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# Foreword: Deterrence of War Crimes in the 21st Century

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## ARTICLES

### **THE INTERNATIONAL CRIMINAL TRIBUNAL FOREWORD: DETERRENCE OF WAR CRIMES IN THE 21ST CENTURY**

AMBASSADOR DAVID J. SCHEFFER\*

In my job as U.S. Ambassador at Large for War Crimes Issues, I meet and work with military personnel around the world. They are on the front line of my particular war, the war against atrocities. The U.S. military, for example, has a proud tradition of military justice that has greatly influenced the development of the laws of war since the American civil war. I draw upon that tradition constantly in my own work.

My intention is to focus on three aspects of deterrence of war crimes. 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 ongoing 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.

We deal daily with the horrific handicraft of genocide, of torturers, of butchers, or of poorly trained soldiers who commit unjustified violence against civilians or abuse prisoners of war. Today, 80% of the victims of armed conflicts are civilians. Tidy theories and international conventions on the laws of war seem to mean very little, if they are aware of them at all, to the perpetrators of atrocities. Yet, it is our duty in both the civilian and military chains of command 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

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\* U.S. Ambassador-at-Large for War Crimes Issues. This foreword is excerpted from a presentation given by Ambassador Scheffer at the International Military Operations and Law Conference held in Honolulu, Hawaii on February 23<sup>rd</sup>, 1999.

countless civilians and their means of shelter and livelihood from those whose pursuit of power knows no bounds.

### THE WAR AGAINST CIVILIANS

The challenge of deterring serious violations of international humanitarian law; genocide, crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws and customs of war; in the 21st century first requires that we recognize the problem generated during the 20th century, particularly in its final decades. Conventional warfare has been transformed in our lifetimes. Armed conflict has become increasingly identified not with the clash of armies across sovereign borders, or between “-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 atrocities do not, under such circumstances, bring a keen knowledge of international humanitarian 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.

I just returned from Sierra Leone, which might serve as the paradigm for our inquiry into what would deter war crimes in the next century. The setting is West Africa, far from the beautiful shores of the Pacific Rim. But what is happening in Sierra Leone should serve as a warning of the clear and present danger war crimes pose to civilization in our own time.

While the world's attention has been focused on the massacre last month of 45 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, torture, 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 represents a frac-

tion of the casualties in the two-thirds of Sierra Leone now under rebel control. We have no idea what atrocities are being committed right now throughout most of Sierra Leone, except what the stray refugee can relate. 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 said after performing the mutilations: "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 abducted 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 preteen 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; of funding 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, children high on dope and untrained in civilized military discipline, seems almost surreal; it certainly will 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 much-needed humanitarian relief to the victims. 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 West African peacekeeping force, ECOMOG, is strong enough to prevail against them. ECOMOG, comprised of mostly Nigerian soldiers, necessa-

rily 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 almost \$9 million to support ECOMOG and is looking for additional federal funds. The United Kingdom has provided significant assistance, 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 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 with 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. I stressed to all during my visit to the region that any government that supports the rebels risks becoming a collaborator in the atrocities.

Our responses to the atrocities in Kosovo and Sierra Leone are tests of deterring war crimes in the 21st century. In February, I briefed representatives of many of the member states of the UN Security Council and from Africa about the situation in Sierra Leone in New York. The Security Council is uniquely positioned to evaluate the threat to international peace and security, to encourage support for ECOMOG, and to energize the proposed peace talks. Days earlier, 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 international attention

to 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 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."

President Clinton announced on December 10th, 1998 the establishment of a formal mechanism in the U.S. Government 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, but as head of the inter-agency group working this project, I am determined to craft a permanent working system. The Atrocities Prevention InterAgency 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 every day, 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. We hope to hold a conference in Washington in May where government representatives will be invited to address these issues.

## WAR CRIMES TRIBUNALS

Another test of deterrence is the work of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. As with the Nuremberg and Tokyo international criminal tribunals after World War II, 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, and that 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 27 are in custody in The Hague. Thirty indictees remain at large. Of the original 83 public indictees of the Yugoslav Tribunal, 17 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 35% to a total of \$103 million. This will permit hiring 206 new staff members and a new chamber of judges to handle an increasing 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. 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.

These are hard tests for international justice, but 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. We will continue to do everything we can, and which we have demonstrated 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 UN Detention Facility in Arusha and are standing or facing trial. Of 45 publicly indicted suspects, 36 are now in custody. Nine remain at large. Within the first two weeks of February, 1999, Casimir Bizimungu, the Health Minister during the 1994 genocide, and Eliezer Niyitegeka, the Information Minister in 1994, were arrested in Kenya. Last weekend, Ignace 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. The 1999 budget for the Rwanda Tribunal increased by 44% over the 1998 budget, and now stands at \$75 million. 197 new staff positions are being funded with this increase, as is a new chamber of judges.

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.

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 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 UN 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 Madeleine Albright has often said, 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 towards 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, third-country civilians used as human shields, and U.S. and coalition forces. 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, destroying the unique culture of the Marsh Arabs.

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, but 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 examples of the need for an effective international court were the need to prosecute 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.

#### U.S. POLICY 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. 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 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 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 recently led the U.S. delegation in the critical work of the PrepCom to develop the elements of crimes and the rules of evidence and procedure. The United States has taken the lead in the elements discussions. This summer the PrepCom will afford an opportunity for concerns we and 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, and 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 in 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, many of whose governments are sitting in this room today, 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 (preliminary rulings regarding admissibility), which is drawn originally from an American proposal, and its companion Articles 17 and 19. 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 reasonable guidelines that respect the authority 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 in many other jurisdictions. Part 9 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" or similar language is pragmatic and legally essential for the successful operation of the court.

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: a national government must have the right of final refusal if the request pertains to its national security. 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 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.

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."

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.

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 significant magnitude were included as crimes.

As I mentioned earlier, our emphasis on the elements of crimes resulted in Article 9 of the treaty, which requires their preparation; a task

that governments are now undertaking in New York. We also were instrumental in creating acceptable definitions of command responsibility and the defense of superior orders.

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 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 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 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 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 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 non-parties 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 non-party state acknowledged as such by that non-party. This would require a non-party 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, albeit undefined until a Review Conference seven years after entry into force of the treaty when only the states parties to the treaty at that time 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 Preparatory Commission 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 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.

#### CONCLUSION

In conclusion, the challenges we all confront to deter war crimes in the 21st Century have multiplied in recent years, but so too have the instruments to confront the epidemic of atrocities that bedevils our generation of civilian and military leaders. I would like to leave you with the words of a far wiser diplomat, Under Secretary of State Thomas Pickering, who addressed the cadets at West Point Military Academy on February 10<sup>th</sup>, 1999. Under Secretary Pickering said, "[W]e face serious questions, particularly when military force is used to intervene in an internal conflict. Such questions include whether an alliance must wait until its members' territory is directly attacked or whether it might exercise the use of force as part of preventive diplomacy. Our Allies' interest in intervening in humanitarian crises is also under review," Under Secretary Pickering said, "with some seeking a new standard that would call for the use of force for this purpose. Another potential justification for force would be against rogue states or near-rogue states that use force first, such as Iraq against Kuwait or Milosevic inside Serbia against Kosovo Albanians, in a manner contrary to international legal norms . . . In the midst of these debates, international engagement may look hopelessly complex. But this debate is both healthy and necessary. We have entered a new stage in our history and it is appropriate that we carefully review national interests, resources, and political will, as well as consider the ethical and legal bases for our actions."

