

EXCEPTIONAL CASES IN ROME:

The United States and the
International Criminal Court

(1998)

I. PRELUDE

“The Mother of all Motherboards”

“**T**his is easily the most complex international negotiation I have ever been involved in,” Philippe Kirsch, the chairman of the International Conference, convened in Rome in the summer of 1998 and aimed at promulgating, for the first time, an International Criminal Court, commented one afternoon during a rare break in the proceedings. The chief legal advisor to the Canadian foreign ministry, the youthful-seeming Kirsch could claim an improbably vast experience chairing such convocations (in recent years, he’d spearheaded, among others, conferences on maritime terrorism; the safety and deportment of UN workers in the field; refinements of various International Red Cross protocols; and, most recently, nuclear terrorism). As it happened, he wasn’t even supposed to be anywhere near this particular process, having been dragooned into his current role, on an emergency basis, when the highly regarded Dutch legal advisor Adriaan Bos, who’d been chairing the painstaking four-year-long preparatory conference (Prep Con) process leading up to the Rome meeting, fell gravely ill a mere three weeks before the opening of the final convocation. “We have representatives here from 162 countries,” Kirsch continued, “confronting—many of them for the first time—a draft document of over 200 pages, consisting of 120 articles, and containing 1,300 brackets. That is to say, 1,300

issues which the six Preparatory Conferences couldn't resolve, leaving multiple options to be tackled one by one by everybody gathered here. The 1,300 hardest issues.

"There's the simple linguistic complexity of the undertaking." (Earlier, the head of the drafting committee had related to me a confounding moment when the Chinese delegate had suddenly started objecting to the eventual court's seat being in The Hague—"although, as it turned out, it wasn't The Hague that was bothering him; rather, it was the shockingly inappropriate reference to—how shall I put it?—the court's *derrière*.") "There's the way we have to interweave all sorts of different legal procedural traditions," Kirsch continued, "for instance the Napoleonic civil law tradition on the one hand, and the Anglo-Saxon common law tradition on the other. The one enshrines an activist investigating judge as the finder of fact; the other favors an adversarial procedure, defense versus prosecution before a studiously impartial judge. The one allows trials in absentia; the other finds such trials utterly abhorrent. And so forth. And that's not even getting into, say, traditions of Islamic law. How does all that get channeled into a single statute?"

"And precisely what law is the eventual Court supposed to be enforcing? The Geneva Conventions, the Hague law, the Genocide treaty, the Crimes against Humanity jurisprudence flowing out of the Nuremberg Tribunal—not everyone subscribes to all of those standards, and in any case, much of this body of law exists in so-called 'customary' form, which is to say the degree to which it is actually observed is subject to evolving customary practice, which is in constant flux. This statute, on the other hand, has to be precise, every detail spelled out, all the ambiguities clarified. For example, the law of war with regard to international conflict is considerably more developed than that applying to internal conflicts, even though most conflict nowadays comes in the latter form. There are some countries here that don't want the Tribunal having *any* say over internal conflicts, while others are pushing

for a fairly stiff internal conflict regime. Some countries insist on the death penalty while others insist that they will walk out if the death penalty is included. Some countries want the Tribunal to be as much under the Security Council's control as possible—several of the Permanent Five, for example. Others—India, Pakistan—insist on its being completely free of any Security Council role.” (There had been a marvelous moment in the Committee of the Whole just that morning when the Indian and the Pakistani delegates had taken to lavishly praising each other for taking precisely that stand. Translation: They both wanted to be entirely free to enter into savage war, no holds barred, with one another, at any moment, without having to worry about their case getting referred to the Tribunal by any meddling Security Council.)

“And it goes on and on,” Kirsch continued. “How will the judges be chosen? Who will pay for the entire operation? With everything to be resolved in just five weeks. Some countries want the use or even the threat of using nuclear weapons included as a war crime—India, again, for instance—others, such as the United States, would storm out of the conference were that to happen. Trinidad and Tobago started this whole recent phase of negotiations back in 1989 by reviving a long-dormant proposal for a permanent International Criminal Court—only what they wanted it to address was drug crimes, and they still want that. Others want it to cover the crime of aggression, which nobody at the UN has been able to define in fifty years. Others want to include terrorism—but how do you define that?

“Some favor a strong, robust court; others say they do but clearly don't; while others say they don't and mean it. It often depends on who happens to be in power back home at the moment: A fledgling democracy that a few years ago might have been a dictatorship, or the other way around. A country just coming out of a civil war, or just about to go into one. They all look at matters differently, and differently than they might have a few years ago, or might a few years from now. It's incredibly dispersed.”

“Like a 3-D chess game,” one of Kirsch’s lieutenants now interjected, “being played on a rotating board.”

“On a rotating *fluid* board,” elaborated another.

“And on top of everything else,” Kirsch resumed, “this conference is transpiring under a truly unprecedented degree of public scrutiny. The NGOs”—nongovernmental organizations—“are here in force, incredibly well disciplined and coordinated. They’ve got representatives monitoring all the working groups and even inside the Committee of the Whole.” (The General Assembly had passed a special measure earlier this year allowing NGOs unprecedented access into the Committee of the Whole, at which point the press had been allowed in as well.) “Everything is happening in full view. Nothing happens without everybody knowing about it instantaneously. It’s really altogether unique.”

“People compare it to the land mines process,” Alan Kessel, the acting head of the Canadian delegation, who’d dropped by to check up on his compatriot, now interjected, referring to the international campaign that had culminated last year in Ottawa with a comprehensive land mine ban (which the United States, up till now, has pointedly declined to sign on to). “Some of the NGO people sometimes say, ‘Well, we can do it like the land mines.’ But Land Mines was—I mean, by the end that was a simple on-off switch. Either you were for it or you were against it. This, by contrast, is like a great big motherboard. You touch a switch here, and five lights blink off over there. You attend to one of those, and sixteen flash on over here. This conference has to be the Mother of all Motherboards!”

Double Vision

THERE WERE TIMES, SITTING there on the margins of the Committee of the Whole there in Rome, gazing out over the hall and squinting one’s eyes in a particular way, that one could momentarily envision the hundreds of delegates and experts gathered

there—the blue-black Africans, the turbaned Iranians, the Brits in their Savile Row finery and the Russians in theirs, the Chinese and the Japanese and the Indians, the Americans toting their ever present satchels and briefcases—as a vast convocation of the Family of Man, all gathered together in that one place at last, finally and once and for all, to face down the greatest scandal of the twentieth century, the galling impunity with which millions and indeed hundreds of millions of victims had been hounded to their deaths, and to proclaim, on the cusp of the new millennium, in the firmest possible voice, “Never Again!”—to proclaim it and mean it *and make it so*: that never again would victims be permitted to sink like that into oblivion, and never again would their tormentors be permitted to harbor such blithe confidence regarding their own indubitable inviolability.

It was possible, squinting one’s eyes one way, to see it like that, but then, if you squinted them another, or if you cocked your ear such that you were actually listening to some of the speeches, suddenly the same convergence of delegates could transmogrify from stand-ins for the Family of Man to the representatives of 162 separate and distinct states, each one zealously husbanding its own righteous sovereignty: each one all for lavishing such vigilance on the other guy but damned if they were going to subject themselves or their compatriots to any such intrusive oversight. Not all of them, in fairness, and not all the time, but these were, after all, diplomats first and foremost, whose overriding brief, here as anywhere else (as one of the NGO representatives observed dispiritedly from the margins) was “to protect sovereignty, reduce costs, and dodge obligations.”

I mentioned that double vision one afternoon to a young lawyer on an important Southern hemisphere delegation, a veteran of the Prep Con process and one of the most energetic presences in the working-group trenches, and he noted that many of the delegates experienced themselves in a similarly doubled light. “Especially among some of the younger, middle- and lower-ranking

delegates,” he said, “many of whom start out as the representative of Country X to the ICC Diplomatic Conference but slowly find their allegiances shifting, so that they become rather the delegate of the ICC Conference back to their foreign ministry, and presently, even, a sort of secret agent, burrowing toward a successful outcome. ‘My minister says this,’ they’ll tell you, ‘but I think if you propose it this other way, he won’t notice, and we can still accomplish the same purpose.’ That sort of thing.”

I was struck by the similarity of that sort of drama to accounts I’d read of the American Constitutional Convention of 1787–8, and indeed I often had the sense of being witness to a parallel sort of historic undertaking. Just as back then fiercely independent states were being enjoined to surrender part of their precious sovereignty to an as yet inchoate united entity and were doing so at best grudgingly (insisting on the primacy of “state’s rights” to the very end—an insistence that could arise out of an honest concern for the more authentic, responsive kind of governance available at the more localized level, but could just as easily arise out of more perverse imperatives, such as the desire to preserve the institution of slavery), so the nation-states gathered in Rome seemed driven by a similar amalgam of authentic and then more suspect misgivings.

II. THE ROME PROCESS

Conference Dynamics

FOR THE FIRST THREE weeks of the Conference, Chairman Kirsch and his multinational associates in the Conference’s executive Bureau maintained an almost studied aloofness, allowing the delegates to flounder in the complexities of the evolving document. Although many of the delegates were veterans of the Prep Con process, many more were encountering the draft statute for the first time there in Rome (many of the smaller countries simply hadn’t been able to afford to send delegations to the earlier meetings), and

there was a cliff-steep learning curve. In addition, the Rome meeting had elicited the attendance of higher-ranking delegates, and as one of the Prep Con veterans noted wryly, “Such types aren’t generally prone to humility. They are incapable, for instance, of saying, ‘I don’t understand this provision. Could you explain it to me?’ Instead they launch into a long, flowery statement detailing their own manifest misunderstanding of the matter, all so as to provoke you, at the very end, into responding with the simple clarification they’d been trying to elicit all along. But it can take forever.” The various working groups were plowing through the myriad brackets all the while, struggling toward occasional consensus and moving on. But the tough questions—the independence of the court and its prosecutor, the oversight role of the Security Council, what sort of jurisdiction the Court would be able to extend over precisely what sort of law—remained scarily unresolved, and time now seemed to be fast running out.

At the beginning of the fourth week of a five-week conference, expertly gauging the growing sense of anxiety in the hall, Kirsch launched a series of calibrated interventions—working drafts on major issues in which he attempted to narrow the contours of the sprawling debate, bracketing out extreme positions that weren’t any longer likely to elicit consensus, narrowing the options on any given contentious matter to three or four, floating various compromises, narrowing the options still further. It was remarkable to watch the way he seemed to amass authority—stature he’d doubtless be needing to spend later on—simply by being the one who was at last seen to be moving the process demonstrably forward.

By the middle of the fourth week, a range of possible outcomes was beginning to arc into view. One afternoon around that time I worried out a sort of flowchart of such possible outcomes with a Latin American delegate. There seemed at that point to be basically three: On the one extreme, the Conference could completely collapse by the end of the next week, the delegates storming home in unbridgeable anger. At the other extreme, they might

emerge with a truly robust court—"Not just a court," in the words of the Canadian Minister of Foreign Affairs Lloyd Axworthy, "but a court worthy of the name." A court with powerful jurisdiction over clean, clear law; a strong mandate; and the wherewithal to carry it out. Wasn't going to happen, was the simple verdict of my Latin American friend: no way.

In between, there were middle possibilities: One branch debouched in a sort of crippled court, a Potemkin court, a court in name only. Something that would look for all the world like a full-fledged court, but whose tendons—as to jurisdiction, independence, authority—would have been surgically severed from the outset. An excuse court: a court to which the Great Powers could refer intractable problems, as if they were actually doing something, confident that nothing would actually get done. The other branch led toward a fledgling court, a baby court, a court whose powers and prospects, at the outset at any rate, would be highly circumscribed. But with the capacity to grow. "Something like your own Supreme Court in the original Constitution," my Latin American friend volunteered. "I mean, if you look at the Constitution itself, the Supreme Court at the outset really had very little authority; it was very weak. For instance, the Constitution itself doesn't grant it the right of judicial review—the power, that is, to rule on the constitutionality of the acts of other branches or of the sovereign states. That was a power it only grabbed for itself, fifteen years later, with Justice Marshall's ruling in *Marbury vs. Madison*. And maybe one could imagine a similar development here. A baby court now that gradually gains the confidence of the world community through its baby steps and then, at some moment of crisis in the future, under appropriate leadership . . . On the other hand, that presupposes that it's given room to grow." This option in turn seemed to sprout two possible suboutcomes: a baby in a spacious crib, as it were—or a baby in a tight-fitting lead box. "Imagine, for instance," my Latin American friend ventured, "if the U.S. Constitution had specifically forbidden the possibility of

judicial review.” The baby in the lead box. “On the other hand,” he smiled conspiratorially, “maybe it would be possible to build some hidden trapdoors into that lead box.”

America’s Bottom Line

ONE AFTERNOON, ONE OF the most canny thinkers in the hall, a leading Asian delegate, was parsing some of the 3-D game’s more intricate strategic considerations for me: “The thing is,” he explained, “you want to create a court that the parties that might need it would still be willing to sign on to. I mean, face it, we’re not going to need to be investigating Sweden. So, the treaty needs to be ‘weak’ enough, unthreatening enough to have its jurisdiction accepted without being so weak and so unthreatening that it would thereafter prove useless. It’s one of our many paradoxes.”

And yet, paradoxically, those last few weeks, the biggest challenge facing the process no longer seemed to be coming from such potentially renegade states (the ones that might someday “need it”). Rather, they were being presented, with growing insistence, by the United States, whose position was truly incongruous.

The United States had been one of the principal moving forces behind the Nuremberg Tribunal and more recently was a leading sponsor of the ad hoc tribunals on Rwanda and the former Yugoslavia (dozens of lawyers from the Justice Department, the Pentagon, and other government agencies had been seconded to serve stints in the prosecutor’s office in The Hague, and several of those were now serving on the U.S. delegation in Rome as well). Secretary of State Madeleine Albright—herself a childhood witness to the Holocaust in Europe—had played a strong role in fostering the ad hoc tribunals during her term as ambassador to the UN and had made the apprehension and prosecution of accused war criminals one of the rhetorical touchstones of her tenure at State. In addition, on several occasions across the preceding years, President Clinton had himself issued forceful calls

for a permanent war crimes tribunal, most recently in March 1998, when he addressed genocide survivors and government officials in Kigali, Rwanda.

The U.S. delegation—forty strong and easily the best prepared and most professionally disciplined at the conference—was spearheaded by David Scheffer, Albright's ambassador at large for war crimes issues, who'd clearly been consumed by the subject for some time. Over lunch one afternoon, on the rooftop cafeteria atop the conference proceedings, he became quite emotional, describing a trip he'd taken to Rwanda in December 1997, accompanying Secretary Albright: the horrors he'd witnessed, the terrible testimonies he'd heard. He grew silent for a moment, gazing out toward the Colosseum, before continuing: "I have this recurrent dream, in which I walk into a small hut. The place is a bloody mess, terrible carnage, victims barely hanging on, and I stagger out, shouting, 'Get a doctor—Get a doctor!' and I become more and more enraged because no one's reacting fast enough." He went on, passionately invoking the importance of what was going on down below and insisting on the necessity of its successful outcome.

And yet, increasingly as the Conference lumbered toward its climax, the American delegation seemed gripped by a single overriding concern. Senator Jesse Helms, the Republican head of the Foreign Relations Committee, had already let it be known that any treaty emerging from Rome that left open even the slightest possibility of any American ever, under any circumstance, being subjected to judgment or even oversight by the court would be "dead on arrival" at his committee. The Pentagon was known to be advancing a similarly absolutist line. The State Department, sugarcoating the message only slightly, regularly pointed out how, in Scheffer's words, "The American armed forces have a unique peacekeeping role, posted to hot spots all around the world. Representing the world's sole remaining superpower, American soldiers on such missions stand to be uniquely subject to frivolous, nuisance accusations

by parties of all sorts. And we simply cannot be expected to expose our people to those sorts of risks. We are dead serious about this. It is an absolute bottom line with us.”

Originally the American team thought it had addressed this concern with a simple provision mandating that the court only be allowed to take up cases specifically referred to it by the Security Council—where the United States has a veto (as do the other Permanent Five: Britain, France, China, and Russia). In effect, the Americans seemed to be favoring a permanent version of the current ad hoc Yugoslav and Rwandan tribunals, one all of whose authority would flow from the Security Council, but without the cumbersome necessity of having to start all over again (statutes, staffing, financing) each fresh time out. The rest of the Permanent Five tended to favor such an approach as well, for obvious reasons of self-interest, but also out of concern over the Security Council’s own paramount mission, enshrined in Chapter VII of the UN Charter—the securing and maintenance of world peace.

The Role of the Security Council

THE ENTIRE ROME CONFERENCE was transpiring under the motto “Peace and Justice,” but, as proponents of the Security Council’s primacy liked to point out, there would come times when the two might not necessarily coincide, at least not simultaneously. In order to secure peace, the Security Council might need to negotiate with technically indictable war criminals and might even need to extend pledges of full amnesty to them in the context of final peace agreements. At such moments, it couldn’t very well have an unguided prosecutor careering about, upending the most delicate of negotiations. Therefore, if the Security Council was “seized” with an issue—as the term of art has it—it needed to be able to forestall, even if only temporarily, any such court interference.

Opponents of this line—many of the countries that didn’t happen to have such veto power, and the preponderance of the

NGO observers—liked to cite a Papal remark to the effect that “If you want peace, seek justice,” further pointing out that as often as not, historically, a Security Council “seized” with an issue was a Security Council seized *up* and paralyzed. The veto-encumbered Security Council was the very institution, after all, which for fifty years after Nuremberg had proved incapable of mounting trials in the cases of Idi Amin, Pol Pot, or Saddam Hussein (at the time of his genocidal Anfal campaign against his own Kurdish population). More often than not, indeed, over the past fifty years, war criminals have had sheltering patrons among the Permanent Five—Pol Pot, for instance, had the Chinese; the Argentine generals had the Americans (just as, more recently, as many of the NGOs were pointing out, U.S. Ambassador Bill Richardson had actively shielded the Congo’s Laurent Kabila from the full force of Security Council oversight into the ghastly massacres involved in the campaign leading up to his installation). In this context, the Yugoslav and Rwandan ad hoc tribunals had been historic flukes (in both instances the product, as much as anything else, of Security Council embarrassment over its failure to take any more concerted action to stop the violence itself). “If we’re going to have gone to all this trouble,” my Latin American friend commented, “only to have ended up with a slightly more streamlined version of the very failed system we gathered here in the first place to overcome, it will hardly have been worth the bother.”

As it happened, it was Lionel Ye, a lanky and self-effacing young government attorney out of Singapore, generally regarded as one of the most supple thinkers in the hall and a master of the 3-D game, who at one point during the Prep Cons came up with a possible route out of the impasse through the simple expedient of turning the conundrum on its head. Instead of requiring Permanent Five unanimity to launch a Court investigation, why not require Permanent Five unanimity in order to block one? More specifically, why not establish a regime where a simple majority

vote of the Security Council could at any time forestall any further Court action on a given case, for a renewable period of up to twelve months (though any single Permanent Five veto could derail the stalling effort). After all, Ye pointed out, if a majority of the Security Council, including all five Permanent Five members, agreed on the peacekeeping necessity of temporarily blocking Court action, there'd likely be something to it.

The Permanent Five were understandably dubious about the so-called Singapore Proposal, but in what may have been the single most important development during the Prep Cons, in December 1997, Britain, under fresh New Labour auspices (with their foreign minister Robin Cook's highly vaunted new "ethical foreign policy"), swung around behind it. In so doing, Britain became the first and only Permanent Five member to join onto what was becoming known as the Like-Minded Group, a loose coalition of some sixty countries (including, among others, Australia, New Zealand, Canada, most other European countries with the exception of France, and most of the newly democratizing countries in Latin America and sub-Saharan Africa) favoring a more robust court.

State Referrals and the Independent Prosecutor

TO SUGGEST THAT THE Security Council could *block* certain Court initiatives was likewise to acknowledge that one might want to include other ways, besides Security Council referral, of instigating such cases in the first place. And indeed two further such procedures had been broached during the Prep Cons.

The first would allow so-called state referrals, such that any state party to the treaty (any state that had both signed and ratified the treaty) could on its own and by itself refer a complaint to the Court. Some argued that that ought to be enough: If not a single one of the, say, sixty countries that were going to have to ratify the treaty before it went into effect was going to be willing to lodge a

complaint—singling out, say, Hussein’s Anfal campaign against the Kurds—then how much merit was such a complaint going to be likely to have?

The NGOs were supporting state-referral; however, from bitter experience over the last several years they’d come to feel that in fact it would not be enough. As it happened, Human Rights Watch had recently spent several years shopping around the very case of Hussein’s Anfal campaign, trying to find a single country willing to lodge a formal complaint against Iraq with the International Court of Justice in The Hague (the ICJ lacks the authority to hear criminal cases against individuals but is still empowered to adjudicate certain sorts of claims against entire countries). Despite the widespread publicity and documentation regarding Iraq’s manifest depredations (including the indiscriminate use of poison gas), HRW was unable to find a single state willing to pursue the matter. (Most fretted over issues of trade—if not now, in the future—or retaliation, and even some of the Nordic European states in the end backed off, citing domestic political complications.)

For that reason, the “soft coalition” of the NGOs and the Like-Minded Group were additionally advocating an independent prosecutor—a prosecutor’s office, that is, empowered to evaluate complaints from any source (nonparty states, party states, NGOs, news reports, the petitions of individual victims)—and to launch investigations or prosecutions on its own (subject, granted, to majority Security Council postponement). Only an office thus empowered, it was argued, would be able to respond to the worst depredations in real time, as they were happening, efficiently and free of political coercion.

Nonsense, countered that proposal’s adamant opponents (the United States chief among them). “For one thing,” Scheffer suggested to me, “such a prosecutor would be inundated with complaints from Day One. His fax machine would be permanently jammed up. With no filter between him and the world, and no possible way

of responding to all the complaints, his selection process would of necessity take on a political tinge. Why did he choose to pursue one matter and not another? Each time he passed on a given matter, he'd lose that much more of his desperately needed authority."

The proponents of an independent prosecutor argued that such dilemmas were no different than those faced by any other prosecutor anywhere in the world—all of whom face decisions like that every day.

"But those prosecutors exist in a framework of accountability," Scheffer pointed out when I rehearsed that argument for him. "States are accountable to their polities; the members of the Security Council are accountable to theirs. There are checks and balances. But who would this independent prosecutor be accountable to?" Scheffer himself didn't specifically raise the specter, but others did: What would prevent such an independent prosecutor from ballooning into a sort of global Kenneth Starr (the independent prosecutor back in the United States who had been hounding Bill Clinton with such arguably frivolous and politically motivated scandals as the Whitewater and Monica Lewinsky affairs)—if not worse. This office, after all, stood to become, as it were, the judicial branch of a world government that lacked an effective, functioning, democratically chosen legislative or executive branch to check and oversee it. An untethered international Kenneth Starr, floating free.

The proponents of an independent prosecutor, for their part, scoffed at the notion. For one thing, the prosecutor—like every member of the Court—would be answerable to an Assembly of State Parties and removable at any time for cause. Certainly at the outset, his budget would be minuscule and he'd be utterly dependent on the good will and cooperation of states (for instance, he'd have no police or enforcement resources of his own). He'd continually be having to demonstrate his upstanding character and evident fairness, since from the outset what authority he'd be able to muster would be largely moral. Beyond that, with regard to any

specific case, the way the statute was evolving, he'd have to present his evidence and justifications every step of the way before a supervising panel of judges: He wouldn't even be able to launch an investigation without their authorization.

None of which assuaged the U.S. delegation, which remained fixated on the prospect of that lone American marine—a peace-keeper stationed, say, in Somalia—getting nabbed on some capricious charge and inexorably dragged into the maw of the machine, his fate at the mercy, as it was sometimes phrased, of some Bangladeshi or Iranian judge.

“What is the United States talking about?” an exasperated Like-Minded diplomat virtually sputtered at me one evening over drinks. “This prosecutor is going to have a lot more important things to worry about than some poor Marine in Mogadishu.”

Earlier I'd tried a similar argument on one of those incredibly competent and respected midlevel delegates—in this case, a Pentagon lawyer attached to the U.S. delegation: Surely the prosecutor is going to have a lot more important things . . . I said. “Not necessarily,” he countered, recalling some recent proceedings at the Yugoslav tribunal where, “At a certain point, word came down from the prosecutor that they really had to find more Croats to indict—there were too many Serbs getting indicted; it was too unbalanced. The prosecutor had to be able to project the appearance of fairness.

“And I can almost guarantee you,” he continued, “that a similar thing will happen one day up ahead. Say, it's something like the end of Desert Storm, and the prosecutor has been able to round up and indict dozens of Iraqis. You just watch: The Iraqi government will be lodging all sorts of trumped-up, phony complaints about Americans, and the prosecutor will come under terrific pressure to indict a few of them as well, just to demonstrate his fairness.”

I subsequently related the Pentagon lawyer's scenario to my Like-Minded friend, at which point he immediately shot back, “But that's what complementarity is for!”

The Principle of Complementarity

COMPLEMENTARITY WAS PERHAPS THE keystone of the entire draft statute, and one would have thought it would have gone a long way toward answering American concerns. For central to the entire enterprise was the notion that national judicial systems would be taking precedence over international ones, and specifically over this Court. That is to say that if a state could show that it was itself already dealing with any given complaint in good faith—investigating and if necessary prosecuting—then those national efforts would automatically trump the International Court’s. “In fact,” the Like-Minded diplomat continued, “in the best of all possible worlds, one day in the future, the International Court will have no cases whatsoever. Under the pressure of its oversight, all national judicial systems will be dealing in good faith with their own war criminals, at the local level. That would obviously be a better system, and getting to such a point is one of the goals of the entire exercise. In the meantime, democracies like the United States, with highly developed systems of military as well as civilian justice, would invariably be able to shield their own nationals by invoking complementarity.” (To further buttress this doctrine of complementarity, the United States had demanded, and the Like-Minded seemed willing to accede to, an entire statute section requiring the prosecutor to notify any investigative target’s home state at the outset of its investigation, so that the home state could apply to the Court on complementarity grounds from the very start.)

As it happened, Conference participants were being afforded a high-profile object lesson in the proper workings of a complementarity regime during the very weeks of their deliberations. Earlier that year, a U.S. Marine jet flying too low on training maneuvers in the Italian Alps had tragically sheared the cables on a ski lift, an accident that claimed twenty lives. The plane’s crew had initially been charged with manslaughter in Italian courts.

But from the moment that U.S. military prosecutors filed court-martial charges against two of those officers (at the same time clearing two others)—as it happened in the very middle of the fourth week of the Conference—the Italian prosecutor dropped all his charges, exactly as he was required to in keeping with the complementarity provisions in the bilateral “status of forces agreement” governing the presence of U.S. forces in Italy.

“And on top of that,” my Like-Minded drinking companion was continuing, “the Americans have the protection of the chapeau”—the preamble, as it were, of the section defining what sorts of crimes could come under the prosecutor’s scrutiny. The chapeau stipulated that only “systematic or widespread” instances of such crimes would qualify. The Americans would have preferred “widespread *and* systematic,” but still the former wording would likewise have seemed to radically narrow the exposure of any single Marine peacekeeper or group of them who wandered down the wrong alleyway in Mogadishu.

The Americans, however, were not satisfied. As far as they were concerned, there still remained a chance, however slim, that Americans could find themselves exposed on the wrong side of the line. And, as Scheffer insisted to me one afternoon in the halls, almost jabbing his finger into my chest with his intensity, “The exposure of American troops is *really serious business*, and bland assurances about the unlikelihood of any given outcome simply don’t move the mail back where I come from.”

The Requirement of State Consent

WHICH MAY BE WHY the American delegation chose to make its stiffest stand on the question of jurisdiction itself.

The legal issue involved went something like this: Suppose the prosecutor had reason to launch an investigation or prosecution regarding a particular case, either on his own or because he’d had the case referred to him by a state party or an NGO: What

conditions, particularly with regard to states that had not yet chosen to join onto the treaty, would have to be met for him to be able to move forward?

The Germans favored giving the prosecutor the widest possible latitude in this regard, which is to say *universal jurisdiction*. They pointed out, for instance, that according to the Geneva Conventions, every signatory (for all intents and purposes, all the countries of the world) had not only the right but also the obligation to pursue war criminals from any countries anywhere—and failing anything else, to deliver them up for trial in their own courts. (Granted, in practice, most countries had thus far failed to enact the necessary enabling legislation, but according to their signatures on the Conventions, as well as on the Genocide Treaty, they'd acknowledged such universal jurisdiction over war crimes.) All that was being asked here was that state parties together transfer the rights granted each one of them separately to the Court they were founding in concert. The Germans didn't need to point out that the doctrine of universal jurisdiction had been a cornerstone rationale at the Nuremberg Tribunals—the crimes the defendants there had been accused of were universal in nature, as hence so was the Tribunal's jurisdiction; otherwise all that could have been possible there would have been so-called “victor's justice” (which the Americans have always insisted was not what they were perpetrating). If such a principle was good enough for the Germans at Nuremberg, the Germans in Rome seemed to be saying, it ought to be good enough for everybody else now.

This viewpoint, however, so rattled international lawyers affiliated with several of the delegations—not just the Americans—that by the middle of the fourth week, Kirsch's Bureau had already shaved it from its list of four possible remaining options regarding jurisdiction. The broadest of these, the so-called Korean plan, stipulated that in order for the prosecutor to claim jurisdiction over any given case, at least one of the following four states would have to be a state party to the treaty (or at any rate have accepted the jurisdiction of the Court in that particular case):

- a) the state where the crime took place
- b) the state of nationality of the accused,
- c) the state that had custody of the accused, or
- d) the state of nationality of the victim.

A narrower second option mandated that the state where the crime took place would have to be a state party. A yet narrower third option stipulated that both that state and the state having custody would have to be state parties. Finally, a fourth option would limit the court's jurisdiction exclusively to accused who were themselves nationals of state parties.

Guess which one the United States was favoring.

The Soundings Proceed Apace

KIRSCH WAS INVITING ALL the delegations to stand up and, as briefly as possible, indicate how they were tending with regard to each of the contentious issues highlighted in his paper, including that of jurisdiction. In effect, he was conducting a poll without having to have recourse to any actual vote ("the dreaded V-word," as he'd characterized that prospect for me during our conversation), the polarizing consequences of which could have blown the conference apart at any moment. (He was trying to nudge the process along through a sequence of grudging consensual concessions, culminating only at the very end with a single up-or-down vote.) So, one by one the delegates were rising to lay out their preferences.

It was vaguely unsettling, once again, this tug-of-war between the claims of humanity and those of sovereignty, especially if, squinting your eye, you momentarily chose to visualize the proceedings from the point of view of a victim, or victim's survivor, who might one day be seeking recourse before this Court. For it is, of course, of the essence of genocide itself that it denies the essential humanity of its victims: They are not humans like the rest of us; they are vermin, swine, sub-beings worthy solely of extermination.

Granted, here the question wasn't so much one of humanity as one of standing: myriad seemingly arbitrary hoops an eventual victim would someday have to jump through before being deemed worthy of recognition by this Court (whether his violator was or wasn't a national of a state party, whether the war in which the violations took place had or hadn't been international in scope, and so forth). But in the end it came down to the same thing: victims whose core humanity had already been trampled upon in the crime itself having a good chance of seeing it denied all over again across an abstruse legal process in which, clearly, some stood to be counted as more fully human than others.

Having said that, it was striking how many countries were still coming out in favor of the broadest possible remaining jurisdictional option, and how many of these included countries only recently, if ever so precariously, emerged from their own totalitarian or genocidal sieges. Many of the Latin American delegates, for example, were lawyers whose own attempts to settle accounts with their countries' earlier military rulers had been stymied by amnesties those militaries had been able to wrest, on leave-taking, from their still timorous civilian successors. The president of Korea, whose country was offering that broadest remaining jurisdictional scheme, had himself been a longtime prisoner of one such regime—as had the president of South Africa of another. The pattern recurred throughout the hall. The delegate from Sierra Leone, whose country at that very moment was being ravaged by renegade bands of recently dislodged coup-plotters, got up and delivered a riveting plea for the most robust possible court. Afterward, he commented to me how “for many of the delegates here, these pages are just so much text. For me, they are like a mirror of my life. This article here,” he said, flipping through the draft statute, “this is my uncle; this one here, my late wife; this one here, my niece. This is not just paper for me.”

On the other hand, there were others—India, Pakistan, most of the Middle Eastern delegations—who were decidedly more

suspicious of the Court. (“I had the chief of the Iranian delegation in here a few minutes ago,” the head of the drafting committee told me at one point, “and believe me, he’s just as spooked at the prospect of having one of his people dragged before an American judge as the Americans are the other way around.”)

Kirsch’s sounding continued apace—several delegations going for the Korean option, others going for the second or the third—until eventually David Scheffer got up to deliver the American response. On several issues (the degree of coverage of crimes committed in internal wars, for example), the U.S. was notably expansive. (Scheffer even indicated, for the first time, that under certain conditions the U.S. might even be willing to entertain something like the Singapore compromise.) But when it came to the question of jurisdiction, Scheffer was adamant: The U.S. was insisting on the fourth option (that the court be denied jurisdiction over the nationals of any country that had not signed the treaty). Not only, he said, would the U.S. refuse to sign any treaty that dealt with jurisdiction in any other manner, it “would have to actively oppose” any resultant court. Whatever that meant. On the other hand, Scheffer concluded, if this and all “the other approaches I have described emerge as an acceptable package for the statute, then the United States delegation could seriously consider favorably recommending to the U.S. government that it sign the ICC treaty at an appropriate moment in the future.”

Scheffer’s address sent a chill through the auditorium: Defy us and we’ll kill the baby; accede to our terms and, well, we’re not sure; we’ll see.

More startling yet, though, was the seeming ineffectiveness of the American stand: It didn’t seem to be changing anybody’s mind. A few minutes after Scheffer’s presentation, tiny Botswana got up and spoke of “the breathtaking arrogance” of the American position. And, ironically, it was precisely the sort of line represented by Jesse Helms back in Washington that so seemed to be undermining American authority there in Rome (as it had, last

year, during the land mines process in Ottawa). “The U.S. struts around like it owns this place,” one NGO observer pointed out. “It doesn’t own this place: It *owes* this place.” And indeed the fact that the United States was still well over a billion dollars in arrears in its debt to the UN was having a direct impact on the efficient operation of the conference itself: There was a distinct shortage of interpreters on site; documents were having to be sent back to Geneva for overnight translation; inadequate photocopying facilities were causing backups. America’s UN debt, furthermore, had had a direct impact on many of the countries it was now trying to influence. Samoa’s representative commented to me on how “the Fijians have peacekeepers scattered all over the world, too, and you don’t see them worrying about their boys’ exposure before this Court. What they do worry about is how, thanks to the U.S. debt, the UN has fallen behind in paying the salaries of those peacekeepers, leaving Fiji itself to have to pick up the tab, which, I assure you, it can afford far less than the U.S.” America’s implicit threat not to help finance the Court unless it got its way thus tended to get discounted by delegates dubious that it ever would even if it did.

By the same token, many delegates discounted the likelihood of the United States ever ratifying the treaty no matter what. “David Scheffer could draft the entire document, every single word of it,” David Matas, a lawyer with the Canadian delegation, commented toward week’s end, “and the Senate would never ratify it. It took America forty years to ratify the Genocide Convention. The United States still hasn’t even ratified the Convention on the Rights of the Child. There are only two countries in the entire world that have failed to do so—the United States and Somalia—and Somalia, at least, has an excuse: They don’t have a government. So, one has to wonder, why even bother trying to meet such demands?”

Beyond that, the logic of the U.S. position seemed all twisted in knots: Still obsessed over this question of the status

of its own soldiers in the field, the U.S. was saying that it would endorse only a treaty that included an explicit provision guaranteeing that the resultant court would hold no purchase on the nationals of countries that hadn't signed on to the treaty. So, in other words, clearly, the United States appeared to be signaling the fact that it had no intention of signing on to the treaty—or, at any rate, of ever ratifying it. (Surely, Helms would be able to shoot down any treaty whose only conceivable, if ever so remote, threat to American soldiers would come if the Senate ratified the plan.) And meanwhile, in the words of Kak-Soo Shih, the exasperated head of the Korean delegation, “In order to protect against this less than 1 percent chance of an American peacekeeper's becoming exposed, the U.S. would cut off Court access to well over 90 percent of the cases it would otherwise need to be pursuing. Because what tyrant in his right mind would sign such a treaty? What applies to America also applies to Hussein, and simply by not signing he could buy himself a pass.”

“No, no, *no!*” Scheffer insisted, when I brought this argument back to him. “Hussein would still be vulnerable to a Security Council referral under Chapter VII, by virtue of Iraq's being a signatory to the UN Charter.”

Except, as my Like-Minded drinking companion subsequently pointed out, bringing the argument full circle, that was the very channel that, thanks to the blocking vetoes and with the sole exceptions of Yugoslavia and Rwanda, had failed to work every other time in the past. “Including, to take just one example, the very case of the Iraqi Anfal campaign, which, to this day, and even in the wake of Kuwait, the Security Council has been unwilling or unable to refer to an ad hoc Tribunal.”

Scheffer was unswayed. Furthermore, he pointed out, the U.S. position was grounded both in common sense and in all prior international law, as codified in the Vienna Convention on the Law of Treaties, which stipulates that no state can be held to the provisions of a treaty it has not itself ratified. It would be patently

unacceptable for Americans to be held to account before a court and under laws they had themselves not democratically endorsed by way of the actions of their legislative representatives.

But that, too, was nonsense, another Canadian lawyer delegate pointed out to me. “Americans are subjected to courts and laws they didn’t vote for all the time. You think an American can come to Canada—or a Canadian go to the U.S., for that matter—break some local ordinance, and then claim, ‘Well, I didn’t have any say in passing that ordinance, or voting for this judge, so it doesn’t apply to me.’” (For that matter, as Michael Posner, the head of the New York-based Lawyers Committee for Human Rights, reminded me, since 1994 the United States has had implementing legislation related to the Torture Convention on its books that allows an American court to go after a visitor from another country for acts of torture he committed *in that other country*, with penalties ranging from twenty years all the way through death.) “As for American military men on official business,” the Canadian lawyer continued, “again, it’s a moot point, at least as regards this Court, thanks to the complementarity provisions.”

The Option of Opting Out

FOR HIS PART, THOUGH still unswayed regarding the basic argument, Scheffer, too, hoped the matter might prove moot, at least with reference to the United States, because, as he pointed out, the U.S. delegation was still trying to craft a treaty that the country would one day be able to sign on to, which is where a second jurisdictional issue came into play: the so-called opt-out clause. The United States, along with several other important countries (notably including France, which was just as concerned about the status of its Foreign Legionnaires in the field), was supporting language that would make court jurisdiction automatic for any state ratifying the treaty as regards the crime of genocide. However, at the

time of ratifying, states would have the right to opt out of coverage on war crimes and crimes against humanity, as applied to themselves or their own nationals. (War crimes generally get defined as occurring between warring parties, and in particular refer to the behavior of the established military units; crimes against humanity, by contrast, as first codified in positive law at Nuremberg, refer to specific acts of violence against individual members of a persecuted group, irrespective of whether the individual was a national or nonnational of the warring parties and irrespective, for that matter, of whether these acts were committed in times of war or times of peace. Genocide, in turn, requires that the violence perpetrated be part of a campaign to destroy such persecuted groups “in whole or in part.”) Obviously, the United States had no plans for committing genocide anytime soon, and such a clause would provide yet another way of shielding American forces from the Court’s scrutiny.

But the arguments here were virtually identical to those regarding the status of nonstate parties. What would prevent Saddam Hussein from opting out as well? For that matter, why would anybody opt in? And what kind of crazy Swiss-cheese jurisdictional regime would such a scheme lead to? William Pace, the head coordinator for the NGOs, parsed the matter in terms of numbers: “Having trouble holding the line with a forum in which five countries, including the U.S., could veto Court initiatives, the U.S. now wants in effect to extend veto power to 185 nations, such that in the end the only forum that would really retain the ability to launch Court action would once again be the one with five vetoes.”

III. THE ENDGAME

The United States Digs In

“LOOK,” AN INCREASINGLY GRIM and embattled Scheffer was almost shouting at me by the end of the fourth week, “*The U.S. is*

not Andorra!” He immediately caught himself up short. “*That’s off the record!*” What, I asked—official State Department policy has it that the U.S. is Andorra? Laughing, he continued, “No” (by which I inferred that the comment was no longer off the record), “but the point is that the world—I mean, people in there, some of the people in there—have yet to grasp that the challenges of the post-Cold War world are so complex that, in some instances, the requirements of those few countries that are still in a position to actually do something by way of accomplishing various humane objectives simply have got to be accommodated. And you can’t approach this on the model of the equality of all states. You have to think in terms of the *inequality* of some states. There have been times, there will come others, when the U.S. as the sole remaining super power, the indispensable power, has been and will be in a position to confront butchery head-on, or anyway to anchor a multilateral intervention along such lines. But in order for that to be able to happen, American interests are going to have to be protected and American soldiers shielded. Otherwise it’s going to get that much more difficult, if not impossible, to argue for such humanitarian deployments in the future. Is that really what people here want?”

A few minutes later, Charles Brown, the official spokesman of the U.S. delegation, who’d been listening in on my conversation with Scheffer, pulled me aside. “We’re coming to the endgame now,” he suggested, “and basically, we’re facing three possible outcomes: A Court the U.S. is going to be able to be part of. A Court the U.S. can’t yet be part of but could still support—cooperating behind the scenes, assisting in detentions, sharing intelligence, and providing other sorts of background support—and which it might one day still be able to be part of. Or a Court the U.S. will find it impossible to work with and may yet have to actively oppose.

“And, frankly, I don’t see how this Court is going to be able to flourish without at least the tacit support of the United States.” He pointed to my notepad. “Remember that flowchart you were

showing me the other day? The baby in the nurturing crib or the baby in the lead box. It seems to me there's a third possibility. A baby alone, unprotected, in the middle of a vast, open field."

"IT'S AS IF WE'RE being forced to choose," Kak-Soo Shih, the Korean delegate, sighed disconsolately late Friday of the fourth week. "A court crippled by American requirements with regard to state consent, or a court crippled by lack of American participation."

"The Court could definitely live without U.S. participation," insisted an NGO representative at their news conference that same afternoon. "If all the Like-Minded sign on, that's virtually all of Europe, with the exception of France. That's Britain, Canada, Australia, much of Africa and Latin America, all sorts of other countries—there's funding there, support resources, a definite start. And the U.S. in fact would still be pivotally involved through its Security Council referral role. The U.S. claims it wants a weak treaty that could be strengthened later on. But that's being disingenuous: For one thing, the U.S. itself, anxious at the prospect of the process spinning out of control later on, has placed incredibly high thresholds on amending the treaty—in some instances, seven-eighths of state parties would have to ratify any changes. Not just vote for them at the Assembly of State Parties but get their legislatures to ratify them back home. Almost impossible.

"But in any case," he continued, "the main point is a weak treaty won't work. And even more to the point—you've seen the soundings—a majority of those gathered here are calling for a strong treaty. It's a scandal that two of the major democracies—France and America—are the main ones standing against such an outcome."

Hans-Peter Kaul, the head of the German delegation and one of the most passionate proponents of a strong court, was meanwhile addressing a news conference of his own: "We desperately, desperately, *desperately* want the U.S. on board. We are not sure the

Court will even be workable without the U.S. We are willing to walk the extra mile, beyond the extra mile, to meet U.S. concerns. So the problem is not on our side, but on the side of the U.S. Will they be willing to move the slightest bit in order to meet us?”

“The trick,” Chairman Kirsch explained to me, “is to emerge with a strong statute with incentives enough that down the line currently reluctant governments may yet want to join on. Because later on it will be far easier to get governments to change their minds than it will be to change the statute itself. And, anyway, no government is going to want to join onto a useless statute.”

Honing the Final Treaty

BY MONDAY OF THE fifth and final week, Kirsch’s Bureau was facing challenges on all sides. The United States was still fuming over state consent. India, dubious over the entire treaty, was itching to provoke a conference-busting vote on the question of the inclusion of nuclear weapons and lobbying the other members of the Non-Aligned Movement hard in preparation. Mexico was still restive over the Security Council’s referral powers. Thailand and others were still trying to dilute coverage of internal wars. Faced with all of these challenges, Kirsch was painstakingly guiding the delegates through a second sounding—narrowing the options—and then a third, steadily aiming toward a Thursday night final vote. Informal meetings were burgeoning off to the side, and the truly hot ticket: the informal informals. Nobody anymore seemed to be pausing for sleep.

The United States, meanwhile, was stepping up the pressure. Albright and Defense Secretary William Cohen were known to be phoning their counterparts all over the world, and President Clinton himself was said to be placing some key calls. (A high American delegate assured me, that last week, that Washington was now focused on these negotiations, “at the very highest level,” and over “the most specific details.”) Some of that pressure was proving

remarkably ham-fisted. When Defense Secretary Cohen warned his German counterpart that the treaty as it was currently evolving might force the Pentagon to reconsider the advisability of even stationing troops anywhere in Europe, the Germans, far from crumpling in horror, became righteously indignant and leaked word of the demarche back into the auditorium in Rome, provoking a brief firestorm of outrage and embarrassed denials. The Latin Americans, for their part, were still smarting over a March incident in which the Pentagon had convened a meeting of military attachés from throughout the hemisphere, urging them to pressure their home governments to bend to American treaty demands. Several delegates described for me their enduring annoyance over the ploy, how it had only been with the greatest difficulty, over the past decade, that their civilian governments had been succeeding, ever so precariously, in easing their officers back into thier barracks, and they certainly didn't need any Americans coming around, urging the officers back where they didn't belong.

On Monday night, the Russians hosted an exclusive private dinner limited to top delegates from the Permanent Five, at which tremendous pressure was brought to bear on Like-Minded renegade Britain. When the NGOs got wind of that meeting the following morning and began worrying over a possible wavering in the British line, they instantaneously swung into a typically impressive lobbying blitz, contacting all their affiliates back in England, who in turn started pulling all the right media and parliamentary levers. New Labour's "ethical foreign policy" had already been taking its share of hits earlier in the month (notably over a scandal involving the sale of arms to the warring parties in Sierra Leone), and faced with such a massive upwelling of vigilance, the Brits in Rome appeared to stiffen their position once again.

The Bureau had been aiming to release its final document—the result of hours of front-room soundings and backroom recalibrations—by midday Thursday, but midday came and nothing emerged. Sierra Leone was brokering a final compromise on the

coverage of internal wars. The French were cutting a last-minute deal with Kirsch on their main concern: a seven-year opt-out clause, inside the treaty itself, limited to war crimes alone. (Since their interventions seldom included carpet aerial bombing campaigns, it was explained to me, they weren't that worried about the Crimes against Humanity provisions.)

Scheffer and Kirsch held several urgent parleys those last few days; both seemed equally desperate to find some way of bringing America under the Treaty tent. "And it was amazing," one of Kirsch's top deputies on the Bureau subsequently recounted for me. "Nothing could assuage them. We figured they'd be trying to negotiate, to wrest concessions from us in exchange for concessions on their part. Frankly, as of that Monday morning, we figured the independent prosecutor was toast, that we'd have to give him away in the final crunch negotiation. But they never even brought him up. They seemed completely fixated on that Helms/Pentagon imperative—that there be explicit language in the Treaty guaranteeing that no Americans could ever fall under the Court's sway, even if the only way to accomplish that was going to be by the U.S. not joining the treaty. We talked about complementarity, we offered to *strengthen* complementarity—for instance, a provision requiring the prosecutor to attain a unanimous vote of a five-judge panel if he was going to challenge the efficacy of any given country's complementarity efforts. In the unlikely event of their ever getting thus challenged, all they would need was one vote out of five. Not enough. In fairness, they seemed on an incredibly short leash. Clearly, they had their instructions from back home—and very little room to maneuver."

Thursday midday dragged into Thursday evening and then past midnight. Still the Bureau's final draft failed to emerge: In fact it only finally came out Friday at two in the morning. Kirsch was giving delegates less than twenty-four hours to digest the seventy-odd page tiny-typed document and consult with their capitals. They'd all reconvene for a final Committee of the Whole session that evening at seven.

The Climactic Session: the Final Vote

"FOUR WORDS. FOUR LITTLE words," Charles Brown, the spokesman for the U.S. delegation, was almost wailing the next morning. "It's incredible. They're within four words of a draft that, even if we couldn't necessarily join, we would still be able to live with. And they're not going to budge. They're going to stuff them down our throat."

On the question of state consent, the Bureau had ended up splitting the difference, stipulating that the Court could exercise its jurisdiction if "one or more of" the following states were parties to the Statute or had accepted the Court's jurisdiction in a given particular case: 1) the state on the territory of which the crime was alleged to have occurred; 2) the state of which the accused was a national.

The NGOs were none too happy with that compromise, either. "They took the Korean plan, split it in half, and left us with North Korea," the indefatigable and endlessly quotable Richard Dicker, of Human Rights Watch's Rome delegation, quipped almost immediately. "By leaving out the state of the victim, and even more crucially the state having custody of the accused, they've spawned a treaty for traveling dictators. Even if France, say, joins the Treaty, the next Mobutu or Baby Doc would still be able to summer blissfully undisturbed on the Riviera and to squirrel away his ill-gotten gains in the local banks."

Which, come to think of it, may have been one of the reasons the French were so avidly pushing for it. My source in the Bureau, on the other hand, told me that actually several countries besides France had been expressing profound misgivings about the custody clause. In Africa, for instance, former allies are crossing over into each other's countries all the time, and things could get quite messy.

But it was the Americans who, more than anyone else, were denouncing the provision, spooking themselves with sordid scenarios. "What if," Scheffer postulated, "the American army finds itself deployed on the territory of Iraq as part of a UN force. Now,

Hussein and his nationals are not subject to this treaty because he hasn't signed on, but what if suddenly he pulls a fast one, accuses some of our men of war crimes, and as head of the territory in question, extends the Court permission to go after them on a one-time basis? And one of the really weird anomalies in all this is that, thanks to the French provision, signatories are able to opt out of such exposure for seven years, but nonsignatories aren't afforded the same option."

"Well," said HRW's Dicker, when I relayed that observation over to him, "maybe then the U.S. had better sign on. For that matter," he continued, "if I were an American GI, I'd much prefer being held in a cell in The Hague to one in Baghdad."

The U.S. was going to have one last opportunity to upend the provision at that evening's final meeting of the Committee of the Whole, and all through the day urgent communiqués were coursing from Washington to capitals throughout the world.

Kirsch brought the meeting to order at seven fifteen in the evening, on Friday, July 17, 1998, and presented the draft text as a whole, hoping to fend off amendments of any sort. It was generally conceded that if even one provision was called into question, the whole intricately cantilevered structure could start coming apart.

India rose to propose an amendment, reintroducing the use or even the threat to use nuclear weapons as a war crime. Norway immediately moved to table the motion. (The Like-Minded had agreed among themselves that Norway would serve this function with every attempted amendment.) Then, in one of the most significant moments at the Conference, Malawi rose to second Norway's motion. In a brief speech of strikingly understated eloquence, Malawi noted how the treaty was a package, everyone had given up something and gained something else, that many of the delegates had sympathy for India's position, but that pursuing the matter any further would no longer advance the process and could threaten to blow everything up. As Malawi sat back down, everyone realized that the Non-Aligneds had fractured, and that India was not going

to be able to rely on their votes to subvert the Conference. Chile rose to give another second to Norway's motion; a vote was taken on the question of whether or not to take a vote; and India lost overwhelmingly (114 against, 16 for, and 20 abstentions).

Scheffer now rose up. He looked ashen. "I deeply regret, Mr. Chairman," he began, "that we face the end of this Conference and the past four years of work with such profound misgivings and objections as we have today." Going on to note how tragically the statute was creating "a court that we and others warned of in the opening days—strong on paper but weak in reality," he proceeded to lay out the U.S. position one more time before proposing a simple amendment: that the words "one or more of" be stricken from the nonstate party provision, such that *both* the territory and the nationality would be required.

After Scheffer was seated, Norway immediately rose up to table the motion. Sweden seconded Norway's motion, and Denmark followed suit. A vote was held, and the United States lost in a similarly lopsided vote (113 against, 17 for, and 25 abstentions).

Kirsch looked over at Mexico and Thailand—both had earlier indicated their intention to file amendments, but both now shook their heads: No, they'd pass. There were no other amendments. A mood of heady celebration was rising in the hall. In that case, Kirsch announced, gaveling the meeting to a close, they would all reconvene in half an hour upstairs, in the flag-decked ceremonial chamber, for the final plenary session, for speeches and a final vote.

Filing upstairs, several of the longtime NGO activists were discussing Scheffer in remarkably sympathetic terms. Over the years many had had occasion to work with him, and few doubted the fervency of his commitment and concern. "His instincts were better than his instructions," Dicker surmised. "Would make a good epitaph," someone else observed.

The delegates streamed into the plenary chamber and took their seats amid the flags. There were broad smiles, fierce hugs, a growing swell of elation. Kirsch handed the gavel to the frail

guest by his side—Adriaan Bos, the ailing Dutch legal advisor who'd piloted the four-year Prep Con process right up till a few weeks before the opening of the Rome Conference. Bos, beaming, banged the session to order, said a few words, and retired to the side. Kirsch called for a vote. It ended up 120 to 7 with 21 abstentions. Cuba voted for the Statute, as did Russia, Britain, and France. The United States was apparently joined by China, Libya, Iraq, Yemen, Qatar, and Israel in voting against it (at American request the particulars of the vote itself went officially "nonrecorded"). The hall erupted in applause, which grew louder and louder, spilling over into rhythmic stomping and hooting that lasted a good ten minutes, the room becoming positively weightless with the mingled senses of exhaustion and achievement.

"This treaty's flawed," Dicker was saying. "It's badly flawed." He cited another nasty little concession, effected at the last minute—how the chemical and biological warfare provisions had been deleted so as to undercut India's argument about these being poor men's nuclear weapons, unfairly singled out. He was quiet for a moment, gazing out over the scene. "But it's not fatally flawed."

Theodor Meron, one of the world's most distinguished academic experts on international humanitarian law, who'd been serving as a citizen-advisor on the U.S. delegation but now seemed almost visibly to be doffing that official role so as to revert to his private academic persona, walked over and seemed eerily content. "Oh," he said, "these last few hours have been unpleasant, of course. But flipping through the pages of the final document, there's much here that's very good, very strong. The articulation of war crimes: completely solid. And the section on crimes against humanity, which heretofore have existed primarily in the form of precedent and custom: Here they're codified, in a remarkably robust form, and in particular without any nexus to war. This was a big fight, unclear in the customary law, but here it's clearly articulated that crimes against humanity can even take place in the absence of outright warfare: a major development.

As is the section on noninternational war, the most frequent and bloody kind today. The section on gender crimes—rape, enforced pregnancy, and the like—all rising out of recent developments at the Yugoslav and Rwanda tribunals, but codified here for the first time. There's excellent due process language, *mens rea*, all of this reflecting a strong American influence. The requirement for a clear articulation of elements—what exactly, in clean legal language, constitutes the elements of a crime. Command responsibility, superior orders: American fingerprints are all over this document, and with just a few exceptions, America's concerns were largely accommodated.”

“We'll see,” my contact in the Bureau was now saying. “It will take three or four years for the Treaty to garner the required number of ratifications and then come into force. Maybe things will change in the U.S.—they'll be able to give it a second look. Or else, once the Court is up and running, sure enough, a few of those nuisance complaints will get lodged against American soldiers and the U.S. will invoke complementarity and, *boom*, they'll be popped right out of there—and the U.S. will cease feeling so threatened. Or there will come some great crisis, and suddenly the U.S. will want to make use of the Court. Time will tell. In the meantime, the Court will be able to start growing.”

Jerry Fowler, one of the NGO lobbyists affiliated with the Lawyers Committee for Human Rights, was taking an even longer view: “We didn't get Korea, but what we got is still important: the territorial requirement. Because one of these days there's going to come a Baghdad Spring, and one of the first things the reformers there will want to do is to sign on to this treaty—as an affirmation of the new order, but also as a protection against backsliding. One by one, countries will go through their Springs, they'll sign on, and the Court's jurisdiction will grow. A hundred years from now—who knows?”

A bit later, Fowler's boss, Michael Posner, was gazing back the other way. “Do you realize how long the world has been straining toward this moment—since after World War I, after World War II.

It's extraordinary. Who'd have thought it, even ten years ago, that you could get 120 countries to vote for holding their militaries personally liable before a prosecutor with even a limited degree of independent initiative? I mean, it's unprecedented, it's absolutely unprecedented. One day it may even be seen to have been the birth of a new epoch."

IV. CODA

The Father of All Exceptions

"TODAY, FOR THE FIRST time in history," Forrest Sawyer, sitting in for Peter Jennings, led off that evening's *ABC World News Tonight*, just a few hours later New York time, "a Secret Service agent testified before a grand jury as part of a criminal investigation on a sitting U.S. president." That and adjacent stories regarding Kenneth Starr's ongoing pursuit of the Monica Lewinsky scandal took up the next seven minutes of air time. The developments in Rome never even got mentioned. Nor were they broached on NBC or CBS. Nor did they receive a single column inch in the following Monday's *Time* or *Newsweek*. Monica and Kenneth Starr were everywhere.

It occurred to me how surely the siege by this independent prosecutor must have been coloring president Clinton's own responses to the developments in Rome, leaving him especially wary at the very moment the toughest decisions were having to be made.

On the other hand, surely, there was more to it than that. At various times, there in the halls of Rome, various people would invoke the League of Nations. "If the U.S. walks out on this court," the Syrian delegate assured me, his eyes twinkling with grim satisfaction (he was all for it, he could hardly wait), "it will be like the League of Nations."

Perhaps, I remember thinking, but in that case ought President Clinton be cast in the role of Woodrow Wilson or that of Henry Cabot Lodge?

Of course, the answer, in retrospect, is both. With regard to the Court, Clinton wanted to play both Wilson and Lodge. And not half and half: not a wily Wilson disguising himself as a grimly realistic Lodge, or vice versa. Rather, Whitmanesque, Clinton wanted to contain multitudes. He saw no contradiction in being both Wilson and Lodge, each 100 percent and both simultaneously.

Which is to say that he was approaching the International Criminal Court in much the same way he'd approached just about everything else—gays in the military, national health insurance, campaign finance reform, land mines, Bosnia, global warming—in his presidency.

LESS THAN A WEEK later, on Thursday, July 23, back in Washington, D.C., David Scheffer was called to appear before Jesse Helms's Senate Committee on Foreign Relations. He might have been excused a certain feeling of conceptual whiplash.

For if he was being treated, by the end there in Rome, as a sort of pariah or leper, now back in Washington he was being unanimously praised as a kind of returning hero. Positions that had provoked nary a chord of resonance in the conference hall in Rome were almost drowned in a rising chorus of defiant triumphalism on Capitol Hill.

Senators Helms, Rod Grams, Joseph Biden, and Dianne Feinstein each addressed Scheffer in turn, congratulating him on the fortitude of his resolve and pledging their undying contempt for that monstrosity spawned in Rome. Not one of them mentioned Bosnia or Rwanda or Pol Pot or Idi Amin or the Holocaust or Nuremberg. (Senator Feinstein did wonder about the possible implications for Israel.) They all seemed utterly and almost uniquely transfixed by the Treaty's exposure implications for American troops, vowing to protect them and fight it. Scheffer indicated the administration was reviewing its options. For starters, it would be reexamining the more than one hundred

bilateral status-of-forces agreements governing the legal status of American servicemen just about anywhere they might be posted around the globe, with an eye toward tightening them in such a way as to preclude the possibility of any extradition to the ICC.

At that Senate hearing, it became possible to identify what may have been the true underlying anxiety of the American delegation all along, never broached by any of them back in Rome but veritably pullulating just beneath the surface even there. Helms wasn't afraid to name it outright. The status of individual peacekeepers in some Mogadishu alleyway had never been the real concern. Rather, as Helms picked off the examples defiantly, he was going to be damned if any so-called international court was ever going to be reviewing the legality of the U.S. invasions of Panama or Grenada, or the bombing of Tripoli, and holding any American presidents, secretaries of state, defense secretaries, or generals to account.

"I've been accused by advocates of this Court of engaging in 'eighteenth-century thinking,'" Chairman Helms concluded his statement. "Well, I find that to be a compliment. It was the eighteenth century that gave us our Constitution and the fundamental protections of our Bill of Rights. I'll gladly stand with James Madison and the rest of our Founding Fathers over that collection of ne'er-do-wells in Rome any day."

At some level, of course, Helms was way off the mark in his choice and characterization of antecedents. James Madison, for one thing, was a Federalist—with Hamilton, the principal author of *The Federalist Papers*—and as such ranged himself passionately against the nativist states-rightsers of his day and in favor of a wider conception of governance.

But at the same time, it seemed to me that Helms was onto something. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights": Thomas Jefferson strikingly pitched his Declaration of Independence in an assertion of *universal*

human values, an assertion that, cascading down through the ages, from the Declaration of the Rights of Man (1789) through the Universal Declaration of Human Rights (1948), constitutes one of the principal wellsprings of the law feeding into the International Criminal Court.

But at the same time, Jefferson cast those assertions in what was, after all, a declaration of *independence*, of separateness, of American exceptionalism—stirring, defiant themes that had been very much in evidence there in Rome as well.

POSTSCRIPT:

WITH THREE WEEKS LEFT to go in his administration, Bill Clinton signed the Rome Statute on December 31, 2000, the last day countries could become parties to the treaty without ratifying it, though, indeed, he made no move, then or at any other time, to try to get the Senate to ratify the document. And two years later, on May 6, 2002, his successor George Bush formally unsigned the treaty, renouncing any American obligations as a signatory. (During the same period, Israel engaged in a similar dance with an identical outcome.)

Notwithstanding such contortions, the International Criminal Court came into being on July 1, 2002, the date its founding treaty, the Rome Statute, entered into force, a sufficient number of states having signed on and ratified the document.

As of March 2011, 114 states had signed and ratified the treaty (including virtually all European, Latin American, and African countries); a further 34 (including Russia) had signed but not yet ratified it. Notwithstanding these impressive numbers, a majority of the world's population remains unrepresented at the Court (not all that surprisingly, when one realizes that China, India, and the United States all remain outside its purview).

The official seat of the Court is in The Hague, though its proceedings may take place anywhere. Under the leadership of its founding prosecutor, Argentinian lawyer Luis Moreno-Ocampo,

the Court has pursued investigations into five situations, all of them in Africa: northern Uganda, the Democratic Republic of the Congo, the Central African Republic, Kenya, and Sudan (Darfur). The most high-profile of Moreno-Ocampo's indictments, that of Omar al-Bashir, the president of Sudan, for his alleged involvement in the depredations in Darfur, has also proved the most controversial. African states in particular felt especially put upon and mounted a move to try to get the Security Council to block the prosecutor's efforts in this regard, at least for a year, as per provisions of the treaty, but in the summer of 2008, the Bush administration (having come full, or at least half, circle) let it be known that the United States would veto any such effort.

The Court itself—not to mention America's exceptional attitude toward it—remained very much a work in progress.

Baby steps: baby steps.