only to war crimes committed as part of a plan or policy or as part of a large-scale commission of such crimes, and proposals not to include any threshold at all.

The majority of crimes in the exhaustive list of war crimes enumerated by the Statute are taken directly or derived from established provisions of international (humanitarian) law. In several places the ICC formulations are more restrictive than established definitions, however. One example is the prohibition of intentionally launching an attack that causes incidental civilian losses. While Protocol I additional to the Geneva Conventions prohibits 'an attack which may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated',⁶³ the Statute inserts the word 'overall' before 'military advantage'.⁶⁴ Thus, in contrast to Protocol I, a single attack causing incidental civilian losses may only be scrutinized by the Court in connection with other attacks. The formulation of this provision creates difficulties, because it must be asked who is able to decide what the concrete and direct overall military advantage is.⁶⁵ This is especially difficult in the case of peacekeeping forces, where structures of command and control are not always clear and where commanders sometimes confer with their national authorities rather than their superior non-compatriot. Who must be deemed to have decided in these cases?

Not only are certain definitions of war crimes restrictive in the Statute, some grave breaches listed in Article 85 of Additional Protocol I are lacking in it.⁶⁶ One of these is the prohibition of attacks against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or

⁶¹ See, e.g., Lupi, 'Report by the Enquiry Commission on the Behaviour of Italian Peace-keeping Troops in Somalia', 1 *Yearbook of International Humanitarian Law* (1998) 375, at 378.

⁶² ICC Statute, *supra* note 4, Art. 8(1).

⁶³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), of 8 June 1977, 1125 UNTS 3, Art. 51(5)(b).

⁶⁴ ICC Statute, *supra* note 4, Art. 8(2)(b)(iii).

⁶⁵ H. Fischer, paper delivered at the symposium on The International Criminal Court: A Critical Review of the Rome Conference, Erasmus University Rotterdam, 5 November 1998, at 8.

⁶⁶ *Ibid.*, at 6-7.

damage to civilian objects. Another is the unjustifiable delay in the repatriation of prisoners of war or civilians.

States parties can, after the Statute enters into force for those states, ‘opt out’ on the Court’s jurisdiction over war crimes for seven years.⁶⁷ This provision was proposed by France. During the negotiations, the US wanted a 10-year ‘opt out’ period for war crimes and crimes against humanity, which was rejected by the Conference. Nevertheless, if it is to be expected that peacekeepers commit any crime falling within the jurisdiction of the Court at all, it is a war crime, since for the commission of a war crime, proof of widespread or systematic commission or *dolus specialis* is not required. Opting out removes these crimes from the jurisdiction of the Court altogether, albeit only temporarily.

In sum, the definitions of the crimes under the jurisdiction of the Court are in some respects broader than accepted definitions, but in many respects they are retrograde. The Statute emphasizes the prosecution of crimes committed on a large scale, whereas experience teaches that crimes committed by peacekeepers are isolated acts. Article 124 particularly constitutes an important limitation to the jurisdiction of the Court with respect to peacekeepers.

5 *Proprio Motu* Prosecutor

One of the contentious issues at Rome was that of granting the Court’s prosecutor the power to initiate investigations and seek indictments on his own initiative — *proprio motu*. The ILC Draft Statute did not envisage a Prosecutor with the power of initiative. It provided that a prosecution was to be triggered by either a state complaint or Security Council action.⁶⁸ This was in accordance with the US point of view, based on the argument that a prosecutor with the right of initiative would soon become a ‘human rights ombudsman’ and be flooded with complaints.⁶⁹ What in fact the US seems to have feared is that an independent prosecutor might single out US military personnel and officials.

Under the Statute, there is a *proprio motu* prosecutor. He or she may initiate investigations on the basis of information on crimes within the jurisdiction of the Court.⁷⁰ The prosecutor is instructed by the Statute to analyse the seriousness of the information received, if necessary by seeking additional information from states, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate.⁷¹ Under these circumstances, is it likely that this will: ‘encourage overwhelming the court with complaints and risk diversion of its resources, as well as embroil the court in controversy, political decision-making, and confusion’,⁷² as the head of the US delegation to the Rome

⁶⁷ ICC Statute, *supra* note 4, Art. 124.

⁶⁸ ILC Draft Statute, *supra* note 3, Art. 23(1).

⁶⁹ See the Statement by Ambassador Richardson, *supra* note 7.

⁷⁰ ICC Statute, *supra* note 4, Art. 15(1).

⁷¹ *Ibid.*, Art. 15(2).

⁷² Scheffer, *supra* note 8.

Conference stated? Will the prosecutor really be flooded with complaints? A number of provisions in the Statute, defining the powers of the prosecutor, make this a very unlikely scenario. As already noted, the Court and its prosecutor will only be concerned with the most serious crimes as defined in the Statute. In addition, any investigation by the prosecutor must first be authorized by the pre-trial Chamber of the Court consisting of three judges, which shall determine if there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court.⁷³ If the pre-trial Chamber considers that there is a reasonable basis, this does not prejudice subsequent determinations by the Court with regard to the jurisdiction and admissibility of the case.⁷⁴

The argument that the prosecutor may endanger state sovereignty is further weakened by the fact that the powers of the prosecutor to conduct an investigation are seriously limited. For example, independent investigations 'on site' are only possible without having secured the cooperation of the state concerned if the pre-trial Chamber has determined that the state is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation.⁷⁵ Another example is the elaborate protection of national security information contained in the Statute.⁷⁶

By not signing the Statute, the US has excluded itself from exercising influence on a number of issues which could decrease the possibility of politicized prosecutions.⁷⁷ For example, it will not be involved in the election of the prosecutor, who shall be elected by secret ballot by an absolute majority of the members of the states parties.⁷⁸

6 Provisions on Security Council Deferral

The relationship between the Security Council and the Court was an important issue at the Rome Conference. The permanent members of the Council pleaded that the Court should not undermine the authority of that organ. '[T]he Council must play an important role in the work of a permanent Court ... [which] must operate in conjunction — not in conflict — with the Security Council and its role and powers under the UN Charter',⁷⁹ it was asserted. In conformity with this reasoning, the ILC Draft Statute provided that individual permanent members of the Council would have a veto over which cases went before the Court.⁸⁰

Many other states' positions, however, reflected their misgivings about the role the

⁷³ ICC Statute, *supra* note 4, Art. 15(4).

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, Art. 57(3)(d).

⁷⁶ *Ibid.*, Art. 72.

⁷⁷ Scharf, 'Results of the Rome Conference for an International Criminal Court', *American Society of International Law Insight*, August 1998.

⁷⁸ ICC Statute, *supra* note 4, Art. 42(4).

⁷⁹ Richardson, *supra* note 7.

⁸⁰ ILC Draft Statute, *supra* note 3, Art. 23.

Council has played — or rather, failed to play — in the past with regard to the crimes with which the Court is concerned. They pointed at, *inter alia*, the poor performance of the Council with regard to the genocides perpetrated in Cambodia in the 1970s and in Rwanda in 1994. This criticism is only one manifestation of the difficulty that many states have with the present role of the Security Council. These states characterize the actions of the Security Council as selective and based on double standards.⁸¹ It is asked why the Council takes action in some cases and not in others.

The Rome Statute constitutes a compromise between these two points of view. Under the Statute, the Security Council can request deferral of an investigation or prosecution for a period of 12 months by a resolution under Chapter VII of the UN Charter.⁸² Such a request may be renewed under the same conditions. Thus, in theory a deferral can be renewed perpetually, blocking a case from reaching the Court. According to Article 27(3) of the Charter, such a decision by the Council requires the votes of nine members, including the five permanent members. As a result, no single permanent member of the Council — including the US — can block a case before the Court. For this, the support of all the permanent members is needed. Nevertheless, the arrangement still gives the Council an important position with regard to the Court, if no permanent member vetoes the resolution for calling for deferral. In its General Statement after the Statute had been adopted, Sudan, on behalf of the Arab group of states, declared that the Statute might even increase the power of the Council.⁸³ In this regard, it must be underlined that not only American, but also British, French and Russian soldiers are involved in a large number of peacekeeping activities, and that prosecution of US soldiers could constitute a precedent for others. Apart from this, many peacekeeping operations are undertaken under direct authority of the Security Council. For various reasons, the Council may not wish that crimes committed by members of a force under its control be investigated or prosecuted by the Court. The Council might argue, for example, that this would undermine its authority. In such cases, it is effectively able to block an investigation by the Court.

7 An Example

An example may best illustrate the practical implications that the Statute's provisions have for the prosecution of American peacekeepers.

Let us assume that the ICC Statute had already entered into force before the US missile attack on Iraq on 25 January 1999, in which civilians were allegedly killed.⁸⁴ Let us also assume that Iraq had ratified the ICC Statute, thus satisfying the requirement that the territorial state must have accepted the ICC's jurisdiction for a case to be admissible. It could well be imagined that Iraq would seek to bring a case

⁸¹ See, e.g., Ambassador Razali Ismail, Permanent Representative of Malaysia to the United Nations, statement delivered to 1994 Conference on Security Council reform, <http://www.globalpolicy.org/security/conf94/razali.htm>.

⁸² ICC Statute, *supra* note 4, Art. 16.

⁸³ United Nations, press release L/2889 of 20 July 1998.

⁸⁴ See, e.g., Graham, 'US Says Missile May Have Strayed', *Washington Post*, 26 January 1999.

against President Clinton before the ICC. Of course, President Clinton is not a peacekeeper, but the provisions of the Statute are applicable to the US President in the same way as to peacekeepers. Further, the US has explicitly expressed its concern about the possible prosecution of 'senior officials', *inter alia* on the basis of an example similar to the one discussed here.⁸⁵

First, for the case to be admissible before the ICC, the US would have to be unwilling or unable genuinely to investigate the incident. At the time of writing, an investigation had been initiated.⁸⁶ Although the outcome of that investigation is not yet known, this does not indicate unwillingness or inability.

Further, for the incident to fall within the jurisdiction of the ICC, it would have to qualify as a crime against humanity or a war crime.⁸⁷ In the words of the commander of the US forces in the region, however, the attack occurred as 'US aircraft have begun hitting other elements of Iraq's air defence system'.⁸⁸ Attacking Iraq's air defence system amounts to attacking military targets, certainly not the civilian population. In addition, the attack appears to have been an isolated incident. As such, it does not fall under the definition of crimes against humanity in the sense of the Statute, which only encompasses the multiple commission of acts and requires that the attack be 'pursuant to or in furtherance of a State or organisational policy to commit such an attack'.⁸⁹ On the contrary, this indicates that, as the US claimed, the attack occurred to counter a growing number of Iraqi challenges to American and British planes patrolling 'no-fly' zones over Iraq for the purpose of the protection of the pilots,⁹⁰ not for other purposes. This assumption is strengthened by the fact that many previous attacks by US aeroplanes occurred without reports of civilian casualties.⁹¹

If the attack cannot be characterized as a crime against humanity, was it perhaps a war crime? Being an isolated incident, the attack would not satisfy the Statute's requirement of 'in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes'.⁹² The Statute discourages the ICC from taking up cases that do not meet this condition, but instead emphasizes concentrating on larger crimes. Even if the ICC did take up the case, however, the attack would have to be brought under one of the substantive definitions of war crimes. In this case, the most relevant definition would probably be the one prohibiting attacks causing incidental loss of civilian life discussed above (Section 4B). As noted, that provision is

⁸⁵ See D. Scheffer, Ambassador-at-large for War Crimes Issues and Head of the US Delegation to the UN Conference, Remarks before the 6th Committee of the 53rd General Assembly, 21 October 1998.

⁸⁶ Graham, 'US Confirms Missile Hit Civilians in Iraq: No Official Explanation for Misfire', *Washington Post*, 27 January 1999.

⁸⁷ It is submitted that it could not qualify as genocide.

⁸⁸ Graham, 'Strikes Hit Civilians, Iraq Says', *Washington Post*, 26 January 1999.

⁸⁹ ICC Statute, *supra* note 4, Art. 7(2)(a).

⁹⁰ Graham, *supra* note 86.

⁹¹ But see Normand and af Jochnick, 'The Legitimation of Violence: A Critical Analysis of the Gulf War', 35 *Harvard International Law Journal* (1994) 387. In their assessment of the Gulf War, Normand and af Jochnick assert that the Coalition air campaign resulted in catastrophic damage to civilian lives and property. Nevertheless, they concede that this does not necessarily indicate illegal conduct.

⁹² ICC Statute, *supra* note 4, Art. 8(1).

worded restrictively, and it could well be argued that this particular attack was not excessive in relation to the *overall* military advantage achieved in the sense of Article 8(2)(b)(iii) of the Statute.

The Statute might eventually include the crime of aggression, raising the question whether similar future attacks could be qualified as such a crime. This particular attack in Iraq would not be concerned, since the jurisdiction of the Court is not retroactive. Further, the amendment that is required to allow the Court to define aggression might never be adopted. Amendments can only be considered seven years after the treaty enters into force and require approval by a two-thirds vote of the Assembly of states parties and ratification by seven-eighths of the states parties. Such broad consensus on aggression has been very difficult to achieve in the past. This suggests that if any definition were to be agreed on, it would be a narrow one representing the lowest common denominator.

Thirdly, this example raises the question of command responsibility. President Clinton did not commit any crimes in Iraq individually; he could only be criminally responsible as the superior of the perpetrators on the basis of ‘command responsibility’. The Statute lays down two different regimes for command responsibility. The first applies to ‘a military commander or person effectively acting as a military commander’,⁹³ the second to ‘superior and subordinate relationships not described in paragraph 1’.⁹⁴ It is submitted that for the first regime to apply to a politician, he or she should be exercising powers over subordinates which are substantially similar to those of military commanders. This would be in conformity with established customary law.⁹⁵ Although the President is formally Commander in Chief of the US armed forces, his role is not similar to that of a military commander, but rather limited to that of committing or withdrawing forces, while other responsibilities are delegated.⁹⁶ Consequently, the second regime is relevant here. That regime applies if the President ‘either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes’.⁹⁷ The standard imposed by the words ‘consciously’ and ‘clearly’ is high, higher than the customary law standard on command responsibility.⁹⁸ There is no indication that the standard was met in this particular case. The White House Press Secretary stated that: ‘the President plan[s] to allow American pilots . . . to protect themselves against the very real threat that is presented against them’.⁹⁹

The example discussed here largely addresses the fears expressed by the US with

⁹³ *Ibid.*, Art. 28(1).

⁹⁴ *Ibid.*, Art. 28(2).

⁹⁵ See Fenrick, ‘Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia’, 6 *Duke Journal of Comparative & International Law* (1995) 103, at 119.

⁹⁶ See Kaye, ‘Are There Limits to Military Alliance? Presidential Power to Place American Troops under Non-American Commanders’, 5 *Transnational Law & Contemporary Problems* (1995) 399, at 407–409.

⁹⁷ ICC Statute, *supra* note 4, Art. 28(2).

⁹⁸ See Hays Parks, ‘A Few Tools in the Prosecution of War Crimes’, 149 *Military Law Review* (1995) 73.

⁹⁹ Press briefing by Joe Lockhart, 26 January 1999, <http://www.pub.whitehouse.gov/uri-res/12R?urn:pdii://oma.eop.gov.us/1999/1/27/3.text.1>.

regard to politicized prosecutions. It illustrates that there are many obstacles in the ICC Statute to the prosecution of American forces for incidents such as the one in Iraq. This applies *a fortiori* to their superiors. A prosecution of the US President by the ICC for such incidents is no more than a theoretical possibility.

8 Conclusion

The adoption of the Statute for an International Criminal Court has been widely welcomed as an important building block in ensuring international accountability. Once the Statute receives the necessary 60 ratifications for its entry into force, it will be the first time the world has a permanent mechanism for prosecuting genocide, crimes against humanity and war crimes. The Statute illustrates the increasing concern of the international community with serious violations of human rights and international humanitarian law, and the feeling that these may not remain unpunished. Security Council determinations taking into account violations of human rights in recent years are also illustrative of this development. The United States has played a critical role in this development. It supported the two *ad hoc* Tribunals established by the Security Council and it was an important actor in the efforts towards establishing an International Criminal Court.

During the actual drafting of the ICC Statute, however, the US considered that the present regime of criminal jurisdiction over peacekeeping forces would be negatively affected by the Statute's provisions.

This article has shown that this is not the case. The Statute is based on a number of principles and contains a number of provisions that effectively safeguard peacekeepers against prosecution before the Court. These principles and provisions concern complementarity, the jurisdiction *ratione materiae* of the ICC, the powers of the prosecutor and Security Council deferral. The example discussed in Section 7 illustrates the practical consequences of these provisions, which result in the fact that the prosecution of a crime committed by a member of a peacekeeping operation before the ICC is no more than a theoretical possibility. The obstacles in the Statute in the way of prosecution of the superiors of peacekeeping forces, such as the US President, are even higher.

It may be concluded that the present arrangement for the exercise of criminal jurisdiction over peacekeeping forces is not affected. US fears to the contrary are not justified by the content of the ICC Statute. This is largely due to the fact that the same premise underlies that system and that of the Court, namely the premise of complementarity. The emphasis is on the primary responsibility of national authorities in investigation and prosecution. The Statute's acceptance of complementarity constitutes a deference to national sovereignty interests and national jurisdiction, as do the arrangements with regard to peacekeeping operations. With regard to the ICC, it is probably difficult to overestimate the importance that complementarity played in winning acceptance for the Statute. In peacekeeping too, national interest and the primacy of the national sphere 'impacts upon participation in peacekeeping

operations.¹⁰⁰ In shaping foreign policy, particularly in the field of security, states still make decisions based on their own national interests. An important element of this is the preservation of criminal jurisdiction over the state's peacekeepers.

In spite of American arguments, this conclusion is not a positive one. It has been stated, with regard to the Court, that:

enforcement of international criminal law by different states is ad hoc and uneven at best, determined through a system of national courts whose motives we cannot always trust and whose procedures we do not control.¹⁰¹

This is equally applicable to peacekeeping operations. Peacekeeping operations presumably act to further fundamental norms of the international community, including the prevention of crimes and helping to secure punishment of perpetrators of crimes. An example of the latter is the assistance given by SFOR to the ICTY in apprehending those indicted by the Tribunal. Peacekeepers purportedly act in the name of international justice. Consequently, they themselves must be held to the highest standards of justice. The guardians cannot be judged by different standards than the guarded. It cannot be accepted that states do not investigate acts by peacekeeping operations 'that they already regard as valid official actions to enforce international law'.¹⁰² As the former prosecutor of the ICTY, Richard Goldstone, pointed out, it could appear that what the US is saying by raising concerns about its peacekeepers is that, 'in order to be peacekeepers ... we have to commit war crimes'.¹⁰³ If this were accepted, peacekeeping operations would soon lose all credibility as an instrument for the maintenance of international peace and security, for which justice is an essential condition. In the words of one commentator:

The declared aim of UN military action is the restoration of international peace and security, which implies a lawful order of international relations. It would seem bizarre if such maintenance or restoration were permitted to rest upon action in violation of the applicable law.¹⁰⁴

It would be even more bizarre if violation of the applicable law were not addressed as adequately as possible. At present, that appears to be precisely the case. There is no satisfactory mechanism for addressing violations. Unfortunately, the hope that the deliberations on the establishment of an ICC would contribute to developing such a mechanism has not materialized. On the contrary, the international community, and particularly the US, have retreated behind the familiar rhetoric of sovereignty.

Thus, although the adoption of the Statute for an International Criminal Court is a major step forward in many respects, it has had a negative impact on the filling of

¹⁰⁰ Sise, 'Next Generation of Peacekeeping Operations: Problems and Prospects', 89 *ASIL Proc.* (1995) 282, at 284.

¹⁰¹ Coblenz and Bleich, 'We Need a World Criminal Court, But U.S. Opposes Treaty Establishing Rule of World Law', *San Francisco Chronicle*, 5 November 1998, at A29.

¹⁰² Scheffer, *supra* note 85.

¹⁰³ International Press Service, 'US Stance Contradictory, former UN Prosecutor Says', 17 June 1998.

¹⁰⁴ McCoubrey, *supra* note 16, at 43.

lacunae in the criminal jurisdiction regime of peacekeeping operations. Here lies a continuing challenge for an international community truly concerned with ensuring justice for *all* victims of violations of human rights and humanitarian law.