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Keynote Address: The Future U.S. Relationship with the International Criminal Court - An Address on October 14, 2005

David Scheffer

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**FIRST ANNUAL
INTERNATIONAL CRIMINAL
COURT MOOT COMPETITION**

**THE FUTURE U.S. RELATIONSHIP WITH
THE INTERNATIONAL CRIMINAL COURT***

An Address on October 14, 2005

David Scheffer†

We meet on this evening of October 14, 2005, only a few days after the U.S. Permanent Representative to the United

* Major portions of this speech, delivered at Pace University Law School on October 14, 2005, were drawn from a similar address delivered by Ambassador Scheffer at the Hague Joint Conference on Contemporary Issues of International Law—2005, held in The Hague, The Netherlands, on July 1, 2005, which will be published by T.M.C. Asser Institute (The Hague). Parts of this speech are also adopted from his address at the Georgetown University Law Center Symposium, “The United States and International Law: Confronting Global Challenges,” October 27, 2004, which was published in David Scheffer, *Blueprint for Legal Reforms at the United Nations and the International Criminal Court*, 36 *Geo. J. INT’L L.* 683 (2005).

† David Scheffer is Visiting Professor at Northwestern University School of Law (2005-2006) and the former U.S. Ambassador at Large for War Crimes Issues (1997-2001). He led the U.S. delegation in United Nations’ negotiations for the establishment of the International Criminal Court, including the Rome Conference of June-July 1998.

Nations, Ambassador John Bolton, reportedly blocked a discussion in the U.N. Security Council of the report on the situation in Darfur, Sudan, by the U.N. Secretary-General's Special Adviser on the Prevention of Genocide, Juan Mendez.¹ Ambassador Bolton was reportedly joined by the Russian, Chinese, and Algerian representatives, against the strong desires of the Secretary-General and eleven other Member States of the Security Council who wanted to invite Mr. Mendez into the Security Council chamber to report on his recent trip to Darfur.² One can only hope that Ambassador Bolton's reasons for blocking Mr. Mendez had nothing to do with the Special Adviser's criticism of the Sudan for refusing to cooperate with the prosecutor of the International Criminal Court ("ICC" or "Court"), Luis Moreno Ocampo. He was carrying out the mandate of U.N. Security Council Resolution 1593, from which the United States abstained when it was approved on March 31, 2005. Ambassador Bolton's reported reason for denying discussion was that the Security Council needed action, not words, on Darfur.³ It was yet another moment in recent years when the U.S., under current management, demonstrated how seemingly intimidated it is by the ICC, even by the Court's vital work in Africa today.

What pragmatic institutional reforms might be pursued in coming years to bridge the gulf between the U.S. government and the ICC, and strengthen that international institution in the process? Bearing in mind that the forthcoming 2009 Review Conference of the Rome Statute offers an opportunity for amendments to the Rome Statute, there are also other initiatives that could be undertaken soon and which fall short of formally amending the treaty.

The proposals set forth in this address are made from a perspective that is often misunderstood by some scholars, commentators, and politicians who view U.S. policy as one long continuum of opposition to the ICC. The Clinton Administration, for which I worked, strongly supported the establishment of an international criminal court, and President Clinton called for that goal to be met by the end of the twentieth century. Although the U.S. objected to certain provisions of the final draft

¹ *Bolton Blocks a Briefing on Sudan*, N.Y. TIMES, Oct. 11, 2005, at A3.

² *Id.*

³ *Id.*

of the Rome Statute presented at the Rome Conference on July 17, 1998, we worked very hard, thereafter, in 1999 and 2000 to address our remaining concerns about the Rome Statute. After the U.S. delegation to the U.N. talks satisfied some of those concerns in the Rules of Procedure and Evidence and the Elements of Crimes, it joined the consensus vote on them in June 2000. Moreover, we obtained encouraging informal support from key governments regarding further U.S. proposals for other supplemental documents that were scheduled for negotiation in 2001. President Clinton authorized the signing of the Rome Statute by the U.S. government on December 31, 2000.⁴ We thought, at the time, that we were presenting the Bush Administration with the strongest possible negotiating opportunity for 2001 as a signatory state to the Rome Statute. However, the Bush Administration abandoned the U.N. negotiations and, in May 2002, sent a letter to the United Nations effectively nullifying the U.S. signature on the treaty.⁵ The American Service Members Protection Act of 2002,⁶ which the Clinton Administration had vigorously opposed when it was first introduced in the summer of 2000, was adopted with strong Bush Administration support. In recent years, an aggressive campaign, led by John Bolton, to compel other governments to sign purported Article 98(2) non-surrender agreements with Washington has widened the gulf between the United States and the ICC, as well as certain foreign governments.⁷ A largely destructive American relationship with the ICC has only added to the overall tension between the Bush Administration and many international treaties and institutions. Nonetheless, the American abstention from the vote for U.N. Security Council Resolution 1593, a minimalist tactic that I and others had been urging since early 2004 in order to bring the United States on board, permitted the referral of the Darfur situation to the ICC. This may have sig-

⁴ *Clinton's Words: "The Right Action,"* N.Y. TIMES, Jan. 1, 2001, at A6.

⁵ See Press Statement, International Criminal Court: Letter to U.N. Secretary General Kofi Annan (May 6, 2002) <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

⁶ American Service Members Protection Act of 2002, 22 U.S.C. §§ 7421-7433 (West 2002). In December 2004, President Bush signed the Foreign Operations, Export Financing and Related Programs Appropriations Act, which contained the Nethercutt Amendment, PL 108-447 2004 HR 4818. The Amendment authorizes the withholding of economic aid to countries that have ratified the ICC treaty.

⁷ See Press Statement, *supra* note 5.

naled a slight shift in policy and is one that should be nurtured carefully by other governments interested in U.S. engagement.

I believe strongly in a constructive U.S. relationship with the ICC; primarily, one that may ultimately lead to the repeal of the non-cooperation provisions of the American Service Members Protection Act, and to an American posture that is not so fearful of, or intimidated by, the workings of the ICC. I will argue that there are several possible reform initiatives that would have a profound effect on the viability of the ICC and of America's role in its future development.

A great deal of America's standing and effectiveness at the United Nations flows from its commitment, or lack thereof, to broadly accepted international treaty regimes. This is particularly true of the permanent ICC. Often overlooked in the American debate about the ICC is the simple reality that the effective and fair operation of the ICC can go a long way towards dispelling concerns over whether it will seek to influence, using investigation and indictment tactics, the foreign policy choices of major military powers, particularly against newly emerging threats. The U.N. Security Council could play a very constructive role, assuming the United States has the wisdom to permit such action. There are several initiatives, some involving the Security Council and others engaging other bodies that could be undertaken so as to diminish U.S. government concerns about the ICC and strengthen its relevancy and efficiency.

I. NON-AMENDMENT REFORMS

The first category of reforms is one that would not require any amendment to the Rome Statute, but which involves amendments to the Rules of Procedure and Evidence.⁸ These are proposals that could be acted upon within a short period of time, provided the necessary diplomatic initiatives and political will exist.

⁸ See Assembly of States Parties Report of the Rome Statute of the ICC, 1st Sess., Sept. 3-10, 2002, Part II. A., ICC-ASP/1/3, http://www.un.org/law/icc/asp/1st-session/report/first_report_contents.htm.

A. *Article 98(2) Agreements*

In the May 2005 issue of the *Journal of International Criminal Justice*, I presented what I firmly believe is the proper interpretation of Article 98(2) of the Rome Statute. This interpretation is at odds with the Bush Administration's reading of Article 98(2), as well as the Administration's implementation of it through the signing of one hundred flawed bilateral non-surrender agreements with foreign governments.⁹ In short, Article 98(2) only covers those agreements of bilateral or multilateral character between or among nations, whether party or non-party to the Rome Statute and/or international organizations, such as the ICC or the United Nations, that provide for non-surrender to the ICC of a nation's military or official personnel and related civilian component sent abroad on official mission by such nation.¹⁰ The agreements were not intended to cover individuals acting abroad in a private capacity or independently for foreign government or international organization purposes. The bilateral non-surrender agreements negotiated by the current U.S. administration are intended to cover not only current or former government officials, government employees, including contractors, and military personnel, but also *all* U.S. nationals, including those acting in a strictly private or non-U.S. capacity. For example, businessmen, international civil servants, non-governmental organization staffers, tourists, journalists, and mercenaries would be covered under the Article. Primarily ICC judges, not the U.S. government or its treaty partners or anyone else, are left to interpret the application of these bilateral non-surrender agreements under Article 98(2) of the Rome Statute. If the interpretations are flawed, their enforceability before the Court will be, to say the least, problematic.

How can a solution emerge from this unnecessary mess? I propose that existing bilateral non-surrender agreements be rectified with a U.S. public declaration confirming that the reference to "nationals" in such agreements will be interpreted by the U.S. government to mean the U.S. civilian component of a

⁹ See David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUSTICE 333 (2005).

¹⁰ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), <http://www.un.org/law/icc/statute/status.htm>.

military deployment. New or amended agreements negotiated by the United States with foreign governments should limit the scope of application to official and military personnel of the "sending State," and to cover them for actions they undertook in their official capacity. Thus, former officials and personnel would be covered for actions they took while in the service of the sending State, such as the United States. Private contractors may qualify for coverage only to the extent that they could be described as persons of the sending State, are directly contracted by the U.S. government to undertake duties in the foreign jurisdiction in connection with an official mission, and are held accountable (including criminal responsibility) before U.S. courts for their performance. But, in order to ensure that impunity for atrocity crimes would not be the end result of the bilateral agreement, the sending State should commit itself in the Article 98(2) agreement to full investigation and, if warranted, prosecution of persons of the sending State who are suspected of committing such crimes, particularly if arrest warrants against such persons have been issued by the ICC. The European Union has sought (so far without success) a similar assurance as a pre-condition to any of its members entering into an Article 98(2) agreement with the United States. Such a provision would greatly facilitate a State Party's compliance with the Article 98(2) agreement by permitting it to point to an effective exercise of complementarity by the sending State.

The Bush Administration also should issue a declaration that designates as Article 98(2) agreements all U.S. Status of Forces Agreements ("SOFAs") and Status of Mission Agreements ("SOMAs") covering U.S. personnel, to the extent that their terms (which can vary) require criminal jurisdiction to be allocated in a specific manner between the parties to such agreements, and such criminal jurisdiction covers the atrocity crimes within the jurisdiction of the ICC. The bottom line of such a declaration must be that a suspect of an atrocity crime will be investigated and, if merited, prosecuted before a competent court of law pursuant to the procedures of the SOFA or SOMA. Such a presidential declaration would not be regarded as credible if it sought to shield individuals from any investigation whatsoever of atrocity crimes by simply designating SOFAs and SOMAs as Article 98(2) agreements.

This “fix” for the Article 98(2) non-surrender agreements would strengthen their enforceability and encourage European Union governments in particular to consider signing such agreements with the United States. While many would regard this as an imperfect procedure undermining the reach of the ICC’s jurisdiction, it would provide a wide range of enforceable non-surrender protection for U.S. official and military personnel (active and retired) and hence diminish American concerns about the Court’s future intentions. That can be an important contribution to a fresh overall policy of U.S. engagement with the ICC in coming years.

B. *Temporal Jurisdiction*

It is probably heresy to most international lawyers engaged with the study and practice of the ICC to suggest that within the temporal jurisdiction of the ICC lies a simple formula for resolving the concerns of non-party States which, if ignored, would lead to efforts to prohibit national cooperation with the Court (witness the American Service Members Protection Act) and to inhibit some major countries from joining the ICC due to the exposure of their nationals while in non-party status. Such a contingency is politically unacceptable. A misinterpretation of the Court’s temporal jurisdiction poisons the well for signature and ratification of the Rome Statute by governments whose participation could prove so important to the universal application of the Rome Statute.

I will not recite here my interpretation of Articles 126(2), 11(2), 121(5), 24, 22(1), 12 and 13 of the Rome Statute that leads me to conclude that the temporal jurisdiction of the Court commences for the nationals of a non-party State on the date sixty days following the filing of that State’s instrument of ratification, pursuant to Article 126(2) (except under circumstances of U.N. Security Council referral or State consent).¹¹ Suffice it to say here that so many complex formulas for reform of the ICC in order to address U.S. concerns and the concerns of other major nations such as India, China, Japan, Indonesia, Russia, Pakistan, and Egypt would be simplified with a proper interpreta-

¹¹ For discussion of this interpretation see David Scheffer, *How to Turn the Tide Using the Rome Statute’s Temporal Jurisdiction*, 2 J. INT’L CRIM. JUST. 26 (2004).

tion of the Rome Statute and its jurisdictional reach over non-party nationals. An honest appreciation of the ICC's temporal jurisdiction would create robust political dynamics to fully empower the Court to investigate the most serious atrocity crimes and their perpetrators.

For example, in exchange for an agreed interpretation of the Rome Statute of this character, the permanent members of the U.N. Security Council¹² could inform the Assembly of States Parties that where circumstances become compelling enough to require that the ICC have jurisdiction over non-party State nationals, due to such State's (or such individual's particular) threat to international peace and security giving rise to alleged violations of ICC crimes, they would act as speedily and as favorably as possible to approve a U.N. Charter Chapter VII enforcement resolution that refers the situation to the ICC and thus eliminates any doubts about the ICC's jurisdiction over the suspects. The recent referral of the Darfur situation to the ICC is encouraging in this respect. While the accomplishment of such a temporal jurisdiction initiative would require considerable diplomacy, the benefit of doing so in accordance with a correct interpretation of the ICC's temporal jurisdiction would liberate the United States, China, Russia, and other major states to cooperate with, support, and join the ICC far sooner and with a greater sense of integrity. The taint of what many of their respective officials regard, rightly or wrongly, as an *ultra vires* court would be removed. Such an initiative would achieve the jurisdiction of the ICC over the nationals of such major states more effectively and expeditiously than will reliance on a popular but illogical application of temporal jurisdiction.

The Assembly of States Parties of the ICC could adopt an interpretation of the Court's temporal jurisdiction as an amendment to the ICC Rules of Procedure and Evidence that would dispel concerns by existing non-party States seeking greater certainty of interpretation about the full reach of the Court's overall jurisdiction (including personal, subject matter, territorial, and temporal jurisdiction). This could be a relatively painless procedure by the Assembly of States Parties that would

¹² The U.N. Security Council consists of three non-party States to the Rome Statute - the United States, China, and Russia, and two Assembly of State Parties - France and the United Kingdom.

vastly improve cooperation and participation in the treaty regime by major world powers which remain non-party States in significant part because of continued confusion over the ICC's temporal jurisdiction.

C. Amendments to U.S. Federal Criminal and Military Law

Ironically, many of the states that have ratified the Rome Statute and enacted legislation that modernizes their criminal, and in some cases, military codes and aligns them with the crimes of the Rome Statute are now more insulated from the jurisdiction of the ICC than is the United States as a non-party State. That is because the U.S. federal criminal and military codes are out-dated and demonstrate fundamental gaps between U.S. law and the atrocity law falling within the jurisdiction of the ICC. If those gaps could be filled with amendments to U.S. Code Title 18 (criminal) and Title 10 (military), then the United States would be far better positioned to exercise complementarity with the ICC than is currently the case. Improving the complementarity rights of the United States would be a significant confidence-building step for U.S. officials and scholars concerned about the ICC's review of U.S. investigations and prosecutions. That exercise in modernizing Titles 10 and 18 of the U.S. Code and aligning U.S. law with Articles 5-8 of the Rome Statute is far too detailed to relay in a discussion of this character. But the objective deserves some explanation because this exercise alone would greatly ease concern in the United States about whether the exercise of complementarity in fact would be the safeguard from ICC prosecution of American suspects that it purports to be. I want to provide a preview of what might be possible before the U.S. Congress.

First, there is a wealth of experience now recorded in other major jurisdictions, including the ICC implementing legislation in the United Kingdom, Germany, France, Canada, and Australia, that can assist with a modernizing exercise in the United States. So there is much to draw upon regarding how the crimes of the ICC have been incorporated in other national legal systems.

Title 18 of the U.S. Code does not codify crimes against humanity as such. The combined definitional and juridical elements required for a crime against humanity in the Rome

Statute and Elements of Crimes simply do not exist in U.S. federal law, and some of the Rome Statute's crimes against humanity—such as the crime of apartheid or the crime of extermination or of persecution—do not exist as such in the federal criminal code. Title 18 should be amended to ensure that the full range of crimes against humanity and their constituent elements, including the requirement that the individual crime be committed as part of “a widespread or systematic attack directed against any civilian population,”¹³ are properly recited therein. The federal genocide statute does not permit prosecution of an alien for genocide committed outside U.S. territory, even if the alien is a resident of or otherwise present in the United States.¹⁴ Title 18 should be amended to enable such prosecution in U.S. courts. The federal war crimes statute requires a broader jurisdiction to include perpetrators or victims who are not necessarily U.S. nationals or members of the U.S. military, including perhaps the opportunity whereby if the alleged alien perpetrator is present on U.S. territory, then he or she can be prosecuted.¹⁵ If the alien victim of the war crime is on U.S. territory, he or she could not seek relief unless the alleged alien perpetrator also appears on U.S. territory. Further, the federal war crimes statute should be amended to include the war crimes under international customary law that are reflected in Article 8 of the Rome Statute—only some of which are covered by the existing federal law.

Equally compelling gaps exist in Title 10 of the U.S. Code, which includes the Uniform Code of Military Justice. A wholesale review of Title 10 is necessary to ensure that the U.S. military is fully capable of investigating genocide, crimes against humanity, and war crimes as those crimes are defined in the Rome Statute and its related Elements of Crimes.

¹³ The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998)(Article 7).

¹⁴ 18 U.S.C. §1091 (1994).

¹⁵ 18 U.S.C. §2441 (1996).

D. *Double Complementarity*¹⁶

The ICC Assembly of States Parties also could amend the ICC Rules of Procedure and Evidence so as to implement a procedure of *double complementarity*, namely a procedure that would ensure the initial transfer of ICC suspects to their national jurisdictions that are willing to investigate and, if merited, prosecute them under the complementarity procedures of the Rome Statute. Governments need to be assured, through the procedural workings of the ICC, that a claim of national jurisdiction over an individual properly invokes the complementarity privileges of Article 18 of the Rome Statute. Under Article 18 of the Rome Statute, investigation and prosecution of individuals within its jurisdiction should entail the following: Where a State Party to the ICC decides not to investigate or prosecute an individual who is subject to its national jurisdiction for commission of an ICC crime, that State Party shall agree to transfer the individual to a requesting government (regardless of whether it is a State Party to the ICC) that properly invokes the complementarity privileges of Article 18 of the Rome Statute with the intention of investigating and, if merited, prosecuting the individual in its national courts for the ICC crime(s) in question.

Such *procedural* complementarity, incorporated in the ICC Rules of Procedure and Evidence and ensuring the transfer of the individual to, in most cases, his or her own national jurisdiction, would assure all governments that their implementation of *substantive* complementarity before national courts will be achievable. For example, in the event a non-party State fails to follow through with credible investigation and prosecution of an individual transferred to its jurisdiction and then fails (as would be its right as a non-party State) to heed the ICC's request to voluntarily transfer such individual to the ICC, the new rule could provide for termination of any State Party's obligation to transfer anyone to that non-party State as part of any implementation of Article 18 of the Rome Statute and the new double complementarity procedure. In contrast, a State Party that invokes Article 18 of the Rome Statute and achieves cus-

¹⁶ The following subsection appeared in David Scheffer, *Blueprint for Legal Reforms at the United Nations and the International Criminal Court*, 36 GEO. J. INT'L L. 683, 698 (2005).

tody of a suspect would be required to transfer such individual within its custody to the ICC in accordance with Articles 89 and 90 of the Rome Statute in the event complementarity fails and the ICC requests the transfer.

E. *Strengthened Admissibility Review*

During the negotiations of 2000, which concerned supplemental documentation to the Rome Statute, the U.S. delegation developed a proposal that gained considerable informal support among other governments. The proposal was to ensure that just prior to any surrender of a suspect to the ICC, there would be a review of the admissibility of the case by the judges, using their Article 19(1) power to initiate such a review.¹⁷ This would ensure that if there were developments in a national court system between the time when the suspect was first identified by the ICC and the time of a surrender request by the Court, the judges would take those developments into account to determine whether that national jurisdiction had fulfilled its complementarity responsibilities. For the United States, such a procedure, established by amendment to the Rules of Procedure and Evidence, would provide much greater assurance that good faith efforts of investigation and, if merited, prosecution of a suspect in U.S. courts following any Article 18 procedure of complementarity and prior to actual surrender to the Court would be honored by the ICC judges as a consequence of this Article 19(1) admissibility review on the eve of surrender.¹⁸

This strengthened admissibility review could be established by amending the Rules of Procedure and Evidence with wording of the following character:

Unless there has been a referral to the Court pursuant to article 13(b) of the Statute, the Court shall determine on its own motion pursuant to article 19(1) the admissibility of a case in accordance with article 17 when there is a request for the surrender of a sus-

¹⁷ The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998)(Article 19(1)).

¹⁸ See David Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L. J. 47, 59-60, 80, 96 (2001-2002).

pect who is charged in such case with a crime that occurred outside the territory of the suspect's State of nationality.¹⁹

F. *Security Council Referral to the ICC*

Rome Statute Article 13(b) invites the Security Council to refer atrocity situations to the ICC for investigation and prosecution, and that referral power can be executed on terms set forth in the relevant Council resolution.²⁰ Such application of the Security Council's referral power should enable the Security Council, using its U.N. Charter Chapter VII enforcement authority, to limit or qualify the personal, subject matter, territorial, or temporal jurisdiction of the ICC, as well as the scope of complementarity, with respect to the specific situation being referred to the Court. Simultaneously, the Security Council's invocation of Chapter VII authority can enhance greatly the powers of investigation of the Court and broaden the Court's reach over designated non-party States to the ICC and the nationals of such non-party States. These measures of control over the scope of the ICC's investigative and ultimately prosecutorial powers in atrocity situations referred by the Security Council should be recognized by the U.S. government and other permanent members of the Council as remarkable opportunities to use accountability under international criminal law in the most constructive possible way to help maintain or restore international peace and security.

Security Council Resolution 1593, which referred the Darfur situation to the ICC, reflects some of what the Council can accomplish in this situation.²¹ The resolution includes an explicit exemption from the ICC's jurisdiction, stating that

nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan es-

¹⁹ The origin for this proposed language can be found in the U.S. proposal for the Relationship Agreement between the United Nations and the ICC recited in U.N. Doc. PCNICC/2000/WGICC-UN/DP.17 (2000).

²⁰ The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998)(Article 13(b)).

²¹ S.C. Res. 1593, ¶ 6, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.²²

While this exemption from the jurisdiction of the ICC was an unattractive feature of the resolution in the eyes of many Court supporters, including myself, it does demonstrate that the United States can ensure adequate safeguards for its own personnel through a Security Council referral in order to achieve the objective of bringing foreign perpetrators of atrocities occurring outside the United States to justice.

G. *The Security Council's Power to Block the ICC*

Rome Statute Article 16 empowers the Security Council to block the ICC from acting during particularly sensitive security challenges with much calibrated use of the Council's enforcement power under the U.N. Charter.²³ This power of blockage is likely a very potent instrument of leverage on the ICC by the Security Council. Even the threat of a Security Council resolution invoking Article 16 authority could deeply influence the choices made by the ICC Prosecutor while exercising his powers. The United States already has toyed with Article 16 in achieving adoption of Security Council Resolutions 1422 (2002) and 1487 (2003), albeit for purposes never intended by the negotiators of the ICC. If the United States turned its attention to a more constructive use of Article 16 in the future, using it sparingly and for persuasive purpose in agreement with other members of the Security Council with respect to particular situations, then it could become a safeguard of considerable utility.

II. AMENDMENTS TO THE ROME STATUTE

A. *Amendment to Make the Crime of Aggression Actionable*²⁴

There remains a high probability that an effort will be made at the 2009 Review Conference of the Rome Statute to amend the subject matter jurisdiction of the Court so as to es-

²² *Id.*

²³ The Rome Statute of the International Criminal Court art. 16, U.N. Doc. A/CONF.183/9 (1998)(Article 16).

²⁴ The following subsection also appeared in Scheffer, *supra* note 16, at 699.

establish a trigger mechanism and definition for the crime of aggression, and thus to make it an actionable crime before the Court. It would be a folly for the United States to remain disengaged in the on-going negotiations by the Assembly of States Parties over how, for purposes of individual criminal responsibility, the crime of aggression will be enforced by the ICC. (Even as a non-party State, the United States can participate as an observer in such negotiations.)

If there is any ICC crime that might be used for political purposes against the United States in the future, it will be the crime of aggression due to America's global military commitments and often bold and controversial use of its armed forces on or over foreign territory. A proper trigger procedure and definition for the crime of aggression would dispel concerns that the ICC might be manipulated by governments or the ICC prosecutor to thwart legitimate uses of military force to confront threats to international peace and security. As a no-show in the negotiations, the United States may have only itself to blame if the trigger mechanism and definition of the crime of aggression that emerge for consideration at the 2009 Review Conference prove unacceptable.

B. *Amendment to the Rome Statute to Criminalize U.N. Corruption and Sexual Abuse*²⁵

In addition to the crime of aggression, crimes of terrorism and drug trafficking are expected to be seriously considered for amendment to the Rome Statute at the 2009 Review Conference. While these initiatives may be all the review conference can absorb regarding the ICC's subject matter jurisdiction, effort should be made to consider using the ICC to investigate and prosecute officials charged with the most egregious types of corruption and sexual abuse within the U.N. system, including its specialized agencies, related organizations, and peace operations. In light of the recent investigation into the Oil-for-Food Program for Iraq²⁶ and sexual abuse investigations of the U.N. peacekeeping operation in the Democratic Republic of the

²⁵ *Id.* at 700.

²⁶ See Chairman of the Independent Inquiry Committee, *The Management of the United Nations Oil-for-Food Program* (Sept. 7, 2005), http://www.iic.offp.org/Mgmt_Report.htm.

Congo,²⁷ there is a strong case to be made that the United Nations needs access to an independent criminal court before which U.N. administrators charged with corruption or U.N. peacekeeping personnel charged with sexual assault may be brought. The requirements of sufficient gravity and importance to the international community that limit the range of crimes already in the Rome Statute also would need to be retained in some fashion for these additional categories of crimes. Otherwise, the ICC would be overwhelmed with investigating and prosecuting relatively low-level individuals for relatively low-impact crimes. Some criteria for the targets of investigation and the magnitude of the crimes at issue would have to be established. Given Washington's investigative focus on both U.N. corruption and peacekeeping and sexual abuse, the U.S. government should find such subject matter jurisdiction an attractive feature of the ICC worth cooperating with and in which participation may be valuable.

III. DECLARATIONS, UNDERSTANDINGS, AND PROVISIO TO A U.S. RATIFICATION OF THE ROME STATUTE

If some of the reform initiatives introduced above can be realized, and the United States achieves the political will to ratify or accede to the Rome Statute, then it is entirely predictable that the U.S. Senate will push as close as possible to the cliff of reservations not permitted under the Rome Statute in order to assure the sufficient two-thirds vote required in that body for approval of a treaty. Various governments that already have ratified the Rome Statute have employed declarations and understandings of occasional bold character. One can easily imagine what the United States might draw upon to frame its own declarations, understandings, and proviso. For example, Australia confirmed a far-reaching declaration regarding complementarity, requiring that "no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged "crimes.""²⁸ For this purpose,

²⁷ The Secretary-General, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, delivered to the General Assembly, U.N. Doc. A/59/710 (Mar. 4, 2005).

²⁸ Australia Declaration, C.N. 706.2002, July 1, 2002, http://untreaty.un.org/ENGLISH/CNs/2002/701_800/706E.doc (last visited Dec. 1, 2005).

the procedure under Australian law supplementing the Statute of the Court provides that no person can be surrendered to the Court unless the Australian Attorney-General issues a certificate allowing surrender. Australian law also provides that “no person can be arrested pursuant to an arrest warrant issued by the Court without a certificate from the Attorney General.”²⁹ The Australian declaration further states “its understanding that the offences in Articles 6, 7 and 8 will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law.”³⁰

Colombia included in its declaration the requirement that, “[c]oncerning Article 17(3), Colombia declares that the use of the word ‘otherwise’ with respect to the determination of the State’s ability to investigate or prosecute a case refers to the obvious absence of objective conditions necessary to conduct the trial.”³¹ Colombia’s declaration further requires that “none of the provisions of the Rome Statute alter the domestic law applied by the Colombian judicial authorities in exercise of their domestic jurisdiction within the territory of the Republic of Colombia.”³²

Both Colombia and France invoked their right under Article 124 of the Rome Statute to exempt their nationals from investigation by the ICC for Article 8 war crimes for a period of seven years following ratification.³³ France also addresses several specific issues arising under Article 8 with interpretative declarations that one could easily envisage the United States employing. One such interpretation relates to Article 8(2)(b) and France’s view that it “relates solely to conventional weapons and does not prohibit the use of nuclear weapons nor impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defense. . . .”³⁴

²⁹ *Id.*

³⁰ *Id.*

³¹ Colombia Declaration, C.N. 834.2002, Aug. 5, 2002, http://untreaty.un.org/ENGLISH/CNs?2002/801_900/834E.doc.

³² *Id.*

³³ See *id.*; see France Declaration, C.N. 339.2002 (Apr. 11, 2002), http://untreaty.un.org.English?CNs/2002/301_400/339E.doc (last visited Dec. 1, 2005).

³⁴ France Declaration, *supra* note 33.

Some of the constitutional concerns raised by American commentators could be addressed in a U.S. interpretative declaration or, preferably, a proviso that need not be formally submitted with the instrument of ratification. Such a proviso could express the U.S. intention that nothing in the Rome Statute requires or authorizes legislation, or other action, by the United States that is prohibited by the U.S. Constitution as interpreted by the United States. While this may prove controversial, it is not uncommon in U.S. treaty practice and should mean very little if anything to the cooperative relationship between the United States and the ICC.³⁵

IV. CONCLUSION

Such proposals are not mission impossible. Neither do they constitute a mission that the United States should forfeit or be intimidated by. Such a multi-pronged initiative may not be possible for some time to come, but we always knew this would be a long process, and I see every reason to keep dogging it until that day when the U.S. signature on the Rome Statute is resurrected and the United States finally joins the international court that represents its highest values.

³⁵ For example, such a proviso was required by the U.S. Senate in connection with the U.S. ratification of the International Covenant on Civil and Political Rights. See *International Covenant on Civil and Political Rights, opened for signature* Dec. 16, 1966, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Dec. 1, 2005); *United States of America, Ratification*, June 8, 1992, 1676 U.N.T.S. 543, 543, available at http://untreaty.un.org/humanrightsconvs/Chapt_IV_4/reservations/USA.pdf (last visited Dec. 1, 2005). See also CARTER, TRIMBLE, AND BRADLEY, *INTERNATIONAL LAW* 177-178 (4th ed. 2003).