

September 1999

War Crimes and Crimes against Humanity

David J. Scheffer

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

Recommended Citation

David J. Scheffer, *War Crimes and Crimes against Humanity*, 11 Pace Int'l L. Rev. 319 (1999)

DOI: <https://doi.org/10.58948/2331-3536.1236>

Available at: <https://digitalcommons.pace.edu/pilr/vol11/iss2/2>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

BLAINE SLOAN LECTURE

WAR CRIMES AND CRIMES AGAINST HUMANITY

David J. Scheffer†

I. INTRODUCTION

We deal daily with the horrific handicraft of genocidaire, of torturers, of butchers, or of poorly trained soldiers who commit unjustified violence against civilians or abuse prisoners of war. Today eighty percent of the victims of armed conflicts are civilians. Tidy theories and international conventions on the laws of war seem to mean very little to the perpetrators of atrocities if they are aware of them at all. Yet, it is our duty to translate those words into meaningful and enforceable instruments of law. At stake is not our freedom to conduct the just war justly, but the chance to save the lives of countless civilians and their means of shelter and livelihood from those whose pursuit of power knows no bounds.

The challenge of deterring serious violations of international humanitarian law in the Twenty-first Century - by which I mean genocide, crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws and customs of war, first requires that we recognize the problem generated during the Twentieth Century, particularly in its final decades. Conventional warfare has been transformed in our lifetimes. Armed conflicts have become increasingly identified not with the clash of armies across sovereign borders, or between the

† David John Scheffer was nominated by President Bill Clinton to serve as the first-ever Ambassador-at-Large for War Crimes Issues on May 22, 1997. He was confirmed by the Senate on July 31, 1997 and was sworn in by Ambassador Bill Richardson, United States Representative to the United Nations, on August 5, 1997. The appointment carries an Ambassadorial rank. The Blaine Sloan Lecture was delivered extemporaneously on March 4, 1999 at the Pace University School of Law. This article reflects the main points covered in the lecture.

“isms,” but with the assault by a government and its military on its own population, or by a rebel force bent on terrorizing its own society, or by the use of weapons that have as their aim indiscriminate mass murder. It is difficult to find an armed conflict anywhere in the world today where one could describe the regular armed forces of two countries as waging conventional cross-border warfare between themselves and generally observing the laws of war. The norm has become the internal conflict or self-inflicted atrocity, often with foreign influence at work to ensure a bloody outcome. Such situations are not easily influenced by the strictures of law, which are little known or understood by those who control the firepower. The perpetrators of war crimes and crimes against humanity do not, under such circumstances, bring a keen knowledge of law to their work. In fact, as I walk through one massacre site after another in distant reaches of the globe, I have to ponder whether the laws of war have been of any relevance at all to this insanity.

My intention this evening is to focus on four challenges in the field of international humanitarian law. First, I will address the disturbing phenomenon of the post-Cold War world, namely the prominence of internal conflicts and assaults on civilian populations. I want to discuss one example: Sierra Leone, and our efforts in Washington to create a more effective preventive mechanism to respond to prospective or on-going atrocities. Second, we need to recognize the important work of the two existing international criminal tribunals as instruments of deterrence, and the continuing need to address the crimes of our own era if we are to sustain a credible policy of deterrence. Third, I will examine the new treaty to establish a permanent international criminal court and U.S. views about that treaty. This would be the central institution of deterrence, but we must consider seriously its content and structure and its impact on military capabilities to confront atrocities and maintain international peace and security. Fourth, I will briefly describe the United States Administration's efforts with respect to some other treaties.

II. THE WAR AGAINST CIVILIANS—SIERRA LEONE

I visited Sierra Leone last month. What has happened there might serve as a paradigm for an inquiry into what would

deter war crimes in the next century. The setting is West Africa, far from the secure neighborhoods of Westchester County. But what is happening in Sierra Leone should serve as a warning of the clear and present danger that war crimes pose to civilization in our own time.

While the world's attention has been focused on the January massacre of forty-five civilians at Racak, Kosovo, and the resulting peace talks in Rambouillet, France, the atrocities in Sierra Leone are far greater in number and severity. The magnitude of massacres, mutilations, tortures, rapes, and destruction of civilian property in Sierra Leone is so great that its full extent is unknown. Eighty percent of Eastern Freetown has been destroyed, and looting and fire have gutted key buildings in Central Freetown. While as many as 5,000 civilians were slaughtered in Freetown in the last two months alone, that number almost certainly only represents a fraction of the casualties in the two-thirds of Sierra Leone now under rebel control. UNICEF¹ reports that 1,192 children are missing after the attack on Freetown. Due to lack of security, humanitarian agencies have access to only 300,000 of the 700,000 to 1,000,000 internally displaced people. Sierra Leone's neighbors host almost half a million refugees. We have no idea what atrocities are being committed right now throughout most of Sierra Leone, save for what the stray refugees are able to report. If past experience holds, the darkness that has swept over Sierra Leone over the last year has countless victims whose fate we may never know.

I visited mutilation victims in Freetown and at several refugee sites in Guinea. Their stories fit a familiar pattern. The rebels burn down entire neighborhoods, line up men, women, and children and, one-by-one, chop off their arms and/or feet. Many of the rebels are child soldiers, typically smoking dope, and weak enough so that the "choppings" often leave hands dangling from arms, requiring the victim to finish the job on himself or herself. Victims reported that the rebels, after performing the mutilations, said: "Go show this to President Kabbah. Tell Kabbah to help you now. Kabbah is our enemy." Some boys are spared mutilation, at least for a while, and ab-

¹ United Nations International Children's Emergency Fund.

ducted to serve as slave labor to the rebels and as soldiers themselves. Large numbers of young girls and women are raped and kept in sexual slavery until killed. Some victims told me of doing everything the rebels told them to, including surrendering all of their property and performing menial chores for days, only then to be chopped or, of the unluckiest, killed. I saw one pre-teen girl whose eyes had been burned out by rebels pouring heated plastic into them after having raped and shot her. She was still extremely traumatized. Another girl of five or six years old had been thrown into a fire and suffered extreme burns on the front of her body. Other children were suffering multiple injuries from gunshot wounds, burnings, and choppings.

The character of the Sierra Leone conflict is indicative of what likely confronts the international community in the future: an undisciplined force of child soldiers, led by revenge-seeking rebels and former government soldiers who exercise no restraint whatsoever in the prosecution of their campaign for power, and funding of these forces derived from control of diamond concessions; of foreign governments collaborating with war criminals, of the humanitarian crisis wrought by such criminal behavior. Enforcing the laws of war against such perpetrators, many of whom are children high on dope and untrained in civilized military discipline, seems almost surreal. Our work will certainly not be easy.

The United States is trying, along with a few other governments to seek an end to the hostilities and atrocities in Sierra Leone and to provide humanitarian relief to the victims. In Fiscal Year 1998, the United States Government humanitarian assistance to Sierra Leone totaled over \$55 million, fourteen times more than our assistance to the West African peacekeeping force. The U.S. is the largest humanitarian donor to Sierra Leone and so far this fiscal year has provided more than \$28 million in humanitarian relief. This assistance includes a recent airlift of 20,000 blankets and 860 rolls of plastic sheeting to provide temporary shelter to Freetown residents.

Efforts are under way to bring President Kabbah and the rebels together for peace talks. But the offer for peace talks is only credible if the rebels realize that the peacekeeping force, ECOMOG, is strong enough to prevail against them.

ECOMOG, comprised of mostly Nigerian soldiers, has become a peace enforcement operation and it should be fully supported for the purpose of confronting the rebels and stopping the atrocities. The United States has committed more than \$10 million to support ECOMOG and we are looking for additional federal funds. The United Kingdom is providing up to \$16 million in additional funding for ECOMOG, and the Dutch have provided some critical assistance recently. But additional support of all kinds, including arms and ammunition is required. Nigeria, which is considering pulling out within the next few months, must be persuaded to stay the course.

I met with the ECOMOG Commander, Major General Timothy Shelpidi from Nigeria, and discussed with him the alleged summary executions of rebels by his soldiers. I recalled the need for military discipline and enforcement of the rule of law, which he said would be administered against any soldiers found to be guilty of crimes. We hope that will indeed be the case and that the discipline of ECOMOG, which also has troops from Guinea, Ghana, and Mali, will conform to the fundamental requirements of international humanitarian law. But these alleged incidents need to be kept in perspective in comparison with the magnitude of atrocities committed by the rebels. The consequences of a failure by the international community to adequately support ECOMOG in this hour of desperation in Sierra Leone can be catastrophic, not only for the people of Sierra Leone but also for Guinea and the region as a whole. The Sierra Leone conflict can easily spill over into other West African nations and destroy whatever hope we may have had for regional peacekeeping efforts.

The role of Liberia, Libya and other African states in supporting the rebels also requires our continued attention and response. The diamond trade is attractive to rebel and foreigner alike. Without foreign support, including mercenaries, the rebels would be a much weaker force. During my visit to the region, I stressed to all that any government that supports the rebels risks becoming a collaborator in the atrocities.

In New York, in March 1999, I briefed representatives of many of the member states of the U.N. Security Council and from Africa about the situation in Sierra Leone. The Security Council is uniquely positioned to evaluate the threat to interna-

tional peace and security, to encourage support for ECOMOG, and to energize the proposed peace talks. At stake in Sierra Leone is democracy, the rule of law, regional security, and the fate of so many desperate human beings. Our responses to the atrocities in places like Kosovo and Sierra Leone are tests of deterring War Crimes in the Twenty-first Century. On February 12th the Security Council held a formal meeting on "Protection of Civilians in Armed Conflict," chaired by Canadian Foreign Minister Lloyd Axworthy, who urged the Council to do more to protect civilians in armed conflict.

The U.S. representative, Ambassador Peter Burleigh, confirmed that, "The United States shares Canada's desire to bring to international attention the new character of armed conflict, in which civilians, including humanitarian workers, are often not simply random, incidental victims of conflict, but its very targets. We must work together." Ambassador Burleigh also said, "to find ways to halt this trend we must strive to strengthen international protection of civilians, recognizing that the Council's task of maintaining peace and security can extend to the protection of individuals as well." Ambassador Burleigh, on behalf of the United States, welcomed the Security Council's reaffirmation in its Presidential Statement on February 12th of:

the need for the international community to assist and protect civilian populations affected by armed conflict; of the need for all parties concerned to ensure the safety of civilians and to guarantee the unimpeded and safe access of United Nations and other humanitarian personnel to those in need; of the obligation of all states to comply strictly with their obligations under international law; and of the need to bring to justice individuals who target civilians, as such, in armed conflict, or who otherwise commit offenses under international humanitarian and human rights law. We also support the Council's willingness to respond, in accordance with the UN Charter, to situations in which civilians have been targeted, or humanitarian assistance to civilians has been deliberately obstructed.²

President Clinton announced on December 10th of last year that the establishment of formal mechanism in the U.S. Gov-

² U.N. SCOR, 54th Sess., 3977th mtg., U.N. Doc. SC/6642 (1999).

ernment to facilitate early warning of atrocities and to consider means to prevent or respond to them as quickly and effectively as possible. This is a tall challenge- one that will take time to fully establish. As head of the inter-agency group working on this project, I am determined to craft a permanent working system. The Atrocities Prevention Inter-Agency Working Group, as it is termed, will be a focal point within the U.S. Government for identifying and coordinating policy responses to atrocities. Our intelligence community and diplomatic posts will be actively engaged in identifying the warning signs of atrocities. Information in the public domain from journalists and non-governmental organizations witnessing what we often cannot see, will be critical to this effort. We also intend to create a network of relationships with other governments dedicated to the war against atrocities so that we can alert each other as quickly and effectively as possible to unfolding events that may merit collective responses. We have no illusions as to the degree of difficulty an undertaking of this character will entail and the criticism it will inevitably attract when we have not met everyone's expectations of action. But we have a duty to try our best to confront atrocities head-on. Just yesterday, I held a lengthy meeting on Sierra Leone to examine our options for action. We will hold a conference in Washington in October 1999 where representatives from many governments will be invited to examine prevention initiatives.

Successful enforcement of humanitarian law requires the commitment of nations, but prosecutions must ultimately rely on accurate information. The Atrocities Prevention Inter-Agency Working Group will be a focal point within the U. S. Government for identifying and coordinating policy responses to atrocities. Our armed forces deployed throughout the world will remain an integral part of our efforts to identify violations of international humanitarian law and to contain the spreading conflicts that are the backdrop for those who ignore their legal obligations. The Department of Defense recently issued a directive applicable to all United States armed forces. The directive requires that all possible suspected or alleged violations of the law of war be documented and reported quickly. The military commanders on the scene now have a specific duty to take steps

to preserve evidence of violations, which will then be transmitted to appropriate authorities.

III. WAR CRIMES TRIBUNALS

Another test of deterrence is the work of the International Criminal Tribunals for the Former Yugoslavia³ and for Rwanda.⁴ As with the Nuremberg and Tokyo international criminal tribunals after World War II,⁵ it is very difficult to judge with precision the real deterrence value of such courts. Unfortunately, the level of criminal activity since 1945 has surpassed the worst nightmares of those who prosecuted the war criminals of that era. But we know that a central purpose of enforcement of law is deterrence. This is as true on the international plane as it is domestically. We have as much a duty to enforce the rule of law today as our fathers did at Nuremberg and Tokyo. We too must hope, in this fallible world, that a signal will be sent to future generations that there will be consequences for those who wage a war of atrocities.

The work of the Yugoslav and Rwanda war crimes tribunals is beginning to show real progress. Thirty-five indictees of the Yugoslav Tribunal have been taken into custody since 1994. Currently, twenty-seven are in custody in The Hague. Thirty indictees remain at large. Of the original eighty-three public indictees of the Yugoslav Tribunal, seventeen have had charges dismissed against them and one has been acquitted. Four trials, some with several defendants, are in progress today; three sets of convictions are on appeal. The 1999 budget for the Yugoslav Tribunal was increased by thirty-five percent to a total of \$103 million. This will permit the hiring of 206 new staff members and a new chamber of judges to handle an increasing

³ The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the territory of the Former Yugoslavia Since 1991, U.N. S.C. Res. 827, 48th Sess., Annex, at 40, U.N. Doc. S/25704 (1993) (establishing the tribunal) [hereinafter ICTY Statute], reprinted at 32 I.L.M. 1203.

⁴ The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/Res/955 (1994) [hereinafter ICTR Statute].

⁵ See generally Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203 (1998).

caseload and investigative challenge. The apprehension in December of General Radislav Krstic, who led the assault on Srebrenica in 1995, signaled our resolve to bring to justice the highest level individuals indicted by the Tribunal. An impressive number of leaders are in custody in The Hague now. Nothing would serve deterrence better than the swift surrender or apprehension of those indictees who remain at large. To the best of our knowledge, there are no known indictees remaining in the American sector of Bosnia and Herzegovina, where U.S. soldiers in SFOR⁶ operate. We will not rest until every indicted individual is brought to the bar of justice in The Hague. It is critical, for deterrence purposes, that these crimes enjoy no statute of limitations and no weakening in the resolve of the international community to bring all indictees into custody. Radovan Karadzic and Ratko Mladic, who remain at large, must understand that they cannot escape judicial accountability for their alleged actions. Nor can the infamous "Vukovar 3," who enjoy sanctuary in Serbia along with other indictees, including Ratko Mladic.

These are hard tests for international justice. The United States calls upon other governments, far from the conflict in the Balkans, to stand with us and the Security Council in pressuring Belgrade to comply with its obligations and to see that indictees on Bosnian or Croat territory reach the Hague. We will continue to do everything we can. We have demonstrated that we have the capabilities to undertake to bring indictees to justice. But we need the sustained support of many other governments who also believe in the importance of the Yugoslav Tribunal's work to join us in this critical endeavor.

The Rwanda War Crimes Tribunal has had remarkable success in apprehending indictees. A large number of the senior political, military, and media leaders in Rwanda, before and during the genocide of 1994, now sit in the U.N. Detention Facility in Arusha and are standing or facing trial. Of forty-five publicly indicted suspects, thirty-six are now in custody. Nine remain at large. Within just the last two weeks, the former health minister and the former information minister during the 1994 genocide were arrested in Kenya. Two weeks ago, Ignace

⁶ NATO-led "Stabilization Force."

Bagilishema, the former mayor of Mabanza commune in the Kibuye Prefecture and one of the first leaders indicted by the Rwanda Tribunal in 1995, surrendered himself to Tribunal authorities in Pretoria. He had been tracked for three years, with arrest warrants issued by the Governments of Zambia, Australia, South Africa, and Singapore. The U. S. Government is working to see that Elizaphan Ntakirutimana, an indictee who is in federal custody in Laredo, Texas, will be transferred to the Rwanda Tribunal in Arusha as soon as possible. The case is currently before the U.S. Court of Appeals.⁷ The 1999 budget for the Rwanda Tribunal increased by forty-four percent over the 1998 budget, and now stands at \$75 million. One hundred and ninety-seven new staff positions are being funded with this increase, as is a new chamber of judges.

We have been disturbed by reports that certain defendants have been denied their choice of defense counsel at the Rwanda Tribunal. I investigated this last year and had been assured that obstacles had been removed. We trust that in the future there will be full access to defense counsel, particularly with the requisite language skills, that defendants merit.

The jurisprudence of both tribunals is beginning to establish a strong body of case law in the enforcement of international humanitarian law. As instruments of deterrence, the tribunals are formidable partners that cannot be lightly ignored in the future. The Rwanda War Crimes Tribunal has greatly advanced the enforcement of international humanitarian law by holding key leaders-Akayesu, Kambanda, and Serushago guilty, either by conviction or their own plea, for serious violations of international humanitarian law committed against their own people and in a purely internal conflict. The consequence has been to strengthen the enforcement of international humanitarian law.

While on its surface, the September 1998 decision against Akayesu⁸ for the crime of genocide would appear to speak for itself, a closer examination is worthwhile to show the true advancement in this decision. Prior to *Akayesu*, there was no judicial interpretation of the Genocide Convention. The Rwanda Tribunal's Trial Chamber noted that the definition of genocide

⁷ *Ntakirutimana v. Reno*, No. 98-41597, 184 F.3d 419 (5th Cir. 1999).

⁸ *The Prosecutor v. Akayesu*, (1998) ICTR-96-4-T.

in Article 2 of the Tribunal statute is taken verbatim from Articles 2 and 3 of the 1949 Genocide Convention.⁹ As a result, the judges followed the prosecutor's rationale and gave genocide a broad interpretation and reading in order to maximize the protection of a protected group. The Chamber emphasized that the crime of genocide does not imply the actual extermination of a group in its entirety, but is understood as a crime of genocide once any one of the acts in Article 2 is committed with the specific intent to destroy in whole or in part a national, ethnical, racial, or religious group as such.¹⁰ The Chamber made clear that rape and sexual violence constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy in whole or in part a covered group.¹¹ Sexual violence can indeed be an integral part of the process of destruction. In the past, sexual violence was not recognized by many scholars or even in the preparatory works of the Genocide Convention as an act of genocide. This was mainly due to the fact that society erroneously thought that genocide must encompass lasting physical injury or death.

Further, the *Akayesu* decision held that rape (as opposed to the broader offense of sexual violence) may be a crime against humanity.¹² In the past, specifically the Tokyo trials after World War II, rape was mentioned under the umbrella of "inhumane acts," but never itself recognized in any judgment as a specific crime against humanity. Under the *Akayesu* decision, for the first time, rape has stood on its own and alone as a crime against humanity.¹³

As challenging as the work in the Balkans and Rwanda remains, we have a collective duty not to forget other arenas of conflict and atrocities in our own time. The United States has long supported the establishment by the Security Council of an

⁹ See *id.* at pt. 6.3.1, para. 494. Article 2 of the ICTR Statute defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." See ICTR Statute, *supra* note 5, art. 2. See also Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. The Genocide Convention defines Genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." *Id.*

¹⁰ See *Akeyesu*, *supra* note 8, para. 497.

¹¹ *Id.* at para. 508.

¹² *Id.* at pt. 6.4, para. 596-598.

¹³ *Id.* at pt. 7.7, para. 685-695.

international criminal tribunal to bring the senior Khmer Rouge leaders who remain alive to justice for the crimes of the Pol Pot regime in Cambodia from March 1975 through January 1979. An estimated 1.7 million Cambodians perished during that period due to the criminal conduct of the Pol Pot regime. In light of recent developments and a forthcoming report by a group of legal experts appointed by the U.N. Secretary-General, we look forward to concrete action in the Security Council, in cooperation with the Cambodian Government, to realize this much delayed mechanism of justice.

As Secretary of State Madeline Albright said in Bangkok yesterday, "We want the top leaders brought to justice and we do support an international tribunal on this." She said the United States believes "that is the way to reconciliation."¹⁴ We understand that Prime Minister Hun Sen has said that Cambodia is considering a South Africa-style truth commission. As the Secretary said, we do not believe this is a substitute for an international tribunal for the 1975-79 period.

Secretary Albright has often remarked that Iraq's Saddam Hussein is a repeat offender. He and his regime have committed war crimes on the Iraqi people and on Iraq's neighbors to all points of the compass. Our policy toward the Iraqi regime is defined in part by our determination not to let its long history of criminal conduct prevail. We believe that the Iraqi regime committed crimes during the invasion and occupation of Kuwait in 1990-91, including crimes against the Kuwaiti people, U.S. and coalition forces, and through the use of third-country civilians as human shields. We believe that the Iraqi regime committed crimes during its campaigns against the Iraqi Kurdish peoples in the late 1980s and early 1990s in northern Iraq. We believe that the Iraqi regime committed, and continues to commit, crimes against the Iraqi Shi'a peoples in its efforts to drain the southern marshes, and to destroy the unique culture of the Marsh Arabs.

¹⁴ SECRETARY OF STATE, MADELINE K. ALBRIGHT AND THAI FOREIGN MINISTER SURIN PITSUWAN, JOINT PRESS CONFERENCE, MINISTRY OF FOREIGN AFFAIRS, Bangkok, Thailand, Office of Spokesperson, U.S. Department of State, (Issued at Joint Press Conference held on Mar. 4, 1999) (visited Nov. 1, 1999) <<http://secretary.state.gov/www/statements/1999/990304.html>>.

American and British patrols of the "no-fly zones" began in part to enforce international humanitarian law. The origins of the no-fly zones rest in the criminal conduct the Iraqi regime unleashed upon the Kurds in the north and the Shi'a in the south. By preventing the Iraqi air force from flying in the two zones, we blunt the Iraqi regime's ability to repress civilian groups which unquestionably are under threat by the Iraqi regime. And yet Saddam's propaganda machine would have you believe that British and American air power is somehow violating Iraqi sovereignty. Not only do prior Security Council resolutions support the legality of the enforcement of the no-fly zones, we trust that the international community knows the difference between true enforcement of the law and the hypocrisy of one of the worst violators of law in our time.

It is telling that at the Rome conference on the establishment of an international criminal court last summer the most frequently cited need for an effective international court was the need to prosecute the future Pol Pots and Saddam Husseins. Those same governments and non-governmental organizations need to join us, and others, to focus just as strongly on the present Saddam Hussein and the living senior Khmer Rouge leaders.

IV. U.S. POLICY AND THE INTERNATIONAL CRIMINAL COURT¹⁵

The United States has had, and will continue to have, a compelling interest in the establishment of a permanent international criminal court (hereinafter 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. As head of the U.S. delegation to the ICC talks since mid-1997, I can confirm that the United States has had an abiding interest in what kind of court the ICC would 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. Our refusal to support the final draft of the treaty

¹⁵ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9* [hereinafter Rome Statute]. Portions of Part IV originally appeared in 93 AM. J. INT'L. L. 12 (1999).

in Rome last summer was grounded in law and in the reality of our international system.

On December 8, 1998, we joined consensus in the UN General Assembly to adopt a resolution creating the Preparatory Commission on the ICC (hereinafter PrepCom) which is meeting now in New York under the expert leadership of Philippe Kirsch, the Legal Adviser of the Canadian Ministry of Foreign Affairs. I led the U.S. delegation in the critical work of the PrepCom to develop the elements of crimes and the rules of procedure and evidence. The United States has taken the lead in the elements discussions. In July and August 1999, the PrepCom will afford an opportunity for concerns we, as well as others, have had about the effectiveness and acceptance of the Court to be addressed. This is an important opportunity to correct the Treaty. We believe the problems in the treaty, which prevent us from signing it, can be solved. We further believe that it is in the interest of all governments to address those problems now so that we can all be active partners in the ICC. There is far more to lose in the effectiveness of the ICC if the United States is not a treaty partner than there is to gain from its current dubious regime of jurisdiction. As I said at the United Nations last October, we do not pretend to know all the answers. We hope some creative thinking can be generated in the months ahead.

At the Rome conference last summer, the U.S. delegation worked with other delegations to achieve important objectives. One major objective was a strong complementarity regime, namely, deferral to national jurisdiction. A key purpose of the international criminal court should be to promote observance and enforcement of international humanitarian law by domestic legal systems. Therefore, we were pleased to see the adoption of Article 18,¹⁶ which is drawn originally from an American proposal, and its companion Articles 17¹⁷ and 19.¹⁸ 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 guidelines that respect the author-

¹⁶ *Id.* at art. 18 (Preliminary rulings regarding admissibility).

¹⁷ *Id.* at art. 17 (Issues of admissibility).

¹⁸ *Id.* at art. 19 (Challenges to the jurisdiction of the Court or the admissibility of a case).

ity of the court, to take the lead in investigating their own nationals or others within their jurisdiction.

Our negotiators struggled, successfully, to preserve appropriate sovereign decision-making in connection with obligations to cooperate with the court. Some delegates were tempted 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 also in many other jurisdictions. Part 9¹⁹ of the statute represents hard-fought battles in this respect. The requirement that the actions of States Parties be taken “in accordance with national procedural law”²⁰ or similar language is pragmatic and legally essential for the successful operation of the court.

We were pleased that the discussion on the rules of procedure and evidence at the February 1999 session of the PrepCom was undertaken with a constructive attitude by participating delegations. Some progress was made, and we trust that the groundwork has now been laid to accelerate the work on the rules in the months ahead. The U.S. experience with the Yugoslav Tribunal has shown that some sensitive information collected by a government could be made available as lead evidence to the prosecutor, provided that detailed procedures were strictly followed. We applied years of experience with the Yugoslav Tribunal 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 the release of all national security information requested from a government. Our view prevailed in Article 72, which provides: “a national government must have the right of final refusal if the request pertains to its national security.”²¹ In the case of a government’s refusal, the court may seek a remedy from the Assembly of States Parties or the Security Council.

The United States helped lead the successful effort to ensure that the ICC’s jurisdiction over crimes against humanity²²

¹⁹ See *id.* pt. 9 (International co-operation and judicial assistance).

²⁰ *Id.* at art. 89(1).

²¹ *Id.* at art. 72 (Protection of national security information).

²² *Id.* at art. 7.

included acts in internal armed conflicts and acts in the absence of an armed conflict. We also argued successfully that there had to be a reasonably high threshold for 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. We 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. We believe the definition arrived at 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."²³

A major achievement of Article 8 of the treaty is its application to war crimes committed during internal armed conflicts. In order to widen acceptance of the application of the statute to war crimes committed during internal armed conflicts, the United States helped broker language that excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.²⁴ 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 worked hard to include explicit reference to crimes relating to sexual assault in the text of the statute. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity were included as crimes.²⁵ The United States was also instrumental in creating acceptable definitions of command responsibility²⁶ and the defense of superior orders.²⁷

As I mentioned earlier, our emphasis on the elements of crimes resulted in Article 9 of the treaty, which requires governments to elaborate on the elements of crime during the PrepCom. Despite some early criticism directed at U.S. motiva-

²³ *Id.* at art. 8(1).

²⁴ *Id.* at art. 8(2)(d).

²⁵ *Id.* at arts. 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi).

²⁶ *Id.* at art. 28 (Responsibilities of commanders and other superiors).

²⁷ *Id.* at art. 33 (Superior orders and prescription of law).

tions, we are pleased that work on the elements paper progressed well during the first session of the PrepCom and that there is now a very good basis for making more progress. We look forward to more constructive and cooperative work with delegations in the months ahead. We trust that early skepticism about the intent behind our draft elements has been put to rest and that serious professional work can now continue in order to complete the work on elements of crimes as soon as possible.

These accomplishments and others in the Rome Treaty are 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 unique security requirements, or our need to uphold basic principles of international law, even if some of 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 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. Yet Article 12²⁸ 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 non-party 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 non-parties in ways that parties are not exposed.

Why is the United States so concerned about the status of non-party states under the ICC treaty? Why not, as many have suggested, simply sign and ratify the treaty and thus eliminate the problem of non-party status? First, fundamental principles of treaty law still matter and we are loath to ignore them with respect to any state's obligations *visa-vi* 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 could have non-party 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.

Equally troubling are the implications of Article 12 for the future willingness of the United States and other governments

²⁸ *Id.* at art. 12 (Preconditions to the exercise of jurisdiction).

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.

In Rome, the U.S. delegation offered various proposals to break the back of the jurisdiction problem. The other permanent members of the Security Council joined us in a compromise formula during the last week of the Rome conference. One of our proposals was to exempt from the court's jurisdiction conduct that arises from the official actions of a nonparty state acknowledged as such by that nonparty. This 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 serious violations of international humanitarian law. Regrettably, our proposed amendments to Article 12 were rejected on the premise that the proposed "take it or leave it" draft of the treaty was so fragile that, if any part were reopened, the conference would fall apart.

The final text of the treaty includes the crime of aggression,²⁹ albeit undefined until a Review Conference seven years after entry into force of the treaty. At that time, state parties to the treaty will determine the meaning of aggression. This political concession, to the most persistent advocates of a crime of aggression without a consensus definition and without the linkage to a prior Security Council determination that an act of aggression has occurred, should concern all of us. The PrepCom is addressing the issue, however, and we hope it will proceed responsibly in the years ahead. If handled poorly, this issue alone could fatally compromise the ICC's future credibility.

I will not belabor the final hours of the conference except to say that it could have been done differently and the outcome might have been far more encouraging. While we firmly believe

²⁹ *Id.* at art. 51(d).

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. 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.

V. OTHER PRIORITIES FOR 1999

President Clinton recently reiterated his support to the Senate for the prompt approval of Protocol II Additional to the Geneva Conventions of 1949, which former President Reagan transmitted to the Senate for advice and consent to ratification in 1987 but which has not been acted upon. President Clinton wrote on January 6th of this year that:

[i]nternal conflicts have been the source of appalling civilian suffering, particularly over the last several decades. Protocol II is aimed specifically at ameliorating the suffering of victims of such internal conflicts and, in particular, is directed at protecting civilians who, as we have witnessed with such horror this very decade, all too often find themselves caught in the crossfire of such conflicts. Indeed, if Protocol II's fundamental rules were observed, many of the worst human tragedies of recent internal armed conflicts would have been avoided. Because the United States traditionally has held a leadership position in matters relating to the law of war, our ratification would help give Protocol II the visibility and respect it deserves and would enhance efforts to further ameliorate the suffering of war's victims- especially, in this case, victims of internal armed conflicts.³⁰

We hope the Senate will be able to act soon on the President's request.

Also on January 6th the President transmitted to the Senate, for its advice and consent to ratification, The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which the United States signed in 1954, and for

³⁰ Office of the Press Secretary, The White House, *Letter to the Senate on Hague Convention and Protocol II*, (letter dated Jan. 6, 1999) (visited Nov. 1, 1999) <<http://www.pub.whitehouse.gov/urires/12R?urn.pdi://oma.eop.gov.us/1991/1/7/3.text.1>>.

accession, the related Hague Protocol.³¹ The wanton destruction of civilian, including cultural, property in modern warfare has not abated. We believe that U.S. ratification of this important treaty, already joined by eighty other countries, will send a strong signal of enforcement to those who wage indiscriminate warfare.

I also want to stress the importance to the United States Government of the Convention on the Safety of United Nations and Associated Personnel, which entered into force on January 15th of this year.³² The United States signed the Convention on December 19, 1994, and has been fully supportive of its goals from the time of its negotiation. We are actively working toward becoming a full party to the treaty.

VI. CONCLUSION

These are all daunting challenges. They underscore the realities of an increasingly interdependent world, where American leadership remains constantly on call. I would like to conclude with President Clinton's emphasis in San Francisco last week about the need for greater U.S. participation in the international arena. The President stated that:

we cannot assume today that globalization alone will wash away the forces of destruction at the dawn of the 21st century, anymore than it did at the dawn of the 20th century. We cannot assume it will bring freedom and prosperity to ordinary citizens around the world who long for them. We cannot assume it will avoid environmental and public health disasters. We cannot assume that because we are now secure, we Americans do not need military strength or alliances, or that because we are prosperous, we are not vulnerable to financial turmoil half a world away.³³

The President continued,

³¹ *See id.*

³² Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, 49 U.N. GAOR, Supp. No 49 at 299, U.N. Doc. A/49/49 (1994).

³³ *See* Office of the Press Secretary, The White House, *Remarks by the President on Foreign Policy*, Grand Hyatt Hotel, San Francisco, Ca., (Remarks made on Feb. 26, 1999) (on file with Pace International Law Review) (visited Nov. 1, 1999) <<http://www.pub.whitehouse.gov/urires/12R?urn:pdi://oma.eop.gov.us/1993/3/1/3.text.1>>.

[t]he world we want to leave our children and grandchildren requires us to make the right choices, and some of them will be difficult. America has always risen to great causes, yet we have a tendency, still, to believe that we can go back to minding our own business when we're done. Today we must embrace the inexorable logic of globalization, that everything, from the strength of our economy to the safety of our cities, to the health of our people, depends on events not only within our borders, but half a world away. We must see the opportunities and dangers of the interdependent world in which we are clearly fated to live.³⁴

³⁴ *Id.*