The United States and the International Criminal Court

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This challenge can be met in particular through the development of rules of procedure and evidence, an enumeration of Elements of Crimes, and other necessary instruments,[38] which will be within the mandate of the commission.

The role of the Preparatory Commission, however, is not to reopen the statute or modify its provisions, directly or indirectly. The statute contains numerous judicial safeguards, and provisions aimed, essentially, at protecting state interests. The powers of the court are not as strong as many had hoped, but it can still fulfill its role if the integrity of the statute is maintained, and not undermined overtly or covertly. Irrespective of the legitimacy of the objectives sought by states in making proposals aimed at introducing further protections, the issue is now to ensure that future proposals will not result inadvertently in sheltering the very perpetrators of the crimes described in the statute. The establishment of an international criminal court is a historic achievement, the culmination of many decades of hope and hard work. It is our collective responsibility to keep in mind the raison d'être of the court, which is the protection of victims, and to ensure its success.

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THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

The United States has had and will continue to have a compelling interest in the establishment of a permanent international criminal court (ICC). Such an international court, so long contemplated and so relevant in a world burdened with mass murderers, can both deter and punish those who might escape justice in national courts. Since 1995, the question for the Clinton administration has never been whether there should be an international criminal court, but rather what kind of court it should be in order to operate efficiently, effectively and appropriately within a global system that also requires our constant vigilance to protect international peace and security. At the same time, the United States has special responsibilities and special exposure to political controversy over our actions. This factor cannot be taken lightly when issues of international peace and security are at stake. We are called upon to act, sometimes at great risk, far more than any other nation. This is a reality in the international system.

In early 1993, shortly after the start of the Clinton administration, a process of review was begun with respect to the proposal for a permanent international criminal court, which had been under consideration by the International Law Commission since 1992. As we followed the deliberations of the ILC, we hoped that the draft statute for an ICC would reflect enough of our views so that the United States could actively begin to work toward establishment of the court.

Administration lawyers subjected the ILC drafts to extensive internal review and analysis. U.S. objectives included a significant role for the United Nations Security

[38] Resolution F in the annex to the conference's Final Act, UN Doc. A/CONF.183/10 (1998), provides a nonexhaustive list of instruments to be developed by the Preparatory Commission to facilitate the establishment and operation of the court.

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Council in the referral of cases to the court, specific and properly defined war crimes in the statute of the court, exclusion of drug trafficking and the hard-to-define crime of aggression from the statute, and further study of our deep concerns about including crimes of international terrorism in the statute.[1]

The ILC's final draft statute for the ICC addressed many of the U.S. objectives and constituted, in our opinion, a good starting point for far more detailed and comprehensive discussions.[2] Though not identical to U.S. positions, the ILC draft recognized that the Security Council should determine whether cases that pertain to its functions under Chapter VII of the UN Charter should be considered by the ICC, that the Security Council must act before any alleged crime of aggression could be prosecuted against an individual, and that the prosecutor should act only in cases referred either by a state party to the treaty or by the Council. The ILC draft also enabled a state party to "opt out" of one or more categories of crimes when ratifying the treaty, an act that would limit the court's jurisdiction over that country's nationals for these particular offenses.

U.S. leadership in establishing the International Criminal Tribunals for the former Yugoslavia and for Rwanda strengthened our belief that the Security Council should have available to it a standing tribunal that could be activated immediately to hold perpetrators of genocide, crimes against humanity, or serious war crimes accountable for their actions. A permanent court would be more cost-effective and ensure uniformity in the evolution of case law. It would also serve as a more effective deterrent than the uncertain prospect of costly new ad hoc tribunals. President Clinton's public support for a permanent international court was demonstrated on six occasions prior to the diplomatic conference in Rome.[3]

In mid-1997 administration officials decided that long-standing U.S. positions should continue to be advanced by our negotiators. We were fairly hopeful at that stage that inclusion of the crimes of international drug trafficking and international terrorism would not be sustained, and that reason would prevail either to exclude a crime of aggression altogether or to define and qualify its inclusion properly. Conversely, we were not so confident about how cases would be referred to the court. We determined that the critical role of the Security Council as a preliminary reviewer must be sustained when cases pertaining to the work of the Council (whether or not under Chapter VII authority) were at issue. U.S. officials also saw the complementarity regime (deferral to willing and capable national investigations and prosecutions) as a part of the statute where necessary protection for U.S. interests could be pursued. In early 1998, U.S. negotiators pressed hard for a strengthened complementarity regime.

The U.S. delegation succeeded in its effort to broaden the complementarity regime to include a deferral to national jurisdictions at the outset of a referral of an overall situation to the ICC rather than only at a preliminary stage of the work on any particular

[1] *See* Conrad K. Harper, Remarks on Agenda Item 137, Report of the International Law Commission on the Work of its 46th Session: International Criminal Court, before the 49th Session of the United Nations General Assembly, in the Sixth Committee, USUN Press Release No. 149 (Oct. 25, 1994).

[2] Report of the International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. No. 10, at 44, UN Doc. A/49/10 (1994).

[3] William Jefferson Clinton, Remarks at the Opening of the Commemoration of "50 Years After Nuremberg: Human Rights and the Rule of Law," University of Connecticut, 1995 PUB. PAPERS 1597, 1598; Statements of President William Jefferson Clinton, at the Army Conference Room in the Pentagon, 33 WEEKLY COMP. PRES. DOC. 119 (Jan. 29, 1997); before the 52nd Session of the United Nations General Assembly, *id.* at 1389 (Sept. 22, 1997); in Honor of Human Rights Day, the Museum of Jewish Heritage, New York, *id.* at 2003 (Dec. 9, 1997); at a White House Press Briefing on Bosnia, *id.* at 2074 (Dec. 18, 1997); and William Jefferson Clinton, Remarks by the President to Genocide Survivors, Assistance Workers, and U.S. and Rwanda Government Officials, Kigali Airport, Kigali, Rwanda, 34 *id.* at 497 (Mar. 25, 1998).

case.[4] We also succeeded, with the help of many governments, in restructuring the procedures of the court into a more comprehensible and rational sequence of steps.[5] We were unsuccessful at stemming the support for the ICC prosecutor to initiate cases himself absent any referral of an overall situation by a state party or the Security Council. There was also growing opposition to any role for the Security Council in determining which situations should be referred to the court, even those situations regarding which the Council was exercising its Chapter VII responsibilities.

During the final session of the Preparatory Committee, the United States worked with other permanent members of the UN Security Council to craft acceptable language on the crime of aggression. The resulting text was reflected in the Preparatory Committee's draft as option 3.[6] One key to this text was the requirement, which was originally endorsed by the ILC, that the Security Council must first determine that a state has committed an act of aggression. Following such a determination, it would be essential that the individual exposed to investigation be one "who is in a position of control or capable of directing the political or military action of a State."[7] The United States made it clear in working on this text that a clear, precise definition along these lines was imperative. It was a significant step by the permanent members of the Security Council to present this compromise with those governments that so strongly favored the inclusion of a crime of aggression in the statute.

Much debate ensued over whether crimes against humanity would include crimes committed during an internal armed conflict and crimes occurring outside any armed conflict (such as an internal wave of massacres). The United States took the lead in advocating both of these propositions and issued a statement during the session arguing that "contemporary international law makes it clear that no war nexus for crimes against humanity is required."[8] We had submitted a lengthier treatment on this subject as early as March 1996.[9] Our strong support for a broad interpretation of crimes against humanity was instrumental in maintaining this principle in the draft text that would go to Rome.

The U.S. delegation actively participated in drafting the definitions of war crimes at the Preparatory Committee and later in Rome. Throughout the process, we were determined to include only those war crimes that qualified as such under customary international law. This objective required intensive negotiations with other delegations, some of which wanted to stretch the list of war crimes into actions that, while reprehensible, were not customary international law at the end of the twentieth century. So many issues of fundamental importance remained open in April 1998 that we could only approach Rome with "cautious optimism."

[4] *See* Proposal Submitted by the United States of America: Preliminary rulings regarding admissibility, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1998/WG.3/DP.2.

[5] *See* Reference Paper Submitted by the United States: Rules of Evidence of the International Criminal Court, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.248/1998/DP.15 (1998).

[6] Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1, at 12, 14 (1998).

[7] *Id.* at 14.

[8] Statement of the United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court (Mar. 23, 1998), *reprinted in Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on International Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 129 (1998) [hereinafter *Senate Hearing*].

[9] Crimes Against Humanity: Lack of a Requirement for a Nexus to Armed Conflict (Mar. 25, 1996) (on file with the U.S. Department of State).

U.S. Objectives for the Rome Treaty

The United States pursued three main objectives. First, the United States wanted to work toward a successful conference that resulted in a treaty. Second, our responsibilities for international peace and security—shared with many others—had to be factored into the functioning of the court. Third, the United States believed that the court would not be well served by a prosecutor with the power to initiate investigations and prosecutions of crimes falling within the jurisdiction of the court, in the absence of a referral of an overall situation by either a state party to the treaty or the Security Council.[10]

While most governments positioned themselves within some regional or functional grouping at the Rome Conference, the United States usually had to build support for its positions through time-consuming bilateral diplomacy. The U.S. delegation worked with other delegations to achieve important U.S. objectives in the final text of the treaty. One of our major objectives was a strong complementarity regime. Article 18 (preliminary rulings regarding admissibility) is drawn from an American proposal submitted during the final session of the Preparatory Committee.[11] We considered it only logical that, when an investigation of an overall situation is initiated, relevant and capable national governments be given an opportunity under the principle of complementarity to take the lead in investigating their own nationals or others within their jurisdiction. Otherwise, under the original provisions on complementarity (Articles 17 and 19), the need to wait until an individual case has been investigated would have meant that national efforts would always have to defer first to ICC investigations—a delayed procedure that would undermine the willingness and ability of national judicial systems to enforce international humanitarian law. Article 18, while somewhat weaker than we had hoped, preserves the fundamental principle of complementarity from the outset of an investigation by the court.

Throughout the Rome Conference our negotiators struggled to preserve appropriate sovereign decision making in connection with obligations to cooperate with the court. There was a temptation on the part of some delegates to require unqualified cooperation by states parties with all court orders, notwithstanding national judicial procedures that would be involved in any event. Such obligations of unqualified cooperation were unrealistic and would have raised serious constitutional issues not only in the United States but in many other jurisdictions. Governments would respect the court's orders provided the court respected reasonable national judicial procedures to comply with those orders. Part 9 of the statute represents hard-fought battles in this respect. The requirement that the actions of state parties be taken "in accordance with national procedural law" or similar language is pragmatic and legally essential for the successful operation of the court.

Article 72 (Protection of national security information) raised issues of particular concern to the United States. Our experience with the International Criminal Tribunal for the former Yugoslavia (ICTY) showed that some sensitive information collected by the U.S. Government could be made available as lead evidence to the prosecutor, provided that detailed procedures were strictly followed.[12] We applied years of experience with the ICTY to the challenge of similar cooperation with a permanent court. It was not easy. Some delegations argued that the court should have the final determination on

[10] *See The Concerns of the United States Regarding the Proposal for a* Proprio Motu *Prosecutor, in Senate Hearing, supra* note 8, at 147.

[11] *See* note 4 *supra*. For a further refinement of this proposal, see UN Doc. A/CONF.183/C.1/L.25 (1998).

[12] *See* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of former Yugoslavia since 1991, Rules of Procedure and Evidence, *as revised*, Art. 72, UN Doc. IT/32/Rev.13 (1998) (originally adopted Feb. 11, 1994).

the release of all national security information requested from a government. Our view prevailed: a national government must have the right of final refusal if the request pertains to its national security pursuant to Article 93(4). In the case of a government's refusal, the court may seek a remedy from the Assembly of States Parties or the Security Council pursuant to Article 87(7).

The United States helped lead the successful effort to ensure that the ICC's jurisdiction over crimes against humanity included acts in internal armed conflicts and acts in the absence of armed conflict. We also argued successfully that there had to be a reasonably high threshold for such crimes. This was achieved with the language in Article 7 that crimes against humanity means any one of a number of listed acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," and that such conduct must involve the multiple commission of such acts against any civilian population pursuant to or in furtherance of a state or organizational policy to commit such an attack. In the Preparatory Committee we had also introduced the definitions for most of the particular crimes against humanity, which, following much negotiation in Rome, were set forth in Article 7(2).

The United States had long sought a high threshold for the court's jurisdiction over war crimes, since individual soldiers often commit isolated war crimes that by themselves should not automatically trigger the massive machinery of the ICC. An appropriately structured ICC should prosecute significant criminal activity during wartime but should leave to national jurisdictions the job of disciplining the isolated war crimes committed by errant soldiers. While the United States sought a clearer definition setting a high threshold for war crimes, we believe the definition arrived at in Article 8(1) serves our purposes well: "The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes."

U.S. lawyers insisted that definitions of war crimes be drawn from customary international law and that they respect the requirements of military objectives during combat and of requisite intent.

A major achievement of Article 8 of the treaty is its application to war crimes committed during internal armed conflicts. The United States helped lead the effort to ensure that internal armed conflicts were covered by the statute. Although some delegations sought during the Preparatory Committee sessions and in Rome to stack Article 8(2)(e) with most, if not all, of the crimes applicable to international armed conflict as listed in Article 8(2)(b), most agreed that customary international law has developed to a more limited extent with respect to internal armed conflicts. Article 8(2)(e) now reflects that agreement. Also, in order to widen acceptance of application of the statute to war crimes committed during internal armed conflicts, the United States helped broker language that, inter alia, excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.[13]

One of the more difficult, but essential, issues to negotiate was the coverage of crimes against women, in particular either as a crime against humanity or as a war crime. The U.S. delegation, aided by the advice of experts in the NGO community, fought hard during the final sessions of the Preparatory Committee and again in Rome to include explicit reference to crimes relating to sexual assault in the text of the statute. In the end,

[13] Rome Statute of the International Criminal Court, July 17, 1998, Arts. 8(2)(d), 8(2)(f), 8(3), UN Doc. A/CONF.183/9* <www.un.org/icc>, *reprinted in* 37 ILM 999 (1998).

rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of significant magnitude were included as crimes against humanity (Article 7(1)(g)) and war crimes (Article 8(2)(b)(xxii) and (e)(vi)). In exchange, language acceptable to all delegations was also negotiated to properly define "forced pregnancy" (Article 7(2)(f)) and "gender" (Article 7(3)).

During the final session of the Preparatory Committee, the U.S. delegation stressed the importance of elements of crimes to provide greater specificity and guidance for the ICC prosecutor and for defense counsel. At first, we waged a lonely struggle to incorporate elements of crimes into the treaty. The United States submitted the first and only draft of elements of crimes.[14] We succeeded in Rome in requiring the preparation of the "Elements of Crimes" as set forth in Article 9 of the treaty. The U.S. draft should serve as a useful starting point for further work on the Elements of Crimes during the Preparatory Commission. We were also instrumental in establishing the necessity of arriving at acceptable definitions of command responsibility (Article 28) and the defense of superior orders (Article 33).

Due process protections occupied an enormous amount of the U.S. delegation's efforts. We had to satisfy ourselves that U.S. constitutional requirements would be met with respect to the rights of defendants before the court. Parts 5–8 of the treaty contain provisions advocated by the U.S. delegation to preserve the rights of the defendant and establish the limits of the prosecutor's authority.

Other U.S. contributions of major significance to the structure of the court included our position that the expenses of the court and of the Assembly of States Parties be provided through assessed contributions made by states parties to the ICC treaty. We objected to the widely supported proposition that the court and Assembly of States Parties should be funded through the regular UN budget. The fact that the UN budget is under enormous pressure for other reasons, and the belief that member states of the United Nations that are not party to the ICC treaty should not be responsible for its financing, were compelling reasons for a self-financing institution. Nonetheless, we agreed that the expenses incurred because of referrals to the court by the Security Council could be sought from the United Nations, subject to the General Assembly's approval. The question of interim funding from the UN budget—which the United States opposes—was left for resolution at a later stage.

Flaws in the Rome Treaty

These accomplishments in negotiating the Rome treaty were significant. But the U.S. delegation was not prepared at any time during the Rome Conference to accept a treaty text that represented a political compromise on fundamental issues of international criminal law and international peace and security. We could not negotiate as if certain risks could be easily dismissed or certain procedures of the permanent court would be infallible. We could not bargain away our security or our faith in basic principles of international law even if our closest allies reached their own level of satisfaction with the final treaty text. The United States made compromises throughout the Rome process, but we always emphasized that the issue of jurisdiction had to be resolved satisfactorily or else the entire treaty and the integrity of the court would be imperiled.

The theory of universal jurisdiction for genocide, crimes against humanity and war crimes seized the imagination of many delegates negotiating the ICC treaty. They

[14] Proposal Submitted by the United States of America: Elements of Offenses for the International Criminal Court, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1998/DP.11 (1998).

appeared to believe that the ICC should be empowered to do what some national governments have done unilaterally, namely, to enact laws that empower their courts to prosecute any individuals, including non-nationals, who commit one or more of these crimes. Some governments have enacted such laws, which theoretically, but rarely in practice, make their courts arenas for international prosecutions. Of course, the catch for any national government seeking to exercise universal jurisdiction is to exercise personal jurisdiction over the suspect. Without custody, or the prospect of it through an extradition proceeding, a national court's claim of universal jurisdiction necessarily and rightly is limited.

The ICC is designed as a treaty-based court with the unique power to prosecute and sentence individuals, but also to impose obligations of cooperation upon the contracting states. A fundamental principle of international treaty law is that only states that are party to a treaty should be bound by its terms.[15] Yet Article 12 of the ICC treaty reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over the nationals of a nonparty state. Under Article 12, the ICC may exercise such jurisdiction over anyone anywhere in the world, even in the absence of a referral by the Security Council, if either the state of the territory where the crime was committed or the state of nationality of the accused consents. Ironically, the treaty exposes nonparties in ways that parties are not exposed.

Why is the United States so concerned about the status of nonparty states under the ICC treaty? Why not, as many have suggested, simply sign and ratify the treaty and thus eliminate the problem of nonparty status for the United States? First, fundamental principles of treaty law still matter and we are loath to ignore them with respect to any state's obligations vis-à-vis a treaty regime. While certain conduct is prohibited under customary international law and might be the object of universal jurisdiction by a national court, the establishment of, and a state's participation in, an international criminal court are not derived from custom but, rather, from the requirements of treaty law.

Second, even if the Clinton administration were in a position to sign the treaty, U.S. ratification could take many years and stretch beyond the date of entry into force of the treaty. Thus, the United States would likely have nonparty status under the ICC treaty for a significant period of time. The crimes within the court's jurisdiction also go beyond those arguably covered by universal jurisdiction, and court decisions or future amendments could effectively create "new" and unacceptable crimes. Moreover, the ability to withdraw from the treaty, should the court develop in unacceptable ways, would be negated as an effective protection.

It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize. No other country, not even our closest military allies, has anywhere near as many troops and military assets deployed globally as does the United States. The theory that an individual U.S. soldier acting on foreign territory should be exposed to ICC jurisdiction if his alleged crime occurs on that territory, even if the United States is not party to the ICC treaty and even if that foreign state is also not a party to the treaty but consents ad hoc to ICC jurisdiction, may appeal to those who believe in the blind application of territorial jurisdiction. But the terms of Article 12 could render nonsensical the actual functioning of the ICC.

[15] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Arts. 34–38, 1155 UNTS 331.

The complementarity regime is often offered as the solution to this jurisdictional dilemma. However, complementarity is not a complete answer, to the extent that it involves compelling states (particularly those not yet party to the treaty) to investigate the legality of humanitarian interventions or peacekeeping operations that they already regard as valid official actions to enforce international law. Even if the United States has conducted an investigation, again as a nonparty to the treaty, the court could decide there was no genuine investigation by a 2-to-1 vote and then launch its own investigation of U.S. citizens, notwithstanding that the U.S. Government is not obligated to cooperate with the ICC because the United States has not ratified the treaty.

Equally troubling are the implications of Article 12 for the future willingness of the United States and other governments to take significant risks to intervene in foreign lands in order to save human lives or to restore international or regional peace and security. The illogical consequence imposed by Article 12, particularly for nonparties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions, which up to this point have been mostly shielded from politically motivated charges.

During the Rome Conference, the U.S. delegation proposed a structure for jurisdiction that would have greatly enhanced the prospects of U.S. support for and actual participation in the treaty. Our proposal stemmed from the very poor prospects of gaining sufficient support for a desire to work toward a solution with those who disagreed with our long-standing proposal on how referrals to the court should be initially handled. Consequently, we believed it essential that the original "opt-out" concept proposed by the International Law Commission in 1994 be resurrected for crimes against humanity and war crimes. We were prepared to accept the automatic jurisdiction of the ICC over genocide. But to broaden participation in the ICC and to permit governments to adjust over time to its potentially wide-ranging jurisdiction, a state party in our view should be entitled to limit its exposure to the court unless, of course, the Security Council referred a situation to the ICC under its Chapter VII powers. We were also prepared to deny any state party that so chose to "opt out" of either of the two categories of crimes the privilege of being able to refer matters to the court. This would prevent a rogue state from joining the court, opting out of crimes against humanity and/or war crimes, and then using the court to launch politically motivated charges against other governments. Twenty-two delegations openly expressed support for this approach, emphasizing that it was essential to ensure universal and early acceptance of the court.

The U.S. delegation found, however, that opposition to an open-ended right of opting out was so great that another way had to be found if there was to be a prospect of U.S. participation in the court. During the final week of the Rome Conference, the delegations of the Governments of the five permanent members of the Security Council (the United States, Russia, France, the United Kingdom, and China—also known as the P–5) met intensively to arrive at a compromise package that could be presented to the conference. We arrived at a joint proposal that would permit a ten-year transitional period following entry into force of the treaty during which any state party could opt out of the court's jurisdiction over crimes against humanity or war crimes. The opt-out privilege would expire at the end of the ten-year period but could be extended through certain arrangements if there were general agreement. All states parties would be subject to the automatic jurisdiction of the court over the crime of genocide. The proposal would also shield nonparty states from the court's jurisdiction unless the Security Council

were to decide otherwise. The P–5 compromise was rejected by the like-minded group of countries and failed to garner other necessary support.

The U.S. delegation also offered a fresh approach to the court's jurisdiction over any particular crime. We proposed that Article 12 be drafted either (1) to require the express approval of both the territorial state of the alleged crime *and* the state of nationality of the alleged perpetrator in the event either was not a party to the treaty,[16] or (2) to exempt from the court's jurisdiction conduct that arises from the official actions of a nonparty state acknowledged as such by the nonparty.[17] The former proposal recognized the large degree of support at the conference for the consent of the territorial state, but also remedied the dangerous drift of Article 12 toward universal jurisdiction over nonparty states. The latter proposal would require a nonparty state to acknowledge responsibility for an atrocity in order to be exempted, an unlikely occurrence for those who usually commit genocide or other heinous crimes. In contrast, the United States would not hesitate to acknowledge that humanitarian interventions, peacekeeping actions, or defensive actions to eliminate weapons of mass destruction are "official state actions."[18] Regrettably, our proposed amendments to Article 12 were rejected on the premise that the proposed package was so fragile that, if any part were reopened, the conference would all fall apart.

The process launched in the final forty-eight hours of the Rome Conference minimized the chances that these proposals and amendments to the text that the U.S. delegation had submitted in good faith could be seriously considered by delegations. The treaty text was subjected to a mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the like-minded group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 A.M. on the final day of the conference, July 17. Even portions of the statute that had been adopted by the Committee of the Whole were rewritten. This "take it or leave it" text for a permanent institution of law was not subjected to the rigorous review of the Drafting Committee or the Committee of the Whole and was rushed to adoption hours later on the evening of July 17 without debate.

Thus, on the final day of the conference, delegates were presented with issues and provisions in the treaty text that were highly objectionable to some of us. Some provisions had never once been openly considered. No one had time to undertake a rigorous line-by-line review of the final text.[19] Under the treaty's final terms, nonparty states would be subjected to the jurisdiction of the court not only under Article 12 in the commencement of investigations, but also under Article 121(5), the amendments clause. In its present form, which could not possibly have been contemplated by the delegates, the amendment process for the addition of new crimes to the jurisdiction of the court or revisions to the definitions of existing crimes in the treaty will entail an extraordinary and unacceptable consequence. After the states parties decide to add a new crime or change the definition of an existing crime, any state that is a party to the treaty can decide to immunize its nationals from prosecution for the new or amended crime. Nationals of nonparties, however, are subject to potential prosecution. For a criminal court, this is an indefensible overreach of jurisdiction.

[16] UN Doc. A/CONF.183/C.1/L.70 (1998).

[17] UN Doc. A/CONF.183/C.1/L.90 (1998).

[18] An interesting perspective can be found in Theodor Meron, *The Court We Want*, WASH. POST, Oct. 13, 1998, at A15.

[19] At a minimum, this led to an unusually high number of technical errors that were corrected by another objectionable procedure activated by the UN Legal Counsel. *See* Proposed Corrections to the Rome Statute of the International Criminal Court, UN Doc. C.N.502.1998.TREATIES–3 (Annex).

The final text of the treaty also includes the crime of aggression, a surprise to the United States and other governments that had struggled so hard to define it only to reach an impasse during the Rome Conference. The failure to reach a consensus definition should have required its removal from the final text. Instead, the crime appears in Article 5 as a prospective crime within the court's jurisdiction once it is defined. This political concession to the most persistent advocates of a crime of aggression without a definition and without the linkage to a prior Security Council determination that an act of aggression has occurred deeply concerns the United States. The future definition that may be sought for this crime, and ultimately determined, if at all, only by the states parties through an amendment to the treaty, could be without limit and call into question any use of military force or even economic sanctions. Having participated in years of discussion about aggression in the Ad Hoc and Preparatory Committees and the Rome Conference, I know how easily the exercise can be used to strangle legitimate uses of military force and to do so by targeting individuals. This issue alone could fatally compromise the ICC's future credibility.

A better course would have been to suspend the Rome Conference and reconvene it in September or October 1998 so that these final problems could be further negotiated. The United States would then have been better positioned to support a treaty text emerging from a more thoughtful, transparent and disciplined process of final drafting. Other delegations shared this view with regard to the need to consider some difficult issues carefully. Many complex international treaties and political negotiations have benefited from such extensions, sometimes for only a few days, other times for a number of months. Particularly where the object of the exercise was a permanent institution of such enormous significance for the future, more time was warranted. But our efforts in this regard were unsuccessful.

On July 17, I spent the entire day consulting with a large number of governments and explaining that the opportunity still existed to seek reasonable modifications to the bureau's final text. But the momentum of waning time swept over our final efforts. The failure of the Committee of the Whole to consider the U.S., or any, amendments of the text, left us with no choice but to call for a vote on the statute in the plenary session later that night. The United States voted against motions in both bodies to adopt the bureau's final text.

Having considered the matter with great care, the United States will not sign the treaty in its present form. While we firmly believe that the true intent of national governments cannot be that which now appears reflected in a few key provisions of the Rome treaty, the political will remains within the Clinton administration to support a treaty that is fairly and realistically constituted. On December 8, 1998, the United States joined a consensus in the UN General Assembly to adopt a resolution that authorizes the work of the Preparatory Commission in 1999.[20] The next step for the United States will be to discuss with other governments our fundamental concerns about the Rome treaty, many of which have been identified in this report. We believe that these and other problems concerning the Rome treaty are solvable.

[20] *See* David J. Scheffer, Statement on the International Criminal Court, Remarks Before the 53rd Session of the United Nations General Assembly, in the Sixth Committee, USUN Press Release No. 179 (Oct. 21, 1998), and Statement of the United States before the UN General Assembly (Dec. 8, 1998) (on file with the State Department).

The United States remains strongly committed to the achievement of international justice. We hope developments will unfold in the future so that the considerable support that the United States could bring to a properly constituted international criminal court can be realized.

DAVID J. SCHEFFER*

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) took place in Rome at the headquarters of the Food and Agriculture Organization from June 15 to July 17, 1998. The participants numbered 160 states, thirty-three intergovernmental organizations and a coalition of 236 nongovernmental organizations (NGOs). The conference concluded by adopting the Rome Statute of the International Criminal Court by a nonrecorded vote of 120 in favor, 7 against and 21 abstentions. The United States elected to indicate publicly that it had voted against the statute. France, the United Kingdom and the Russian Federation supported the statute.

I. THE NEGOTIATING PROCESS

The Rome Conference was the culmination of a negotiating process that began in 1989 with a request by the General Assembly to the International Law Commission to address the establishment of an international criminal court.[1] In 1993 the Assembly asked the Commission to elaborate a draft statute for such a court as a matter of priority.[2] The Commission completed its draft in 1994.[3] In the same year, the General Assembly established an Ad Hoc Committee to review the major substantive and administrative issues arising out of the Commission's draft statute.[4] The Ad Hoc Committee was followed by a Preparatory Committee, which met in 1996, 1997 and finally in 1998, completing its work in April. While the negotiating process in the Ad Hoc Committee was of a general nature and focused on the core issue of whether the proposition to create a court was serious and viable, the discussions at the phase of the Preparatory Committee focused squarely on the text of the court's statute.[5]

The working text that the Preparatory Committee submitted to the Rome Conference[6] contained 116 articles, some of which were several pages long, with many options and hundreds of square brackets. Not only were the texts of most of the articles raw, but key policy issues about the jurisdiction and operation of the court had not yet been resolved.

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[1] GA Res. 44/39, UN GAOR, 44th Sess., Supp. No. 49, at 311, UN Doc. A/44/49 (1989). The revival of the idea of establishing an international criminal court was initiated by Trinidad and Tobago in 1989 in connection with illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities. *See* Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the Secretary-General, UN GAOR, 44th Sess., Annex 44, Agenda Item 152, UN Doc. A/44/195 (1989).

[2] GA Res. 47/33, UN GAOR, 47th Sess., Supp. No. 49, at 287, UN Doc. A/47/49 (1992); and GA Res. 48/31, UN GAOR, 48th Sess., Supp. No. 49, at 328, UN Doc. A/48/49 (1993).

[3] *See* Report of the International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. No. 10, at 44, UN Doc. A/49/10 (1994).

[4] GA Res. 49/53, UN GAOR, 49th Sess., Supp. No. 49, at 239, UN Doc. A/49/49 (1994).

[5] For a record of the discussions in the Preparatory Committee, see the series of reports by Christopher Keith Hall in 91 AJIL 177 (1997), and 92 AJIL 124, 331, and 548 (1998).

[6] UN Doc. A/CONF.183/2/Add.1 (1998).