

Staying the Course with the International Criminal Court

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Staying the Course with the International Criminal Court

David J. Scheffer*

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Introduction

The imminent establishment of the International Criminal Court (ICC)¹ has brought into sharp focus many concerns and myths about the treaty regime for the ICC and raised questions about what the United States should do to safeguard its interests and either adjust to the reality of the Court or seek to oppose its creation or operation. As the chief U.S. negotiator for the ICC treaty regime until January 20, 2001, I, for years, have observed and responded to a wide variety of views and hyperbole about

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1. See The CICC International Criminal Court Home Page, at <http://www.iccnw.org> (last visited Feb. 5, 2002) (conveying that there are 139 signatories to the ICC Treaty and that, as of Feb. 5, 2002, fifty-two ratifications have been deposited towards the requisite number of sixty ratifications).

the ICC.² The record needs to be set straight at this critical juncture so that the Executive and Legislative branches of the U.S. government can properly examine the ICC treaty regime and reach informed decisions about how to direct U.S. policy towards the ICC.³ In this Article, I will

2. See generally U.S. Department of State Office of the Ambassador-at-Large for War Crimes Issues: International Criminal Court Remarks, at <http://www.state.gov/www/global/swci/pagecourt.html> (August 31, 1998) [hereinafter ICC Remarks].

3. The American Servicemembers' Protection Act ("ASPA") (also, at times, known as the American Armed Forces Protection Act of 2001 ("AAFPA")) has been an attempt to challenge future U.S. participation in the ICC process. See The American Servicemembers' Protection Act of 2001, H.R. 3338, 107th §§ 9001-9012 (2001) [hereinafter Final ASPA in the Senate]. The initial version of the Act, which was exceptionally punitive in character, appeared in the summer of 2000, with a substantial number of sponsors including, in the U.S. Senate, Senator Jesse Helms and in the U.S. House of Representatives, Representative Tom DeLay. See The American Servicemembers' Protection Act of 2000, S. 2726, 106th Cong. (2000); see also The American Servicemembers' Protection Act of 2000, H.R. 4654, 106th Cong. (2000); The American Servicemembers' Protection Act of 2000: Implications for US Cooperation with the ICC, at <http://www.unusa.org/issues/icc/servicefact.htm> (last visited Jan. 21, 2002). In 2001, the Act (slightly revised) was re-introduced by Representative DeLay in the U.S. House of Representatives on May 8, 2001 and by Senator Helms in the U.S. Senate on May 9, 2001. See Washington Working Group on the International Criminal Court: Helms and DeLay Re-Introduce ASPA, at <http://www.wfa.org/issues/wicc/aspainter.html> (last visited Jan. 21, 2002) [hereinafter Helms and DeLay Re-Introduce ASPA]. The U.S. House of Representatives approved the Act on May 10, 2001, by a vote of 282 to 137, but it thereafter languished in the Senate. See Helms and DeLay Re-Introduce ASPA. ASPA was a piece of domestic legislation that, among its punitive counterpunches, included measures such as cutting off military assistance to pro-ICC governments. It also sought to insulate U.S. military personnel from the Court's reach. See David J. Scheffer, Commentary, *Don't Forfeit the Global Criminal Court*, DEFENSENEWS.COM, May 29, 2001, available at <http://www.wfa.org/issues/wicc/press2001.html#scheffer> [hereinafter DEFENSENEWS OP-ED]; see David J. Scheffer, Statement Before the House International Relations Committee, at http://www.state.gov/www/policy_remarks/2000/000726_scheffer_service.html (July 26, 2000) [hereinafter 2000 House International Relations Committee Testimony]; see also David J. Scheffer, Address at American University: Evolution of U.S. Policy Toward the International Criminal Court, at http://www.state.gov/www/policy_remarks/2000/000914_scheffer_au.html (Sept. 14, 2000) [hereinafter AU Speech] (last visited Jan. 21, 2002). During the fall of 2001, the Bush Administration negotiated further revisions to ASPA that strengthened the President's waiver authority and removed the provision that would have prevented U.S. participation in UN peace operations without a guarantee of non-exposure to ICC jurisdiction for U.S. service members as well as the provision that withheld U.S. military assistance to governments that have ratified the Rome Statute. Compare Helms Revised ASPA Statement, § 1403 (2001), available at <http://www.wfa.org/issues/wicc/revised-aspa.html> with Final ASPA in the Senate, *supra*, § 9003; see Helms Revised ASPA Statement, § 1405; see also Helms Revised ASPA Statement, § 1407(a). But the provision authorizing the use of "all means necessary and appropriate to bring about the release" of any U.S. service member or certain other foreign nationals from ICC custody remained. Compare Helms Revised ASPA Statement, §§ 1408(a)-1408(b) with Final ASPA in the Senate, *supra*, §§ 9006(a)-9006(b). Without any hearings in 2001 by either the Senate Foreign Relations Committee or the Senate Armed Services Committee, Senator Helms attached this latest version of the revised ASPA as an amendment to the Department of Defense Appropriations bill for the Fiscal Year 2002 ("DOD Appropriations bill") in the final hours of the bill's consideration by the Senate. The Helms amendment (albeit apparently containing some definitions for terms that were no longer applicable for the negotiated version being voted on) was adopted by the Senate on a vote of 78 to 21 on December 7, 2001, following the defeat (by a vote of 51-48) of a more moderate amendment introduced by Senator Chris Dodd.

argue for continued American engagement in the negotiations of the Preparatory Commission on the ICC,⁴ for U.S. non-opposition to the evolution and establishment of the ICC, and for U.S. initiatives that would make cooperation with the ICC desirable, protect U.S. interests, and make U.S. ratification of the ICC Treaty more plausible in the future.

The terrorist assaults of September 11, 2001 on the United States⁵ were crimes against humanity⁶ that probably would have fallen within the jurisdiction of the ICC had the Court existed on that date. Nonetheless, the utility of the ICC for future acts of international terrorism that also constitute one of the established crimes of the ICC is apparent and should influence the debate in the United States as to the merits of the Court and American participation in it. The long war against terrorism will be incompatible with any American effort to oppose and dismantle the ICC. If only in its own self-interest, the United States will want to collaborate with its

See Final ASPA in the Senate, *supra*, §§ 9001-9012 (2001); see also 147 Cong. Rec. S12612-S12628 (Dec. 7, 2001) (displaying the congressional debate regarding the Helms and Dodd proposed amendments to the DOD Appropriations bill). In conference committee, however, the Senate receded to the ICC-related amendment that had been sponsored by Representative Henry Hyde in the House version of the DOD Appropriations bill. The Hyde amendment requires that “[n]one of the funds made available in Division A of this Act may be used to provide support or other assistance to the International Criminal Court or to any criminal investigation or other prosecutorial activity of the International Criminal Court.” See 147 Cong. Rec. H8547 (daily ed. Nov. 28, 2001). The Hyde amendment applies only to Defense Department funding and is limited to Fiscal Year 2002. The Helms amendment was not so limited in its scope. By receding to the House, the Senate essentially dropped the Helms amendment and replaced it with the Hyde amendment. On December 20, 2001, the Senate and the House of Representatives approved the DOD Appropriations bill with the Hyde amendment and without the Helms amendment. See Bill Summary and Status for the 107th Congress, H.R. 3338, available at http://@_@L&summ2=m& (last visited Jan. 21, 2002). President Bush signed the DOD Appropriations bill into law on January 10, 2002. See *Bush Signs Defense Spending Bill*, N.Y. TIMES, Jan. 11, 2002, available at <http://www.nytimes.com/aponline/national/AP-Bush-Military.html>.

4. See generally Rome Statute of the International Criminal Court; Preparatory Commission for the International Criminal Court (“PrepCom”), at <http://www.un.org/law/icc/prepcomm/prepfra.htm> (last visited Oct. 23, 2001).

5. See Guy Gugliotta, N.Y. *Skyscrapers Collapse After Hijacked Planes Hit*, WASH. POST, Sept. 11, 2001 (late ed.), at A1; see also Matea Gold & Maggie Farley, *America Attacked; Strike Against the Nation; Terrorists Attack New York, Pentagon*, L.A. TIMES, Sept. 12, 2001, at A1.

6. The terrorist attacks of September 11, 2001, would appear to meet the criteria for crimes against humanity, in that they constituted murder that appears to have been committed as part of a widespread or systematic attack directed against a civilian population, and presumably with knowledge of the attack by the perpetrators and their presumed conspirators. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), art. 7, reprinted in 37 I.L.M. 999 (1998), available at <http://www.iccnw.org/html/icc19990712.html> [hereinafter ICC Statute]; see also Frederic L. Kirgis, *Terrorist Attacks on the World Trade Center and the Pentagon*, AM. SOC. INT’L LAW NEWSLETTER (ASIL, Wash., D.C.), Sept.-Oct. 2001, at 11; Mary Robinson, Statement at the International Conference on Human Rights and Democratization, at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/> (Oct. 8, 2001) (“In the aftermath of the catastrophe of 11 September the human rights voice must be heard. The thousands of civilians who died in this atrocity lost the most precious of rights, the right to life. Those responsible for these cruel deaths must be made individually accountable for the crimes against humanity they perpetrated.”).

allies and friends around the world and explore the utility of the ICC as a potent judicial weapon in the war against terrorism.⁷

The continuing atrocities of our time and the reasonable expectation that new international crimes of great magnitude will occur led to deliberations throughout most of the 1990's concerning the creation of a permanent International Criminal Court that would be both a readily available judicial forum for enforcement and a deterrent to the commission of further heinous crimes. The idea of a permanent Court was not new,⁸ but its implementation gained unprecedented support during the last decade of the twentieth century. The establishment and trial work of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda demonstrated the utility of separate international courts for specific crimes committed in two different regions of the world.⁹ Additional ad hoc courts were negotiated and are being established either at the international or national level to adjudicate international crimes committed in Cambodia during the Pol Pot regime of 1975-79,¹⁰ in Sierra Leone from 1996 to the

7. The United States expressed serious reservations about the inclusion of crimes of international terrorism and drug-trafficking in the ICC Treaty, speculating that a court of this nature would not be able to investigate complex terrorist cases as precisely as national governments do and that if such cases are drawn within the ICC's jurisdiction there would be an investigative overload. See *Comments of the United States of America Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, Report of the Secretary-General*, at 10-13, U.N. Doc. A/AC.244/1/Add.2 (1995) [hereinafter *1995 Report*]. During the deliberations [w]e said that while we had an open mind about future consideration of crimes of terrorism and drug crimes, we did not believe that including them will assist in the fight against these two evil crimes. To the contrary, conferring jurisdiction on the Court could undermine essential national and transnational efforts, and actually hamper the effective fight against these crimes. The problem, we said, was not prosecution, but rather investigation.

Id.; *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcom. on Int'l Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 10, 15 (1998) (statement of David Scheffer, Ambassador-At-Large for War Crimes Issues, U.S. Dept. of State) [hereinafter *1998 Testimony Before the Senate Foreign Relations Committee*]. The U.S. view, however, did not deny the possibility that a crime of terrorism could also qualify as a crime against humanity, a war crime, or genocide and thus fall within the ICC's subject matter jurisdiction.

8. See CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 3 (1998) [hereinafter BASSIOUNI, *DOCUMENTARY HISTORY*] ("Since the end of World War I (1919), the world community has sought to establish a permanent international criminal court.").

9. See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 8-9 (2001) (describing the impact that the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have had in post-conflict contexts and how international criminal justice, embodied in these two institutions, has "preventative potential"). See generally *The International Criminal Tribunal for the former Yugoslavia*, at <http://www.un.org/icty/index.html> (last visited Feb. 6, 2002); *The International Criminal Tribunal for Rwanda*, at <http://www.icttr.org/> (last visited Feb. 6, 2002).

10. See G.A. Res. 52/135, U.N. GAOR, 52nd Sess., at 2, U.N. Doc. A/52/644/Add.2 (1997), available at <http://www.un.org/ga/documents/gares52/res52135.htm> (requesting that the UN Secretary-General and the Cambodian government work together in order to address past serious violations of Cambodian and international law); see also Report of the Group of Experts for Cambodia Established Pursuant to General Assembly

present,¹¹ and in East Timor in 1999.¹²

The fundamental reason for these courts is the international community's resolve and potential to respond to the international crimes of genocide, crimes against humanity, and war crimes and ensure that the leading perpetrators of these crimes are brought to justice. The world has changed within a relatively short number of years. With the end of the Cold War and the growing number of democracies and pluralistic societies committed to the advancement of human rights and the rule of law,¹³ it simply is no longer tenable either among democratically elected political leaders or among the publics they serve to tolerate impunity for the commission of such international crimes. The victims of international crimes voice a much stronger determination to see that justice is rendered. Civil society has mobilized to support victims, investigate international crimes, and pressure governments and international organizations to react effectively. Where the will exists within the international community, there is enormous pressure to find the means to fulfill that political and societal resolve in favor of justice.

There are many different mechanisms that the international community is exploring and using to respond to genocide, crimes against human-

Resolution 52/135, at 21-32 (1999), available at <http://www1.umn.edu/humanrts/cambodia-1999.html> (recommending various means through which members of the Pol Pot regime could be held criminally responsible: domestic trials, a tribunal under Cambodia law, a United Nations tribunal, and a Cambodian tribunal under United Nations administration); *Cambodian King Approves Khmer Rouge trial law*, CNN, Aug. 10, 2001, at <http://www.cnn.com/2001/WORLD/asiapcf/southeast/08/10/cambodia.king/index.html> (discussing the Cambodian king's ratification of domestic legislation establishing a UN assisted tribunal for the prosecution of Khmer Rouge leaders).

11. See S.C. Res. 1315, U.N. SCOR, 55th Sess., at 2, U.N. Doc. S/RES/1315 (2000) (requesting that the UN Secretary General issue a report concerning the establishment of a special court in order to prosecute perpetrators in Sierra Leone); see also *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, at 13, U.N. Doc. S/2000/915 (2000) (delineating the legal framework and requisite administrative elements for the establishment of a Sierra Leonean special court); S.C. Res. 1370, U.N. SCOR, 56th Sess., at 3, U.N. Doc. S/RES/1370 (2001) (encouraging the Secretary-General, the government of Sierra Leone and others involved "to expedite the establishment of . . . the Special Court envisaged by resolution 1315 (2000) of 14 August 2000").

12. See Reg. 2000/15, U.N. Transitional Administration in East Timor, at 1, U.N. Doc. UNTAET/REG/2000/15 (2000), available at <http://www.un.org/peace/etimor/untactR/Reg0015E.pdf> (establishing a special panel of judges to address serious criminal offences committed in East Timor).

13. See Press Release, Freedom House, *Democracy's Century; A Survey of Global Political Change in the 20th Century*, at 1, at <http://www.freedomhouse.org/reports/century.html> (Dec. 7, 1999) ("The findings herein [this report] are significant. They show a dramatic expansion of democratic governance over the course of the century. . . . They reinforce the conclusion that humankind, in fits and starts, is rejecting oppression and opting for greater openness and freedom."); see also *Freedom in the World; Tables and Charts; Tracking Democracy*, at 1 (2001), at <http://www.freedomhouse.org/research/freeworld/2001/tracking.htm> (last visited Feb. 6, 2002) (explaining that between 1995 and 1996 the total number of democracies was 117 and that between 2000 and 2001 that number grew to 120).

ity, and war crimes.¹⁴ The mechanisms include international courts, national courts, truth and reconciliation commissions, historical commissions, and other means of transitional justice.¹⁵ No one mechanism is adequate to the task; all of them will be used in the years ahead depending on the circumstances surrounding particular atrocity crimes and the desires of victims and governments about how to address them.

The permanent International Criminal Court is needed at one extreme of this spectrum of mechanisms: where individuals in leadership positions need to face criminal accountability for their participation in atrocity crimes (committed after the establishment of the ICC) and relevant national courts have not met their responsibility to investigate and prosecute such leaders. There can no longer be the gap in the international system that has existed in the past; namely, the possibility that an individual in a leadership position of significant political character or military or paramilitary or police rank can plan or otherwise participate in the commission of atrocity crimes and yet enjoy virtual impunity. Internationally, that possibility is no longer tolerable even though it may well exist for some time to come before the rule of law and its enforcement takes hold through a combination of international and national efforts. The tide is turning against unqualified arguments that would have the "act of state doctrine"¹⁶ shielding the commission of atrocities by individual leaders, or the protections of "head of state immunity"¹⁷ or "diplomatic immunity"¹⁸ permanently absolving leaders of criminal responsibility and accountability for atrocity crimes.¹⁹ The notion that political imperatives immunize any indi-

14. For the purposes of this Article, I will refer to these international crimes as "atrocity crimes," a term that I more fully define, explain and defend elsewhere in a forthcoming book.

15. See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 6 (2000) (discussing the various roles that the law assumes during a period of political transition: punishment, historical inquiry, reparations, purges, and constitution making); see also DOROTHY C. SHEA, *THE SOUTH AFRICAN TRUTH COMMISSION: THE POLITICS OF RECONCILIATION* 5 (2000). Shea describes the South African Truth and Reconciliation Commission (TRC) as:

the most ambitious truth commission to date, with a mandate that includes taking measures to restore dignity to victims and granting amnesty to eligible perpetrators of gross human rights violations, in addition to establishing as complete a picture as possible of the nature, causes, and extent of gross human rights violations that took place inside and outside of South Africa's borders between 1960 to 1994.

Id. See generally 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* xxi-xxvii (Neil J. Kritz ed., 1995) (enumerating the various legal options that transitional governments are presented with such as criminal sanctions, administrative sanctions, truth commissions, and means of compensation, restitution and rehabilitation for affected victims).

16. See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 443 (1986).

17. See *id.* § 451.

18. See *id.* § 464.

19. The trend to deprive heads of state of their immunity against criminal prosecution gained momentum with the decision issued by England's House of Lords against former Chilean Dictator Augusto Pinochet. See *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, reprinted in 37 *I.L.M.* 1302 (1998); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, reprinted in 38 *I.L.M.* 581 (1999); Naomi Roht-Arriaza, *The Pinochet*

vidual from criminal law with respect to the worst possible crimes directed against humankind is quickly losing credibility, and no democratic government – certainly not the United States of America – could champion such impunity and remain true to the fundamental governing principles of a modern civilized society.

Some American commentary and Congressional activity derive from the presumption that somehow the ICC is a threat to national interests, that the United States can prevent it from being established and, whether or not it is created, wage a virtual war against the Court and thus deny it legitimacy and effectiveness.²⁰ This is a dangerous, futile, and indeed embarrassing presumption. Some of the criticism overlooks the totality of the treaty regime, namely the Statute and all of the supplemental documents being negotiated and finalized in the Preparatory Commission. Narrow-minded analyses that only examine the ICC Treaty and ignore the supplemental documents can be greatly misleading and simply erroneous. For the United States to position itself as the enemy of the rule of law

Precedent and Universal Jurisdiction, 35 NEW ENG. L. REV. 311, 312 (2001) (In “[t]he two House of Lords [Pinochet] decisions . . . the court held that there was no former head-of-state immunity for certain international crimes, including torture.”); Reed Brody, *The Prosecution of Hissene Habre - An “African Pinochet”*, 35 NEW ENG. L. REV. 321, 333-34 (2001) (analyzing the initiation of proceedings against former Chadian Dictator Hissene Habre for human rights violations and designating it as the first continuing case to apply the “Pinochet precedent” on the African continent where a nation has brought charges against another nation’s head of state).

20. Upon U.S. signature of the ICC Treaty, Senator Jesse Helms, chairman of the Senate Foreign Relations Committee, declared: “This decision will not stand. I will make reversing this decision, and protecting America’s fighting men and women from the jurisdiction of this international kangaroo court, one of my highest priorities in the new Congress.” Helms Press Release on Clinton Signature, at <http://www.wfa.org/issues/wicc/helmsrel.html> (Dec. 31, 2000); see also Thomas E. Ricks, *U.S. Signs Treaty for Court On War Crimes; Foes Say Tribunal Could Override Americans’ Constitutional Rights*, S.F. CHRON., Jan. 1, 2001, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=chronicle/archive/2001/01/01/MN133236.DTL>. Criticism of the ICC continued throughout the Congressional debate regarding the proposal of ASPA. See 107 CONG. REC. H2118 (daily ed. May 10, 2001) (statement of Representative DeLay), available at <http://www.wfa.org/issues/wicc/aspacenter.html>. Some commentators and scholars also joined in the criticisms. See John Bolton, *Speech Two: Reject and Oppose the International Criminal Court*, in TOWARD AN INTERNATIONAL CRIMINAL COURT? THREE OPTIONS PRESENTED AS PRESIDENTIAL SPEECHES 37-52 (Alton Frye ed., 1999) (attacking the legitimacy of the ICC and the Prosecutor, stating that the Court’s authority is vague and excessively elastic, criticizing the lack of clarity in defining the crimes included in the ICC Statute, mentioning that the ICC poses a threat to U.S. military leaders and top government officials, warning that the Court carries an enormous risk of becoming politicized, emphasizing that the ICC weakens the UN Security Council’s role, and arguing that the notion of complementarity – proposed by ICC supporters to mean that the international Court will pay deference to national courts – actually stands against the creation of the ICC); see also Jeremy Rabkin, *A Dangerous Court*, WALL ST. J., Jan. 3, 2001, at 14, available at <http://delphi-s.dia.smil.mil/admin/EARLYBIRD/010103/e20010103dangerous.htm> (calling the U.S. signature of the ICC Treaty “a betrayal of American interests”); Stephen D. Krasner, *A World Court That Could Backfire*, N.Y. TIMES, Jan. 15, 2001 (late ed.), at A15 (“The fundamental problem with the International Criminal Court is not that it may lead to the prosecution of American servicemen, although this could happen, but that courts are the wrong instrument for dealing with large-scale war, devastation, destruction and crimes against humanity.”).

would be a remarkable reversal of American international law enforcement policy sustained throughout the 20th century. In fact, the consequences for U.S. national interests in pursuing a rejectionist strategy of the ICC would be exceptionally negative and far-ranging. This is particularly so in the wake of the September 11, 2001, terrorist attacks on the United States and the creation of an anti-terrorism coalition under U.S. leadership.²¹

While in government service, I frequently raised concerns about specific issues relating to the ICC and challenged negotiators to improve the treaty regime.²² But those statements should not be interpreted as opposition to the Court itself, particularly by critics of the ICC who now sometimes take them out of context.²³ As I often said on behalf of the Clinton Administration, the world needs a permanent International Criminal Court and the United States needs to keep working diligently as a faithful

21. See Larry Sequist, *In New War, Innovation is Needed*, CHRISTIAN SCI. MONITOR, Oct. 9, 2001, at 1, available at <http://www.csmonitor.com/2001/1009/p11s1-coop.html> ("The United States is leading an international campaign both to root out terrorist networks and to cut off their sources of support.").

22. See David J. Scheffer, Address Before the Carter Center, Atlanta, Georgia, at http://www.state.gov/www/policy_remarks/971113_scheffer_tribunal.html (Nov. 13, 1997) [hereinafter Carter Center Address] (anticipating issues such as defining clear principles of international criminal law within the ICC Treaty, ensuring that the permanent International Criminal Court does not replace national courts in handling everyday cases, limiting the independent Prosecutor's power, and confirming an essential role for the UN Security Council); see also David J. Scheffer, Address Before the Southern California Working Group on the International Criminal Court, at http://www.state.gov/www/policy_remarks/1998/980226_scheffer_hum_law.html (Feb. 26, 1998) [hereinafter Address Before the Southern California Working Group on the ICC] (delineating concerns such as the compatibility of the Security Council with the future ICC, complementarity between the jurisdiction of the ICC and the jurisdiction of domestic courts, the role of the ICC Prosecutor, and other administrative elements of the Court); David J. Scheffer, Address Before the Committee of Conscience, 5-10, at http://www.state.gov/www/policy_remarks/1998/980422_scheffer_genocide.html (Apr. 22, 1998) (discussing the major issues that remained unresolved at the end of the March-April 1998 ICC Preparatory Commission session: complementarity, notice by public announcement when a referral to the ICC occurs, the ability of the Security Council to refer armed conflicts or atrocities to the ICC, the avoidance of politicizing the ICC, and the protection of members of the U.S. Armed Forces from unjustified exposure to criminal legal proceedings); David J. Scheffer, Statement on the Status of Negotiations, at http://www.state.gov/www/policy_remarks/1998/980715_scheffer_icc.html (July 15, 1998); David J. Scheffer, Statement on Creating an International Criminal Court, at http://www.state.gov/www/policy_remarks/1998/980831_scheffer_icc.html (Aug. 31, 1998) (explaining the remaining flaws in the ICC Treaty at the end of the Rome Conference); David J. Scheffer, Remarks Before the 6th Committee of the 53rd General Assembly, at http://www.state.gov/www/policy_remarks/1998/981021_scheffer_icc.html (Oct. 21, 1998) [hereinafter 1998 Speech Before the UNGA 6th Committee] (enumerating the reasons as to why the United States was not going to sign the ICC Treaty in its then present form); David J. Scheffer, Twelfth Annual U.S. Pacific Command International Military Operations and Law Conference, 7-11 (Feb. 23, 1999), at http://www.state.gov/www/policy_remarks/1999/990223_scheffer_hawaii.html.

23. See Final ASPA in the Senate, *supra* note 3, § 9002(4)-(5) (taking portions of Amb. Scheffer's testimony before Congress on July 23, 1998, delivered prior to further developments in the negotiations, out of context in order to embellish the anti-ICC nature of the ASPA bill).

negotiator to ensure that the best possible court is established.²⁴ The United States became a signatory State to achieve that objective.²⁵

In this Article, I will seek to clarify many of the concerns that the Clinton Administration raised about the ICC, respond to some of the criticisms and myths that have been advanced about the Court, and propose steps that the United States could take to protect its interests and strengthen the universality and effectiveness of the ICC. The Article is divided into four sections. Section I explains the rationale for President Bill Clinton's decision on December 31, 2000 to authorize signature of the Rome Statute of the International Criminal Court. Section II describes the evolution of the major U.S. concern over personal jurisdiction prior to and at the Rome Conference, how that concern and other concerns were resolved, or otherwise addressed, in the Treaty or its supplemental documents, and what concerns remained unresolved on December 31, 2000. Section III summarizes the more prominent safeguards in the ICC Treaty regime available to U.S. personnel and those additional safeguards that would be available if the United States were to ratify the Treaty. Section IV proposes further initiatives that could be undertaken either in the negotiations of the Preparatory Commission of the ICC or unilaterally by the United States to protect American interests and improve the prospects for U.S. cooperation with the ICC and ultimate U.S. ratification of the Treaty.

I. Why the United States Signed the Rome Statute

After nearly eight long years of work on proposals for an International Criminal Court,²⁶ the Clinton Administration had to decide no later than December 31, 2000, whether the United States would sign the proposal

24. See Carter Center Address, *supra* note 22, at 4 ("We are confident that, with an acceptable outcome to the negotiations and ultimately with the support of the U.S. Senate, we will see a permanent international criminal court with strong U.S. participation by the end of this century."); see also Address Before the Southern California Working Group on the ICC, *supra* note 22, at 5.

Let me emphasize, too, this Administration's strong support for the creation of a permanent international criminal court. We want it to be a fair, effective, and efficient court and a court that we can support - just as we have provided essential support to the Yugoslav and Rwanda war crimes tribunals both during their creation and continuing through the present.

Id.; see also David J. Scheffer, Remarks, Centre for Human Rights, University of Pretoria; The Global Challenge of Establishing Accountability for Crimes Against Humanity 8 (Aug. 22, 2000), at http://www.state.gov/www/policy_remarks/2000/000822_sheffer_pretoria.html ("[T]he United States can be a good neighbor to the International Criminal Court regardless of whether we achieve party status or not in the near future.").

25. See CICC: Country-by-Country Ratification Status Report, at <http://www.iccnw.org/html/country.html#u> (last visited Feb. 6, 2002) [hereinafter Country-by-Country Ratification Status Report].

26. This process began in early 1993 with the International Law Commission's ("ILC") work on a draft statute and continued through the completion of the ILC Draft, the Ad Hoc Committee of 1995, the Preparatory Committee in 1996-1998, the Rome Conference, and the Preparatory Commission of 1999-2000. See *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) [hereinafter *ILC Report*]. See generally Prepara-

that prevailed, namely, the Rome Statute of the International Criminal Court (the "ICC Treaty").²⁷ Article 125(1) of the Statute established that date as the last possible day for signature,²⁸ following which a state would have to accede to the Statute in order to become a party to it.²⁹ In the Fall of 2000, following the significant adoption by consensus of the Elements of Crimes³⁰ and the Rules of Procedure and Evidence³¹ at the June session of the Preparatory Commission,³² I began to explore the merits of a signature strategy for the United States. The Elements of Crimes and the Rules of Procedure and Evidence had been pillars of the U.S. negotiating position prior to and during the Rome Conference. They only exist in the treaty regime because of U.S. advocacy, which overcame stiff opposition from other governments.³³ Therefore, their adoption on June 30, 2000, was no small achievement. It is noteworthy that some critics of the ICC Treaty

tory Commission for the International Criminal Court, at <http://www.un.org/law/icc/index.html> (last visited Feb. 6, 2002).

27. See *Clinton Endorses War Crimes Treaty with Reservations*, ST. LOUIS POST-DISPATCH, Jan. 1, 2001, available at <http://www.postnet.com/postnet/stories.nsf/ByDo.../4345EC6A31C5FBE0862569C7002ACAB> ("Acting at the last moment, President Bill Clinton on Sunday [Dec. 31, 2000] authorized the United States to sign a treaty establishing the world's first permanent international war crimes tribunal.")

28. See ICC Statute, *supra* note 6, art. 125(1).

This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at the United Nations Headquarters, until 31 December 2000.

Id.

29. See ICC Statute, *supra* note 6, art. 125(3) ("This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.")

30. See *generally Report of the Preparatory Commission for the International Criminal Court; Addendum: Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000), available at <http://www.iccnw.org/html/u.n..html> [hereinafter *ICC Elements of Crimes*]; THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 3-231 (Roy S. Lee ed., 2001) [hereinafter *LEE, ICC ELEMENTS AND RULES*].

31. See *generally Report of the Preparatory Commission for the International Criminal Court; Addendum: Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/INF/3/Add.1 (2000), available at <http://www.iccnw.org/html/u.n..html> [hereinafter *ICC Rules of Procedure and Evidence*]; *LEE, ICC ELEMENTS AND RULES*, *supra* note 30, at 235-702.

32. See *Report of the Preparatory Commission for the International Criminal Court*, U.N. Doc. PCNICC/2000/INF/3 (2000), at 3, available at <http://www.iccnw.org/html/u.n..html> (describing how the PrepCom adopted the Rules of Procedure and Evidence and the Elements of Crimes for the ICC on June 30, 2000).

33. See William Lietzau, *A General Introduction to The General Introduction: Animating Principles Behind the International Criminal Court's Elements of Crimes* (on file with *Cornell International Law Journal*).

[T]he United States was . . . the clear and almost singular proponent of an Elements of Crimes document for the International Criminal Court Statute. Moreover, equally relevant, though probably less openly admitted, is the fact that the United States is the only state to have attended each and every drafting and negotiating session that formulated the text currently found in the document.

continue to ignore these documents in their critiques.³⁴

I believed there was merit in signature provided we could emerge from the November/December 2000 Preparatory Commission session with enough progress to make a credible case for signature. Our March 2000 proposal previously floated with governments was not succeeding. It had become utterly unrealistic to believe that the United States would obtain support, much less the necessary consensus, for the silver bullet of guaranteed 100 percent protection for U.S. service members (particularly while the United States remained a non-State Party) that had so long been a primary objective of the U.S. delegation.

There remained considerable opposition to signature from certain Members of Congress and from within the Executive Branch. U.S. officials, including myself, had repeatedly confirmed that the United States would not sign the “present text” of the ICC Treaty and, as time elapsed after the Rome Conference, that there was no decision “at this time” to sign the Treaty.³⁵ No U.S. official publicly stated with any authorization that the United States would *never* sign the Rome Statute. Nor, when briefing Congressional staffers, did I ever foreclose the possibility of signature. That is a Presidential prerogative that must not be denied unless the President himself has so instructed it, which President Clinton never did. Until the tide turned in December 2000, I stated that Secretary of State Madeleine Albright had not reached her own decision on the matter and that, in any event, I saw little if any support within the Clinton Administration for signature. When asked by Congressional staffers whether I personally would recommend signature, I responded that it would depend on the outcome of the November/December 2000 Preparatory Commission session and that I would need to consult more thoroughly with Secretary Albright to ascertain her views before reaching my own final judgment. But I noted that there are advantages to signature and I explained those advantages in my briefings to Congressional staffers. No Member of Congress requested a personal briefing from me on the ICC between June 30, 2000, and December 31, 2000, but I testified twice on Capitol Hill during that period about the ICC and the ASPA of 2000: on July 26, 2000 before the House International Relations Committee³⁶ and again on September 15, 2000 before the

Id.

34. Jimmy Gurulé, *United States Opposition To The 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1 (Nov. 2001-Feb. 2002).

35. See 1998 Speech Before the UNGA 6th Committee, *supra* note 22, at 3 (“Mr. Chairman, having considered the matter with great care, the United States will not sign the Treaty in its present form. Nor is there any prospect of our signing the present treaty text in the future.”); see also 1998 Testimony Before the Senate Foreign Relations Committee, *supra* note 7, at 12 (explaining the reasons as to why the United States could not accept the final draft of the ICC Statute that emerged at the end of the Rome Conference on July 17, 1998).

36. See 2000 House International Relations Committee Testimony, *supra* note 3.

Congressional Human Rights Caucus.³⁷

As December 2000 approached, I became increasingly persuaded that six major arguments elucidated the merits of a U.S. signature of the ICC Treaty:

1. U.S. signature would sustain and greatly increase our influence in on-going negotiations of the Preparatory Commission regarding key supplemental documents for the ICC, including the definition of the crime of aggression and how it is triggered, the financial regulations, the first-year budget, the rules of the Assembly of States Parties, the Relationship Agreement between the United Nations and the ICC, the Agreement on Privileges and Immunities, and the Headquarters Agreement. Signature would give the United States additional leverage to negotiate whatever proposals the United States develops for the supplemental documents that are specifically oriented toward protection of U.S. service members. The United States also would be in a much stronger position to influence the entire establishment of the ICC and the decision-making within the Assembly of States Parties, even if the United States is not one of the first sixty governments to ratify the ICC Treaty. States Parties would be far more receptive to U.S. views, knowing that U.S. ratification may be on the horizon and that the pace or prospect of U.S. ratification will depend in part on the decisions made in the Assembly of States Parties.

2. The attitude of judges, prosecutors, and other staff of the ICC towards the United States and its official personnel would be more positive if the United States is a signatory than if the United States is either not a signatory or opposed to the ICC Treaty. This is a critical factor in protecting U.S. interests and discouraging legal action against U.S. personnel. The same principle applies to many other governments that would hesitate to initiate actions against U.S. personnel if the United States is a signatory moving towards ratification. Any such action against U.S. personnel might derail U.S. ratification – a consequence that would not be in the interest of most States Parties. If the United States were to ratify the Rome Statute, the United States would be obligated to pay its fair share of the ICC budget, thus diminishing the costs paid (in some cases substantially) by other States Parties.

3. As a signatory, the United States would have more influence as an observer to the Assembly of States Parties prior to any possible status as a ratified State Party.

4. As a signatory, the United States would sustain its leadership on international justice issues. That leadership is critical in order to continue to pursue non-ICC criminal justice initiatives in regions around the world. U.S. advocacy of ad hoc international criminal tribunals, established either by the United Nations Security Council or through special treaty arrangements, would suffer if the United States opposed the most popular interna-

37. See David J. Scheffer, Statement Before the Congressional Human Rights Caucus (Sept. 15, 2000), at http://www.state.gov/www/policy_remarks/2000/000915_scheffer_hrcaucus.html.

tional tribunal for criminal prosecution, namely the ICC. As a non-signatory, U.S. credibility to pursue ad hoc initiatives would rapidly decline.³⁸

5. U.S. signature would greatly facilitate work on ratification of the Rome Statute at the appropriate time in the future. It also would stimulate the necessary revision of federal criminal law³⁹ and the Uniform Code of Military Justice⁴⁰ so as to take full advantage of the principle of complementarity.

6. U.S. signature should improve prospects for negotiating Article 98(2) bilateral and multilateral agreements with other governments,⁴¹ particularly other signatory States, and possibly with the ICC itself for the purpose of preventing the surrender of U.S. citizens or service members to the Court without prior U.S. consent.

Thus U.S. interests would be best protected, and served, by becoming a signatory of the ICC Treaty rather than remaining a non-signatory and losing the leverage and influence that signature would afford the United States. The only reason to have remained a non-signatory and perhaps even try to undermine the ICC Treaty would have been that we had opposed the creation of the Court and believed opposition would have been practical and in the interests of the United States – views never accepted by the Clinton Administration in the past and increasingly implausible as expiration of the signature option fast approached.

During the November/December 2000 session of the Preparatory Commission, there was no closure on the primary U.S. concern regarding the exposure of non-State Party nationals. But an initiative was launched that promised considerable further protection for U.S. citizens both while the United States remained a non-State Party and in the event it were to ratify the ICC Treaty and become a State Party. Several close allies proposed that the United States would fare better in the negotiations if we focused on complementarity and worked the margins of that principle to protect our interests. With no authority to commit the United States to signature of the Treaty, I could not press hard for concessions from others. I had nothing to offer in return for a U.S.-friendly proposal. Nonetheless, after days of consultations and drafting, wording emerged that used the

38. This fact is particularly true now in the aftermath of the September 11, 2001 terrorist attacks on the United States.

39. Certain sections of Title 18 of the United States Code should be revised as soon as possible as a matter of national interest. See generally Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421, 428-35 (2001).

40. See generally *Uniform Code of Military Justice*, in MANUAL FOR COURT-MARTIAL UNITED STATES, Appendix 2, at A2-1-A2-35 (2000); Cassel, *supra* note 39, at 428-35.

41. See ICC Statute, *supra* note 6, art. 98(2).

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Id.

complementarity principle in a manner fully consistent with the Treaty itself.

The U.S. proposal for incorporation in the Relationship Agreement between the United Nations and the ICC sought to activate an admissibility review at the critical moment when a suspect is about to be surrendered to the Court.⁴² Article 19(1) of the Statute states: "The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with Article 17."⁴³ If the United States could be assured that there would be a further determination of admissibility of a case against an American service member just prior to the planned surrender of that suspect to the Court, then an additional protection under the principle of complementarity will have been joined with the other protections already present in the Statute and Rules of Procedure and Evidence.

The prospects of a sequential collapse of U.S. efforts to maintain control over a case involving a U.S. citizen would be exceptionally remote to begin with, but that is precisely what the critics of the Court are most concerned about in their worst-case scenarios.⁴⁴ One would have to imagine the United States *not* using its authority under Article 18(2) of the Statute to seize complete control of any investigation of a situation involving U.S. citizens,⁴⁵ or of the United States *not* using its authority under Article 18(4) to appeal an adverse ruling of the Pre-Trial Chamber to the Appeals Chamber,⁴⁶ or of the United States *not* using its authority under Article 19(2)(b) to challenge the admissibility of the case⁴⁷ on the grounds of addi-

42. See generally Working Group on a Relationship Agreement Between the United Nations and the International Criminal Court, Proposal Submitted by the United States of America, U.N. Doc. PCNICC/2000/WGICC-UN/DP.17 (2000) [hereinafter U.S. Proposal PCNICC/2000/WGICC-UN/DP.17].

43. See ICC Statute, *supra* note 6, art. 19(1).

44. Gurulé, *supra* note 34, at 30-40.

45. See ICC Statute, *supra* note 6, art. 18(2).

Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

Id.

46. See *id.* art. 18(4) ("The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance to Article 82. The appeal may be heard on an expedited basis.").

47. See *id.* art. 19(2)(b).

Challenges to the admissibility of a case on the grounds referred to in Article 17 or challenges to the jurisdiction of the Court may be made by: . . .

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted . . .

tional significant facts or significant change of circumstances⁴⁸ in order to create the worst case scenario where the judges simply defy all U.S. efforts to handle any particular case over which the United States has jurisdiction and suffer the consequences for the Court's future effectiveness and viability that such defiance may trigger.

Despite these complementarity protections, the U.S. delegation sought to add one more protection that would be consistent with the ICC Treaty and thus mute criticism that the United States was trying to amend the Statute to protect its soldiers. Several U.S. allies worked with us to shape a proposal that keyed off of Article 19(1).⁴⁹ The proposal emerged with the following language:

In order to encourage contributions by States to promote international peace and security, and unless there has been a referral to the Court pursuant to article 13(b) of the Statute, the United Nations and the Court agree that 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 suspect who is charged in such case with a crime that occurred outside the territory of the suspect's State of nationality.⁵⁰

In presenting this proposal to the Preparatory Commission on December 7, 2000, I emphasized the utility of the proposal for states contributing forces to international military operations where the presumption typically holds that investigation of alleged crimes of the character found in the Statute by the soldiers of contributing States should be investigated initially by the respective contributing State. It is in the interest of each contributing State to exercise its rights under the complementarity regime, and to be assured that the Court is satisfied that admissibility requirements have been strictly met before a soldier is surrendered to the Court. It also is in the interest of the United Nations and the future of UN peacekeeping and peace enforcement operations for this kind of assurance to be embedded in the ICC Statute. That is why the proposal was so germane to the UN-ICC Relationship Agreement. My statement before the Preparatory Commission read in part as follows:

There are numerous provisions in the Relationship Agreement that describe the need for cooperation between the United Nations and the Court. This proposal joins that list of provisions.

States that are contributing to UN peacekeeping operations or other necessary international missions outside their own borders will be encouraged to continue making such contributions if they know that any case brought against their personnel in the ICC is indeed an admissible case. Acting strictly in accordance with the provisions of the ICC Statute, the Court has the authority to ensure that admissibility indeed is examined. The Statute's preamble emphasizes the importance of complementarity, and

Id.

48. *See id.* art. 18(7) ("A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under Article 19 on the grounds of additional significant facts or significant change of circumstances.")

49. *See id.* art. 19(1).

50. *See* U.S. Proposal PCNICC/2000/WGICC-UN/DP.17, *supra* note 42, at 1.

Articles 17, 18, and 19 reinforce that objective. A State's knowledge that admissibility will be examined in certain cases will encourage that State and others to properly and faithfully investigate and prosecute genocide, crimes against humanity, and war crimes in domestic courts as envisaged by the principle of complementarity.

The proposal focuses the Court's attention on admissibility at a critical moment, namely when the request for surrender is made. For contributors to international peace and security to know that the Court is using its authority at that time to ensure fairness in the process will add greatly to the confidence of all States in the operation of the Court and it will strengthen the political will of States to contribute to UN peacekeeping and other international efforts to maintain or restore peace and security. The decision remains in the Court's hands, as required by Article 19, and the criteria the Court would use for determining admissibility are set forth in Article 17.⁵¹

This reasonable treaty-friendly proposal, which would only apply to international conflicts and thus leave the far more common internal atrocities outside its ambit, was formally presented by the Clinton Administration with the expectation that it would be seriously considered at subsequent sessions of the Preparatory Commission where the draft Relationship Agreement would be further negotiated and finalized. However, that was not to be the case. The Bush Administration squandered its opportunity to advance this proposal and further protect U.S. interests by refusing even to engage in Preparatory Commission discussions on the Relationship Agreement at the two sessions in 2001. A few mid-level career lawyers were tasked to engage minimally in the discussions on the crime of aggression and the financial rules and regulations, but concentrated on nothing else that was included in the 2001 Preparatory Commission agenda.⁵²

The Relationship Agreement was finalized, absent the U.S. proposal, at the September/October 2001 session and adopted by the Preparatory Commission on October 5, 2001.⁵³ Final action on the Relationship Agreement, as with other supplemental documents, will be taken by the Assembly of States Parties following establishment of the ICC. Several

51. See David J. Scheffer, Statement Before the Preparatory Commission for the International Criminal Court (Dec. 7, 2000) (on file with the *Cornell International Law Journal*).

52. See *Proceedings of the Preparatory Commission at its Seventh Session*, at 3, U.N. Doc. PCNICC/2001/L.1/Rev.1 (2001), available at <http://www.un.org/law/icc/prepcomm/mar2001/english/l1rev1e.pdf> (mentioning the items on the February 2001 PrepCom agenda in their totality). See generally *Preparatory Commission for the International Criminal Court; Eighth Session (2001)*, at <http://www.un.org/law/icc/prepcomm/eighth.htm> (presenting a brief overview of the September 2001 PrepCom session) (last visited Feb. 6, 2002).

53. See *Draft Relationship Agreement between the United Nations and the International Criminal Court*, U.N. Doc. PCNICC/2000/WGICC-UN/L.1 (2000), available at <http://www.un.org/law/icc/prepcomm/nov2000/english/wgiccl1e.pdf> (last visited Feb. 6, 2002). "At its 33rd meeting, on 5 October 2001, the Preparatory Commission adopted its report on its sixth to eighth sessions, containing the draft [text] of the Relationship Agreement between the Court and the United Nations. . . ." *Proceedings of the Preparatory Commission at its Eighth Session* at 3, U.N. Doc. PCNICC/2001/L.3/Rev.1 (2001), available at <http://www.un.org/law/icc/prepcomm/prepfra.htm>.

other proposals introduced by the United States in Preparatory Commission sessions in 2000 which would have strengthened protection of U.S. interests also were not pursued by the U.S. delegation to the Preparatory Commission sessions in 2001.⁵⁴ The Bush Administration's short-sighted and anemic approach to the Preparatory Commission had the result of forfeiting opportunities, well established by our negotiating initiatives in 2000, to strengthen protection of U.S. interests. Nonetheless, in December 2000, the Article 19(1) proposal and the other proposals we had introduced in the Preparatory Commission sessions and which were scheduled for further discussion in 2001, enabled Clinton Administration officials to review the state of play in the negotiations and the value of U.S. signature of the Treaty.

We had not achieved the silver bullet of guaranteed protection that many officials within the Clinton Administration had sought for so many years. But I argued that we had achieved the most that pragmatically could be achieved in light of all that we confronted, both internally and externally: a sophisticated matrix of safeguards that provided a high degree of protection for U.S. interests and, with the added leverage of signature and strong efforts in subsequent Preparatory Commission sessions, additional safeguards that would achieve the best possible relationship for the United States with the ICC.

The final deliberative process about signature of the Treaty occurred during the last three weeks of 2000. Agency views were comprehensively communicated to the National Security Council and President Clinton, who was thoroughly briefed about the relevant issues and the pro's and con's of signature.

President Clinton arrived at his decision to sign the Treaty while at Camp David on December 30-31, 2000.⁵⁵ His statement, which was released on December 31st, is a precisely worded articulation of why the United States would sign the Treaty and what remained to be done in order to advance the prospect of serious consideration of ratification of the Treaty in the future.⁵⁶ There were three main points in the statement. First, President Clinton reaffirmed "our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity."⁵⁷ Signing the Treaty would sustain the "tradition of moral leadership" of the United States in advancing the principle of accountability from Nuremberg through to the establishment

54. See discussion *infra* Part II.D.

55. See Text of President Clinton's Remarks on ICC Treaty, at <http://www.wfa.org/issues/wicc/pretext.html> (Dec. 31, 2000) [hereinafter President Clinton Statement]. During the final weeks of December 2000, I was instructed by the National Security Council not to brief Congressional staffers or the incoming Bush administration transition team about internal Executive Branch deliberations on the ICC. I was told that National Security Council staff would contact relevant members of Congress and their staff, and the transition team when appropriate, and that if I did receive any inquiry, I should refer the individual to the National Security Council.

56. See President Clinton Statement, *supra* note 55.

57. *Id.*

of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.⁵⁸

Second, President Clinton emphasized the importance of the complementarity principle in the Treaty and that the U.S. delegation had worked hard to achieve the limitations on the ICC Prosecutor that are part of the complementarity regime, which the United States believes “are essential to the international credibility and success of the ICC.”⁵⁹

Third, President Clinton stated that:

[w]e are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes into existence, it will not only exercise authority over personnel of states that have ratified the Treaty, but also claim jurisdiction over personnel of States that have not. With signature, however, we will be in a position to influence the evolution of the Court. Without signature, we will not.⁶⁰

The use of the term “significant flaws” was not easily arrived at during the final hours of the decision-making process. I believed there were flaws in the Treaty, but I did not believe that a description of them as “significant” either was accurate or would improve our leverage as a signatory. Allied governments do not view as “significant” the flaws we had long identified. Further, the term would only provide ammunition to the opponents of the ICC on Capitol Hill and elsewhere to recklessly bash the Treaty, using our own words to do so. Our work in building safeguards into the Treaty regime had greatly diminished the significance of the flaws that I had identified before the Senate Foreign Relations Committee on July 28, 1998, shortly after the conclusion of the Rome Conference.⁶¹ President Clinton’s statement goes on to recognize achievements in the post-Rome negotiations.⁶² But “significant” was the word that would accommodate the skeptics in the Administration, so it remained.

The presidential statement on December 31, 2000, concluded with a two-pronged message. President Clinton recommended that his successor, who would be President George W. Bush, not “submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.”⁶³ This was consistent with the Clinton Administration’s long-standing position on ratification. The most fundamental concern was that, “Court jurisdictions [sic] over U.S. personnel should come only with U.S. ratification of the Treaty.”⁶⁴ This was consistent with the rather complex and paradoxical point we had been making for years about the jurisdiction of the Treaty.⁶⁵ The central U.S. concern has been exposure of U.S. per-

58. *Id.*

59. *Id.*

60. *Id.*

61. See 1998 *Testimony Before the Senate Foreign Relations Committee*, *supra* note 7, at 12-15.

62. See President Clinton Statement, *supra* note 55.

63. *Id.*

64. *Id.*

65. See ICC Remarks, *supra* note 2.

sonnel while the United States remains a non-Party to the Treaty. Many of us in the Clinton Administration had hoped that such a limited problem could be addressed pragmatically by the Preparatory Commission, which would only occur with a strong U.S. presence and role in the on-going negotiations. We long supported non-State Party nationals being subject to the jurisdiction of the ICC as a result of a Security Council referral pursuant to Article 13(b) of the Treaty.⁶⁶ We also discussed numerous ways to subject non-State Party nationals of so-called rogue or aggressor states to the ICC's jurisdiction under certain circumstances even in the absence of a Security Council referral. We sought some way to enable the ICC to act in obvious cases. We were prepared to subjugate our legal position to a pragmatic solution that would address the concern about exposure of U.S. personnel while the United States is a non-State Party.⁶⁷

The U.S. legal position was that customary international law does not yet entitle a state, whether as a Party or as a non-Party to the ICC Treaty, to *delegate to a treaty-based International Criminal Court* its own domestic authority to bring to justice individuals who commit crimes on its sovereign territory or otherwise under the principle of universal jurisdiction, without first obtaining the consent of that individual's state of nationality either through ratification of the Rome Treaty or by special consent, or without a referral of the situation by the Security Council.⁶⁸ But we made

66. This U.S. position long preceded the Rome Conference. See David J. Scheffer, Address at the Peace Palace, The Hague, Netherlands 4 (Sept. 19, 1997) [hereinafter 1997 Hague Speech] ("We believe that the Security Council . . . should be empowered to refer overall situations to the Prosecutor where there has been apparent commission of one or more of the core crimes in the Court's jurisdiction."); see also Carter Center Address, *supra* note 22, at 3.

67. See AU Speech, *supra* note 3, at 3 (describing the U.S. proposal concerning the status of non-state parties in connection with ICC jurisdiction and the fact that the United States was "prepared to adjust that proposal to 1) eliminate its reference to the Security Council, and 2) revise its wording so that only non-Party states acting responsibly in the international community and honoring the principle of complementarity can invoke a privilege of non-surrender of its nationals to the Court.").

68. See AU Speech, *supra* note 3, at 3; see also David J. Scheffer, *The International Criminal Court: The Challenge of Jurisdiction*, in THE AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE 93^D ANNUAL MEETING 68-72, 71 (2000); Madeline H. Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 29 (2001).

Customary international law evolves as a reflection of the consent or acquiescence of states over time. Because consent to universal jurisdiction exercised by states is not equivalent to consent to delegated universal jurisdiction exercised by an international court, the customary law affirming the universal jurisdiction of states cannot be considered equivalent to customary law affirming the delegability of that jurisdiction to an international court.

There are sound reasons for which a state, even while accepting universal jurisdiction, might wish to reject the delegation of such jurisdiction for exercise by an international court. A state might reject compulsory third-party adjudication before the ICC in order to retain the discretion to address interstate-dispute type cases through bilateral relations, even while recognizing the possibility that those bilateral relations might in some cases entail the prosecution of that state's national in another state's courts under universal jurisdiction. The reasons for which states might prefer bilateral relations to third-party adjudication in interstate disputes involving international criminal law are essentially the

it clear in the negotiations, and I would hope continue to make it clear, that as a *practical* matter the United States is prepared to examine circumstances where individuals from non-State Parties can be prosecuted before the ICC without such requirements – ratification or special consent by the State of nationality or Security Council referral – having been first obtained, and to negotiate such latitude for prosecution into a supplemental document to the Treaty.⁶⁹

In addition to the quest to avoid U.S. exposure prior to ratification of the Treaty, the Clinton Administration sought a matrix of safeguards, including those we could obtain during the Preparatory Commission negotiations, that would ensure there would be no *unwarranted or unfounded* investigation and prosecution of American service members by the ICC *after* the United States became a party to the Treaty. That was not intended to constitute a blanket immunity from investigation and prosecution by the ICC. Rather, it conceded the possibility of exposure for American service members to ICC jurisdiction following U.S. ratification, but it would be exposure of such a remote character as to be exceptionally unlikely and, if it were to occur, manageable. We were determined to find some pragmatic formula that would de facto insulate U.S. personnel from ICC jurisdiction

same as the reasons, discussed earlier, for which states are generally reluctant to submit their interstate disputes to third-party adjudication.

Id.; see also David J. Scheffer, Letter to the Editor, 95 AM. J. INT'L L. 624 (discussing U.S. legal position); David J. Scheffer, Letter to the Editor, 80 FOREIGN AFF. 201 (2001). Contrary to some criticism, I pointed to authority on the U.S. position to the evolving scholarship of Professor Morris, see Morris, *supra*. My public statements on this issue were cleared within the federal bureaucracy. President Clinton confirmed our long-stated position in his December 31, 2000 statement. See 37 WEEKLY COMP. PRES. DOC. 4 (Jan. 9, 2001). It would have been unusual, and bureaucratically implausible, for either the State Department's legal adviser or the attorney general to issue a formal legal opinion on such a theoretical, albeit important, issue. Despite mighty efforts by scholars to discern contradictions in the U.S. position, at no time did the precise American position on the International Criminal Court contradict its support for terrorism treaties or U.S. invocation of extraterritorial jurisdiction in federal courts for certain crimes. Significantly, critics of the U.S. position on jurisdiction fail to point to authorities *directly* on point to support their arguments because the issue is so novel. See Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124, 124-31 (2001); see also Michael Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 213-36 (Sarah B. Sewall & Carl Kaysen eds., 2000); Diane F. Orentlicher, *Politics by Other Means: The Law of the International Criminal Court*, 32 CORNELL INT'L L.J. 489, 491 (1999) (taking issue with the U.S. position regarding non-State Parties and stating that "[i]t is simply incorrect, however, to suggest that the Rome Statute violates international treaty law by exposing nationals of non-adhering States to potential prosecution without the consent of their governments."); Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1 (2000).

69. See AU Speech, *supra* note 3, at 3. Professor Morris' criticism of our willingness to compromise on our own legal position is understandable from a strictly purist perspective, but the International Criminal Court represents a significant melding of both political and legal objectives in the international system. Unless governments recognize that practical solutions must be found for some of the most difficult problems besetting the ICC, the Court's universality and effectiveness will suffer. See Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 350 (2001).

prior to U.S. ratification of the Treaty. That is what led to the diplomatic proposal of March 2000, which only concerned the exposure of a non-State Party and its nationals under circumstances for which we knew the United States could qualify for.⁷⁰ We admittedly faced an awkward dilemma. We had to argue for protection as a non-State Party in order to build domestic support for ultimately signing the ICC Treaty and joining it as a State Party. Other governments were confused and annoyed with the U.S. strategy. Why, I would often hear them say, should they, signatories and ratifiers of the ICC Treaty, accord so much special attention to one State's insistence that it be protected as a non-Party to the Treaty, particularly one such as the United States where certain Members of Congress were determined to prevent the Court from ever being established or, if established, ever to function? They also found it difficult to square the U.S. position on non-Party protection with how that same privilege would be used by civilian and military leaders of other non-States Parties and rogue elements therein to shield themselves from the Court's jurisdiction and perpetrate atrocities at will.

The second prong of President Clinton's conclusion in his statement of December 31, 2000, was that "signature is the right action to take at this point."⁷¹ He continued, "I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide, and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead."⁷² Signature was the right action to take on December 31, 2000, because it would keep the United States "in the game" to finish the work that had to be done to ensure favorable consideration of the Treaty in the United States Senate some day. For the United States to have entered 2001 as a non-signatory of the ICC Treaty would have aligned us, whether fairly or not, with such non-signatory states as the People's Republic of China, Pakistan, North Korea, Libya, Cuba, Vietnam, and Iraq as seeming rejectionists of international justice.⁷³

President Clinton responsibly waited as long as he could before deciding to authorize signature of the Treaty on the last possible day under the terms of the Treaty. He needed to review the results of every Preparatory Commission session, including the session that concluded on December 8, 2001, before arriving at a judgment as to what had been accomplished to justify a U.S. signature. He could not have made that decision earlier in the year 2000 without risking a setback in the Preparatory Commission that might have pointed towards a decision never to sign the Treaty. The fact that what was accomplished in the Preparatory Commission by December

70. See U.S. Proposal to the Fifth Session of the Preparatory Commission for the International Criminal Court; Proposed Text to Supplemental Document to the Rome Treaty (2000), available at <http://www.iccnw.org/html/us2000.html> [hereinafter U.S. Proposed Text for ICC Supplemental Document]; see also discussion *infra* Part II.C.1.

71. President Clinton Statement, *supra* note 55.

72. *Id.*

73. See CICC: Country-by-Country Ratification Status Report, *supra* note 25 (showing that these states are not on the list as signatories of the Treaty).

8th fell short of the desired mark of full protection for U.S. service members while a non-State Party did not automatically freeze out the option of signature. The President weighed the considerable progress that had been made and what further progress was likely if we used our leverage as a signatory to achieve it. That weighing exercise pointed toward the value of signature. The President's decision represented work on the ICC throughout his Administration, and thus was anything but a rushed decision at the end of December 2000. Regrettably, within weeks of taking office, the Bush Administration began to close the doors that had been opened to it with the U.S. signature.

II. Addressing the U.S. Concerns in the ICC Treaty Regime Negotiations

It would be clearly erroneous to assume that during the Clinton Administration the United States stood in opposition to the creation of a permanent International Criminal Court. Overall, there appears to be a common perception that during the Clinton Administration the United States always stood in opposition to the creation of a permanent International Criminal Court.⁷⁴ The Clinton Administration engaged intensively in the negotiations for the ICC, talks which formally began in 1995.⁷⁵ We engaged with the purpose of constructing a detailed and comprehensive framework that could lead to the establishment of an ICC.⁷⁶ We demonstrated that support by exercising leadership in the negotiations and by producing a large number of papers commenting on and proposing text for the emerging draft treaty. President Clinton on six occasions publicly expressed his support for the establishment of a permanent International Criminal Court.⁷⁷

74. See Alessandra Stanley, *U.S. Specifies Terms for War Crimes Court*, N.Y. TIMES, July 10, 1998, at A7 ("Today's statement underscored how strongly the United States opposes the kind of court sought by human rights groups and many democratic allies . . ."); see also Charles Trueheart, *U.S. Cool to War Crimes Panel; Washington May Not Back Proposal for Permanent Tribunal*, WASH. POST, July, 10, 1998, at A32; Thomas Lippman, *Worldwide War Crimes Court Is Approved*, WASH. POST, July 18, 1998, at A1 ("The outcome [of the 1998 Rome Conference] marks a second time in two years that the United States has rejected a major international humanitarian agreement.").

75. The U.S. fielded a full inter-agency delegation of experts beginning with the first meeting in February, 1995. See David J. Scheffer, *Address Before the Commonwealth Club, San Francisco, California*, 5 (May 13, 1998). See generally ICC Statute, *supra* note 6.

76. See 1997 Hague Speech, *supra* note 66, at 3.

President Clinton and Secretary Albright have long supported the establishment of a fair and effective international criminal court. As President Clinton has stated, 'Nations all around the world who value freedom and tolerance [should] establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law. [']

Id.

77. See President William Jefferson Clinton, *Remarks at the Opening of the Commemoration of "50 Years After Nuremberg: Human Rights and the Rule of Law," University of Connecticut*, 1995 PUB. PAPERS 1597, 1598; see also Statements of President William Jefferson Clinton, at the Army Conference Room in the Pentagon, 33 WEEKLY COMP. PRES. DOC. 119 (Jan. 29, 1997); President William Jefferson Clinton, *Statement Before the 52d Session of the United Nations General Assembly*, 33 WEEKLY COMP. PRES.

From the start, however, we never intended that the Treaty's personal jurisdiction would extend as far as the Rome Treaty finally established under Article 12. To argue that our position on personal jurisdiction reflected an underlying opposition to the whole concept of a permanent International Criminal Court or to the Rome Treaty itself is a deeply flawed argument. We remained on the front line every day since the first UN session in early 1995 negotiating to support the establishment of a permanent Court that the United States could participate in with confidence and in a manner that would be compatible with our national and international security responsibilities. I believe the American people expected that of the U.S. negotiating team, and we remained faithful to their interests.

A. Prior to July 17, 1998

For years, and until the third week of the Rome Conference in July 1998, the U.S. position on how the ICC's jurisdiction would be triggered remained consistent. We accepted very early in the UN talks, held prior to the Rome Conference, the proposition that a State Party could initiate an ICC investigation of a situation falling within the subject matter jurisdiction of the Statute of the Court.⁷⁸ We also agreed with others that the Security Council could initiate ICC investigations by referring a situation pursuant to a resolution.⁷⁹ We argued for a long time that such a Security Council referral did not have to be authorized under Chapter VII of the United Nations Charter.⁸⁰ We argued strongly, however, that if Chapter VII authority were invoked by the Security Council, then the ICC's powers could be greatly strengthened by that Chapter VII mandate.⁸¹ It became clear prior to Rome that governments were determined to require a Chapter VII basis for Security Council referrals, and we ultimately conceded that point. However, our original position would have made it much easier for the Security Council to use the ICC for investigations because the Council

DOC. 1389 (Sept. 22, 1997); President William Jefferson Clinton, Statement in Honor of Human Rights Day, the Museum of Jewish Heritage, New York, 33 WEEKLY COMP. PRES. DOC. 2003 (Dec. 9, 1997); President William Jefferson Clinton, Statement at a White House Press Briefing on Bosnia, 33 WEEKLY COMP. PRES. DOC. 2074 (Dec. 18, 1997); President William Jefferson Clinton, Remarks to Genocide Survivors, Assistance Workers, and U.S. and Rwanda Government Officials, Kigali Airport, Kigali, Rwanda, 34 WEEKLY COMP. PRES. DOC. at 497 (Mar. 25, 1998).

78. See 1997 Hague Speech, *supra* note 66, at 4 ("We believe that . . . State Parties to the statute of the ICC should be empowered to refer overall situations to the Prosecutor where there has been apparent commission of one or more of the core crimes in the Court's jurisdiction.")

79. See *id.* ("We believe that the Security Council . . . should be empowered to refer overall situations to the Prosecutor where there has been apparent commission of one or more of the core crimes in the Court's jurisdiction.")

80. See AU Speech, *supra* note 3, at 1; see also 1997 Hague Speech, *supra* note 66, at 4; David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 13 (1999) [hereinafter Scheffer, *AJIL Article*] ("We determined that the critical role of the Security Council as a preliminary review must be sustained when cases pertaining to the work of the Council (whether or not under Chapter VII authority) were at issue.")

81. AU Speech, *supra* note 3, at 1.

would not have necessarily had to engage in the very difficult negotiations that are always required for Chapter VII actions and which sometimes result in the veto power blocking effective action by the Council. If, in future years, the Council does not refer a particular situation to the ICC, this may well be the reason.

Our position on initiating ICC investigations required that "if a State Party referred a situation to the Court and that situation already was the object of Security Council deliberations, then the Security Council's approval would be required before the matter could be taken up by the ICC."⁸² This was an important and entirely logical position to take in light of the Security Council's responsibilities for international peace and security and America's own extensive commitments globally to international peace and security.⁸³ That position proved unsustainable as the Rome Conference progressed in the summer of 1998. The alternative formulation that emerged was the "Singapore compromise," now reflected in Article 16 of the Rome Treaty.⁸⁴ The United States supported that compromise as the best we could obtain under the circumstances.

During the final two weeks of the Rome Conference, we sought three different paths in order to achieve U.S. support for the text of the ICC Treaty and thus join consensus on July 17, 1998.⁸⁵ Though some may fault the U.S. delegation for not having initiated these efforts earlier in the negotiations, they fail to appreciate the complex and multifaceted national security interests that needed to be balanced as we confronted these issues. The United States shoulders responsibilities worldwide that no other nation comes even close to undertaking. The post-September 11, 2001, campaign against terrorism demonstrates that reality in stark terms. Even those close allies of ours that are deeply engaged in support of UN peacekeeping operations are not assuming the vast international security responsibilities that the United States Armed Forces have worldwide. Nonetheless, I was deeply disappointed as a negotiator in the failure of the highest policy-makers in Washington to arrive at decisions about our negotiating positions sooner, particularly their failure to meet and approve more forward-leaning instructions just prior to the U.S. delegation's departure for the Rome Conference.

82. *Id.* at 2.

83. See *ILC Report*, *supra* note 26, at 85 (presenting a proposed version of Article 23(3) that was to be introduced in the ICC Treaty: "No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.").

84. See *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 149-52 (Roy S. Lee ed., 1999); see also ICC Statute, *supra* note 6, art. 16.

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Id.

85. See Scheffer, *AJIL Article*, *supra* note 80, at 14.

Our first effort mid-way through the Rome Conference was to support a procedure that would permit a State Party to “opt out” of crimes against humanity and/or war crimes, but not genocide. Indeed, we offered to empower the Court with universal jurisdiction over the crime of genocide. This had originally been proposed by the International Law Commission in 1994.⁸⁶ We proposed that any such State Party would forfeit its right to refer matters to the Court, however, if it chose to opt out of either of these categories of subject matter jurisdiction. The Security Council could override the “opt out” with a Chapter VII referral. Although 22 governments, including France and Russia, openly supported that proposal, it failed to attract enough support to be sustainable.⁸⁷

Our second effort, in the final week of the Rome Conference, was a package deal developed with the other permanent members of the Security Council that would permit a ten-year transitional period during which a State Party could opt out of crimes against humanity and/or war crimes.⁸⁸ That privilege would expire at the end of the ten-year period but could be extended through certain arrangements if there was general agreement among the States Parties.⁸⁹ If that agreement could not be obtained and the State Party still required the privilege, then it would have the option of withdrawing from the Treaty.⁹⁰ However, the P-5 proposal failed to attract sufficient support quickly enough to be sustainable. The modified version of it, which is now reflected in Article 124 of the Treaty,⁹¹ was never presented to us until it appeared on the final day of the conference (although there was a speculative hint about it made to me by another delegate on the penultimate day of the conference). The provision did not meet

86. See *ILC Report*, *supra* note 26, at 83.

87. The United States advocated this procedure in an oral statement before the Rome Conference on July 9, 1998. In response to the U.S. statement 22 governments expressed their support for the U.S. proposal. The proposal, in fact, was based on one of the options for acceptance of the jurisdiction of the Court that had emerged from the final session of the Preparatory Commission on the Establishment of an International Criminal Court in April, 1998. See Report of the Preparatory Commission on the Establishment of an International Criminal Court at 32, U.N. Doc. A/CONF.183/2/Add.1 (1998); see also David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 19 (1999); Stanley, *supra* note 74; Trueheart, *supra* note 74; Alessandra Stanley, *U.S. Presses Allies to Rein in Proposed War Crimes Court*, N.Y. TIMES, July 15, 1998 (late ed.), at A8.

88. See Proposal Submitted by the United States of America; Article 7 ter, UN Doc. A/CONF.183/C.1/L.90 (1998) [hereinafter Proposal; Article 7 ter]; see also 1998 *Testimony Before the Senate Foreign Relations Committee*, *supra* note 7, at 13-14.

89. See *id.*

90. See *id.*

91. See ICC Statute, *supra* note 6, art. 124.

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Id.

the hard-fought requirements that the United States needed for this particular approach to subject matter jurisdiction. Of course, we will never know what might have transpired if the conference had afforded us more time, as we requested, to consider the provision and discuss it both within the U.S. government and with other governments.

Our third effort was to propose that Article 12 be drafted either 1) to require the express approval of both the territorial State of the alleged crime and the State of nationality of the alleged perpetrator in the event either was not a Party to the Treaty,⁹² or 2) to exempt from the Court's jurisdiction conduct that arises from the official actions of a non-State Party acknowledged as such by the non-Party.⁹³ The former proposal recognized the large degree of support at the conference for the consent of the territorial state, but also remedied the dangerous drift of Article 12 toward universal jurisdiction over non-State Parties.⁹⁴ The latter proposal required a non-State Party to acknowledge responsibility for its actions in order to be exempted, an unlikely occurrence for those who have committed genocide or other heinous crimes.⁹⁵ In contrast, the United States as a likely non-State Party for at least some period of time would never hesitate to acknowledge that, for example, humanitarian interventions, peacekeeping actions, or defensive actions to eliminate weapons of mass destruction or confront international terrorism are official state actions. But the U.S. proposals failed to attract sufficient support in the short period of time left for the Rome Conference.

Washington had hoped that the Rome Conference could be extended to iron out these fundamental problems and arrive at a formula that the United States and, frankly, some other major states could support. I worked very hard in the final days to achieve an extension, including a direct appeal to UN Secretary-General Kofi Annan through his representative at the conference. President Clinton, Secretary of State Madeleine Albright and other senior U.S. officials sought more flexibility from their foreign counterparts in the final days. I still believe a fatal flaw in the process was the decision not to extend the conference, as is so often done with other treaty negotiations in order to achieve broader consensus. So while there are critics who argue the United States did not seize opportunities early enough to push alternative strategies, it must also be recognized that the Rome Conference did not seize the opportunity to allow more time to address a fundamental problem with the ICC Treaty. It probably would have made an enormous difference to U.S. support for the Treaty if we could have labored over it for an additional, albeit brief, period of time.

92. See Proposal Submitted by the United States of America; Article 7, U.N. Doc. A/CONF.183/C.1/L.70 (1998) [hereinafter Proposal; Article 7].

93. See Proposal; Article 7 *ter*, *supra* note 88; see also AU Speech, *supra* note 3, at 2.

94. Proposal; Article 7, *supra* note 92.

95. Proposal; Article 7 *ter*, *supra* note 88.

B. Major U.S. Objectives Achieved in the ICC Treaty

Despite the unacceptable outcome of the Rome Conference, which compelled the United States to request votes that would enable governments to register their approval or disapproval of final provisions which the U.S. delegation believed needed further negotiation, the United States achieved many of its negotiating objectives at the Rome Conference.⁹⁶ The major objectives (in addition to scores of other U.S. objectives that were achieved in the daily drafting of the Statute) entailed long and difficult negotiating sessions both before and during the Rome Conference. They included the following:

1. A strong regime of complementarity, or deferral to national jurisdiction, that provides significant protection.⁹⁷

2. A role preserved for the UN Security Council, including the affirmation of the Security Council's power to intervene to halt the ICC's work.⁹⁸

3. Sovereign protection of national security information that might be sought by the ICC.⁹⁹

4. Broad recognition of national judicial procedures as a predicate for cooperation with the ICC.¹⁰⁰

5. Coverage of internal conflicts and atrocities, which comprise the vast majority of situations likely to confront the ICC.¹⁰¹

6. Important due process protections, including the incorporation in the treaty regime of detailed rules of procedure and evidence.¹⁰²

7. Viable definitions of genocide, war crimes, and crimes against humanity, including high thresholds for any investigation and prosecution and the incorporation in the treaty regime of elements of crimes.¹⁰³

8. Recognition of gender issues.¹⁰⁴

9. Acceptable provisions regarding command responsibility and superior orders.¹⁰⁵

10. Rigorous qualifications for judges.¹⁰⁶

11. Acceptance of the basic principle of State Party funding, possible United Nations funding in relation to expenses incurred due to referrals by the Security Council, and voluntary contributions.¹⁰⁷

96. See Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443, 458-60 (1999).

97. See ICC Statute, *supra* note 6, arts. 17-19.

98. See *id.*; see also *id.* art. 16.

99. See *id.* art. 72; see also *id.* art. 73.

100. See *id.* art. 93; see also *id.* arts. 96, 99.

101. See *id.* art. 6; see also *id.* arts. 7, 8(2)(c)-(e).

102. See *id.* art. 19; see also *id.* arts. 51, 55, 63, 66-69.

103. See *id.* art. 6; see also *id.* arts. 7-9.

104. See, e.g., *id.* art. 7(1)(g)-(h); see also *id.* arts. 7(2)(c), 7(2)(f), 7(3), 8(2)(b)(xxii), 8(2)(e)(vi), 68, 69.

105. See *id.* art. 28; see also *id.* art. 33.

106. See *id.* art. 36.

107. See *id.* art. 115; see also *id.* art. 116.

12. An Assembly of States Parties to oversee the management of the ICC and the Prosecutor's work.¹⁰⁸

13. Reasonable amendment procedures.¹⁰⁹

14. A sufficiently high number of ratifying states before the Treaty can enter into force; namely, sixty governments have to ratify the Treaty.¹¹⁰

15. Explicit right to negotiate international agreements (bilateral or multilateral) to protect any U.S. citizen from surrender to the ICC and, for example, to honor the provisions of U.S. Status of Forces Agreements.¹¹¹

16. Diplomatic immunity from surrender to the ICC pursuant to international law.¹¹²

17. Defeat of proposals to include crimes of international terrorism and international drug trafficking in the ICC's jurisdiction.¹¹³

C. How Flaws in the ICC Treaty Were Addressed Following the Rome Conference

After the Rome Conference of June/July 1998 the United States remained deeply engaged in the subsequent Preparatory Commission sessions, which began in February 1999. We led the negotiations on the Elements of Crimes¹¹⁴ and provided the working draft for those negotiations. We also remained deeply engaged with the negotiations on the Rules of Evidence and Procedure,¹¹⁵ and were satisfied with the leadership of Australia, Canada, France and the chairmanship of the Argentine delegate in those talks. On June 30, 2000, the United States joined consensus in support of both of those work-engine documents of the Court.¹¹⁶ Those were not the actions of a government retreating from the Treaty or waging an opposition campaign against it. We were determined to remain engaged every step of the way to represent important U.S. interests in the process and to advance the cause of international justice.

Specific U.S. objectives that were achieved after the Rome Conference and during the Preparatory Commission sessions through December 8, 2000, included the following:

1. Adoption by consensus in the Preparatory Commission of the Elements of Crimes on June 30, 2000, following introduction of the U.S. draft

108. *See id.* art. 112.

109. *See id.* art. 121; *see also id.* art. 122.

110. *See id.* art. 126.

111. *See id.* art. 98(2).

112. *See id.* art. 98(1).

113. *But see* BASSIOUNI, DOCUMENTARY HISTORY, *supra* note 8, at 104-05 (reproducing Resolution E to the ICC Treaty regarding international terrorism and drug-trafficking).

114. *See generally* ICC Elements of Crimes, *supra* note 30; LEE, ICC ELEMENTS AND RULES, *supra* note 30, at 3-231.

115. *See generally* ICC Rules of Procedure and Evidence, *supra* note 31; LEE, ICC ELEMENTS AND RULES, *supra* note 30, at 235-702.

116. *See generally* Preparatory Commission for the International Criminal Court, Fifth Session, at <http://www.un.org/law/icc/prepcomm/prejun.htm> (June 12-30, 2000).

and U.S. lead in the post-Rome negotiations.¹¹⁷

2. The General Introduction of the Elements of Crimes¹¹⁸ and the Introductions to Genocide,¹¹⁹ Crimes Against Humanity¹²⁰ and War Crimes¹²¹ in the Elements of Crimes reflect key U.S. requirements.

3. Footnote 44 of the Elements of Crimes which clarifies the scope of the war crime covering the transfer of population into occupied territory (as defined by Article 8(2)(b)(viii)) to the satisfaction of the Israeli and U.S. Governments.¹²²

4. Adoption by consensus in the Preparatory Commission of the Rules of Procedure and Evidence on June 30, 2000, with hundreds of detailed provisions pertaining to court procedure, due process rights, and the collection and use of evidence, many of which were actively sought by the U.S. delegation.¹²³

5. Rules 51,¹²⁴ 52(2),¹²⁵ 54(2),¹²⁶ and 59¹²⁷ in the Rules of Procedure and Evidence which strengthen application of the complementarity principle.

117. See generally *ICC Elements of Crimes*, *supra* note 30; LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, 3-231.

118. See *ICC Elements of Crimes*, *supra* note 30, at 5; see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 23-40.

119. See *ICC Elements of Crimes*, *supra* note 30, at 6; see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 44-49.

120. See *ICC Elements of Crimes*, *supra* note 30, at 9; see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 61-80.

121. See *ICC Elements of Crimes*, *supra* note 30, at 18; see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 114-16.

122. See *ICC Elements of Crimes*, *supra* note 30, at 28 ("The term 'transfer' needs to be interpreted in accordance with the relevant provisions of international humanitarian law."); see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 158-62.

123. See generally *ICC Rules of Procedure and Evidence*, *supra* note 31; LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, 235-702.

124. See *ICC Rules of Procedure and Evidence*, *supra* note 31, at 31.

In considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.

Id.; see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, 334-37.

125. See *ICC Rules of Procedure and Evidence*, *supra* note 31, at 31 ("A State may request additional information from the Prosecutor to assist it in the application of article 18, paragraph 2. Such a request shall not affect the one-month time limit provided for in article 18, paragraph 2, and shall be responded to by the Prosecutor on an expedited basis."); see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 338-39.

126. See *ICC Rules of Procedure and Evidence*, *supra* note 31, at 32 ("The Prosecutor shall inform that State in writing when he or she makes an application to the Pre-Trial Chamber under article 18, paragraph 2, and shall include in the notice a summary of the basis of the application."); see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 341.

127. See *ICC Rules of Procedure and Evidence*, *supra* note 31, at 33-34 (describing the procedural requirements with respect to questions of jurisdiction or admissibility); see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 344-46.

6. Rule 44(2) of the Rules of Procedure and Evidence which greatly minimizes the possibility of politically-motivated charges by rogue states. This rule requires that any non-State Party seeking to trigger an investigation would expose its own conduct to the full scrutiny of the ICC, thus discouraging politically-motivated charges and efforts to hold only one State accountable for alleged crimes within an overall situation.¹²⁸

7. Rule 195(2) of the Rules of Procedure and Evidence which can be used in the future to carve out a special agreement between the United States and the ICC.¹²⁹

8. Rules 44-84 of the Rules of Procedure and Evidence regulate the Prosecutor's actions in ways that address many U.S. concerns about an independent Prosecutor.¹³⁰

9. Continuing negotiations on defining the crime of aggression benefited from intensive U.S. engagement to ensure that the definition is one the United States ultimately could accept.¹³¹

10. Formal introduction in the Preparatory Commission of U.S. proposals to address concerns about exposure of a non-State Party to new or amended crimes,¹³² about the conduct of the Prosecutor,¹³³ and to strengthen protection of complementarity.¹³⁴

128. See *ICC Rules of Procedure and Evidence*, *supra* note 31, at 29; see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 326-27, 347.

129. See *ICC Rules of Procedure and Evidence*, *supra* note 31, at 89.

The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.

Id.; see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 666-69.

130. See *ICC Rules of Procedure and Evidence*, *supra* note 31, at 29-44; see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 325-48, 408-22.

131. See David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 *CORNELL INT'L L.J.* 529, 534 (1999); see also Theodor Meron, *The Humanization of Humanitarian Law*, 94 *AM. J. INT'L L.* 239, 277 (2000) ("An effective international criminal court must have American support, but it can only be gained if both the United States and the leadership of the Preparatory Commission for the Establishment of the International Criminal Court seek an acceptable compromise that would not emasculate the court.").

132. See Working Group on Rules of Procedure and Evidence, Proposal Submitted by the United States of America Concerning Rules of Procedure and Evidence Relating to Part 13 of the Statute (Final Clauses), U.N. Doc. PCNICC/2000/WGRPE(13)/DP.1 (2000) [hereinafter U.S. Proposal PCNICC/2000/WGRPE(13)/DP.1]; see also U.S. Statement on Its Proposal Concerning Rules of Procedure and Evidence Relating to Part 13 of the Statute (Final Clauses) (2000).

133. See Working Group on a Relationship Agreement Between the United Nations and the International Criminal Court, Discussion Paper Proposed by the Coordinator, Art. 4-5, U.N. Doc. PCNICC/2000/WGICC-UN/RT.1 (2000) [hereinafter Discussion Paper PCNICC/2000/WGICC-UN/RT.1].

134. See U.S. Proposal U.N. Doc. PCNICC/2000/WGICC-UN/DP.17, *supra* note 42, at 1.

In order to encourage contributions by States to promote international peace and security, and unless there has been a referral to the Court pursuant to article 13(b) of the Statute, the United Nations and the Court agree that 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

In my testimony before the Senate Foreign Relations Committee on July 28, 1998, I identified eight flaws in the ICC Treaty that compelled the United States to vote against the draft treaty that emerged from the Rome Conference.¹³⁵ The following list sets forth each designated flaw in the ICC Treaty and those corrections that either were adopted by the Preparatory Commission following U.S. initiatives or were introduced for substantive discussion in 2001.

1. *Article 12: Preconditions to Jurisdiction (Exposure of the United States as a Non-State Party)*

Flaw: Article 12¹³⁶ has the potential of enabling a non-State Party of concern (for example, an aggressor state) to invoke the jurisdiction of the ICC over another non-State Party for an alleged crime by the latter State without subjecting the non-State Party of concern to ICC jurisdiction for its own alleged crimes within the same situation.

Correction 1: Rule 44(2) of the Rules of Procedure and Evidence¹³⁷ greatly minimizes politically-motivated charges by rogue or aggressor states. Successfully sought by the United States, this rule requires that any non-State Party invoking an Article 12 procedure must expose its own conduct to the full scrutiny of the ICC,¹³⁸ thus discouraging politically-motivated charges and efforts to hold only one state accountable for alleged

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

Id.

135. See 1998 Testimony Before the Senate Foreign Relations Committee, *supra* note 7, at 12-15.

136. See ICC Statute, *supra* note 6, art. 12.

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Id.

137. See ICC Rules of Procedure and Evidence, *supra* note 31, at 29.

When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply.

Id.; see also LEE, ICC ELEMENTS AND RULES, *supra* note 30, at 326-27.

138. See *id.*

crimes within an overall situation. Thus a major concern of the United States was greatly diminished with Rule 44(2), which delegations understood as a rule designed to address the U.S. concern.¹³⁹

Correction 2: Rule 195(2) of the Rules of Procedure and Evidence¹⁴⁰ can be used in the future to carve out a special agreement between the United States and the ICC under Article 98(2) of the ICC Treaty.¹⁴¹ Proposed by the United States and, following negotiation and revision, adopted by consensus, Rule 195(2) nonetheless may prove contentious as some governments hold the opinion that Article 98(2) agreements can only be between or among governments. This view was contested by the United States during the June 2000 Preparatory Commission session, and the language of Rule 195(2) does not explicitly require only governmental agreements.¹⁴² The ICC has international legal personality¹⁴³ and clearly has the statutory authority to enter into international agreements.¹⁴⁴ There is a high probability that in coming years the ICC, acting with the approval of the Assembly of States Parties, will find it in its own interests to enter into international agreements with regional entities (such as the North Atlantic Treaty Organization) or one or more governments in order to address a specific challenge facing the Court.

Correction 3 (rejected): In March 2000 the United States discussed with other governments and informally at the June 2000 session of the Preparatory Commission a provision for the Relationship Agreement between the ICC and the United Nations that would address the issue of exposure of non-State Party nationals to the jurisdiction of the Court. The proposed text read:

139. Rule 44(2) addresses the concern raised by the United States before the UN General Assembly's Sixth Committee on Oct. 22, 1998, and which J. Gurulé erroneously regards as a continuing major impediment to U.S. support for the ICC Treaty. See Gurulé, *supra* note 34, at 21. Acceptance of the Court's jurisdiction by the territorial State is therefore manifestly not a foregone conclusion. *Contra id.*

140. See *ICC Rules of Procedure and Evidence*, *supra* note 31, at 89.

The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.

Id.; see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 30, at 666-69.

141. See *ICC Statute*, *supra* note 6, art. 98(2).

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Id.

142. See *ICC Rules of Procedure and Evidence*, *supra* note 31, at 89.

143. See *ICC Statute*, *supra* note 6, art. 4(1) ("The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.").

144. One example of such agreements is the Relationship Agreement between the United Nations and the ICC delineated in Article 2 of the ICC Statute. See *id.* art. 2.

The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a U.N. Member State, and such directing State has so acknowledged, only in the event

- (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or
- (b) measures have been authorized pursuant to Chapter VII of the U.N. Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply.¹⁴⁵

We readily acknowledged that the Article 13(b)¹⁴⁶ power of the Security Council to refer a situation to the ICC for action could subject non-State Party nationals to the jurisdiction of the Court despite the conditions set forth in this proposal.

The March 2000 proposal was intended to focus on the official actions of non-States Parties, including those undertaken in UN peacekeeping and peace enforcement operations or in UN-authorized military deployments, and to shield the military personnel engaged in such actions unless state consent was obtained or the state at issue was the object of a Chapter VII enforcement action of any character. We included the latter requirement in order to prevent rogue or aggressor non-States Parties, which in most cases would already be the target of UN Security Council action, from benefiting from the provision in the Relationship Agreement. I originally had hoped this “carve-back” on the overall provision would include UN Security Council actions against a non-State Party under general UN Charter authority, and not only under Chapter VII powers. But that view did not prevail.

The March 2000 proposal attracted far more skepticism and opposition than encouragement from other governments. Non-governmental organizations also lashed out at it,¹⁴⁷ igniting more skepticism among delegations to the Preparatory Commission. Two major criticisms were the de facto inclusion of internal conflicts and atrocities in the proposal and the inclusion of Security Council determinations. In September 2000, I announced publicly at American University Washington College of Law what I had been discussing diplomatically for some time: that we would be prepared to modify the proposal to refer only to international conflicts, to remove all references to the Security Council, and to find some formula

145. See U.S. Proposed Text for ICC Supplemental Document, *supra* note 70.

146. See ICC Statute, *supra* note 6, art. 13(b).

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

...

- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII or the Charter of the United Nations

Id.

147. See generally N.G.O. Information, at <http://www.iccnw.org/html/n.g.o..html> (last visited Feb. 6, 2002).

that would protect only those non-States Parties acting responsibly in the international community and honoring the principle of complementarity.¹⁴⁸ Despite further diplomatic efforts to structure such a proposal, we received no encouragement from other governments to pursue even the modified version of the March 2000 proposal. There was above all great aversion to crafting language to protect the interests of a non-State Party, particularly when so many non-State Parties were the major perpetrators of the crimes falling within the subject matter jurisdiction of the Court.

Correction 4 (proposed): As discussed above, the proposal introduced by the U.S. delegation on December 7, 2000, that focuses on the Court's right under Article 19(1) of the ICC Statute to review the admissibility of a case when there is a request for surrender of a suspect,¹⁴⁹ would introduce a healthy backstop to the Court's personal jurisdiction, particularly with respect to U.S. service members who should be dealt with by national courts long before a surrender request is made.

2. *Article 124: Transitional Provision: The Right of a State Party to Opt Out of War Crimes Charges for Seven Years, but Implicitly Exposing Non-States Parties (even Signatories) to War Crimes Charges*

Flaw: Article 124¹⁵⁰ provides States Parties with the right to "opt out" of war crimes jurisdiction for seven years while, at least in theory, a non-State Party could deploy its soldiers abroad and be vulnerable to assertions of war crimes jurisdiction. No comparable right to "opt out" is explicitly provided to non-States Parties.¹⁵¹

Proposed correction requiring, at a minimum, the leverage of U.S. signatory status: In 2000, there was a proposal inspired by a friendly government and informally discussed among key governments and non-governmental organizations that would extend the Article 124 right to opt out of war crimes to signatory States that have not yet ratified the Treaty. I worked this concept very hard, including a final trip to Europe to discuss the concept with key governments in early January 2001. Some governments that have ratified the Treaty insisted on retaining an advantage over signatories on this point, but innovative approaches were developed to accommodate them. Nonetheless, not enough traction on the proposal had taken hold by the end of the Clinton Administration, although continued

148. See AU Speech, *supra* note 3, at 3.

149. See U.S. Proposal PCNICC/2000/WGICC-UN/DP.17, *supra* note 42.

150. See ICC Statute, *supra* note 6, art. 124.

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Id.

151. See *id.*

negotiations led by the Bush Administration might have proven productive. But they were not pursued.

3. *Article 121(5): Amendments Adding New Crimes: The Right of a State Party to Opt Out of a New or Amended Crime but Implicitly Exposing a Non-State Party to the New or Amended Crime*

Flaw: Under Article 121(5),¹⁵² States Parties can avoid jurisdiction over acts committed by their nationals or on their territory for any new or amended crimes, such as aggression, terrorism, or drug trafficking. The provision, however, could be interpreted to extend jurisdiction over non-States Parties for such new or amended crimes.

Proposed correction requiring, at a minimum, the leverage of U.S. signatory status: There is an existing U.S. proposal for the Rules of Procedure for the Assembly of States Parties that would correct this flaw. It reads:

With respect to a crime added by amendment to the Statute pursuant to article 121, paragraph 5, the court may exercise jurisdiction only if the amendment has entered into force for both the State of nationality of the alleged perpetrator and the State in whose territory the crime was committed.¹⁵³

4. *Article 15: Proprio Motu Prosecutor—Enabling the Prosecutor to Self-Initiate Investigations with Pre-Trial Chamber Approval*

Flaw: Article 15 enables the Prosecutor to self-initiate investigations with the consent of two judges and without referral to the ICC of a situation either by a State Party or by the Security Council.¹⁵⁴

Correction: Rules 44-84 of the Rules of Procedure and Evidence regulate the Prosecutor's actions.¹⁵⁵ Rules 51-56¹⁵⁶ in particular were proposed or supported by the U.S. delegation to constrain the Prosecutor's efforts to second-guess national efforts under Article 18(2).¹⁵⁷ Other rules

152. See *id.* art. 121(5).

Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those State Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

Id.

153. See U.S. Proposal PCNICC/2000/WGRPE(13)/DP.1, *supra* note 132, at 2.

154. See ICC Statute, *supra* note 6, art. 15.

155. See ICC Rules of Procedure and Evidence, *supra* note 31, at 29-44; see also LEE, ICC ELEMENTS AND RULES, *supra* note 30, at 325-48, 408-22.

156. See ICC Rules of Procedure and Evidence, *supra* note 31, at 31-32.

157. See ICC Statute, *supra* note 6, art. 18(2).

Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

discipline the Prosecutor on rules of evidence, particularly on how to handle cases of sexual violence,¹⁵⁸ how to preserve the privileged character of certain communications,¹⁵⁹ how to protect against self-incrimination of a witness,¹⁶⁰ defense counsel's right to pre-trial disclosure,¹⁶¹ inspection of material in the possession or control of the Prosecutor,¹⁶² and restrictions on disclosure.¹⁶³ These rules now supplement key articles of the Treaty. Article 16 provides that the Security Council can prevent or stop any investigation or prosecution.¹⁶⁴ Articles 17-19 empower any State to invoke the principle of complementarity (deferral to national jurisdictions) with respect to a relevant situation or case (Article 19 permits a challenge by the accused also), and thus remove the matter from the Prosecutor's initiative (although the Prosecutor has certain rights to seek to resume investigations or prosecutions with the approval of the judges if the State is unwilling or genuinely unable to effectively exercise complementarity).¹⁶⁵

Proposed correction requiring, at a minimum, the leverage of U.S. signatory status: In the November/December 2000 session of the Preparatory Commission, the U.S. delegation proposed negotiations for the "Other Issues" working group that was anticipated to convene at a forthcoming Preparatory Commission session, as follows:

The United States of America proposes for the consideration of the Preparatory Commission the development of factors for the Court that may be relevant for the investigation, prosecution and surrender of suspects, including the context within which an alleged crime has occurred and a State's contribution to international peace and security.¹⁶⁶

This proposal has some potential for establishing guidelines that should inform the Prosecutor's actions, but only if pursued vigorously by the United States.

5. *Article 5: The Undefined Crime of Aggression.*

Flaw: Article 5 includes the "crime of aggression"¹⁶⁷ in the ICC's sub-

Id.

158. See *ICC Rules of Procedure and Evidence*, *supra* note 31, at 37-38 (incorporating Rules 70-72 that provide guidance for the Prosecutor in connection with sexual violence cases).

159. See *id.* at 38 (displaying, in Rule 73, the evidentiary and procedural requirements for preserving the contents of privileged communications and information).

160. See *id.* at 39-41 (laying out the standards against self-incrimination in Rules 74-75).

161. See *id.* at 41 (outlining pre-trial due process rights in Rule 76).

162. Rule 77 requires that the Prosecutor disclose any and all materials that prove to be essential to the defense's case or that he/she intends to use at trial. See *id.* at 41.

163. Rules 81-84 provide for such restrictions. See *id.* at 43-44.

164. See ICC Statute, *supra* note 6, art. 16.

165. See *id.* arts. 17-19.

166. See Preparatory Commission For the International Criminal Court; Working Group on a Relationship Agreement between the United Nations and the International Criminal Court; Proposal Submitted by the United States of America, U.N. Doc. PCNICC/2000/DP.1 (2000) [hereinafter U.S. Proposal PCNICC/2000/DP.1].

167. See ICC Statute, *supra* note 6, art. 5(1)(d).

ject matter jurisdiction but does not make it an actionable crime. A crime becomes actionable only after the ICC Treaty has been amended¹⁶⁸ with a definition for the crime of aggression and a procedure to trigger an investigation of it. The United States believed it was premature to include the crime of aggression in the ICC Treaty in any form until these requirements are satisfied. But no real harm has resulted yet because the process of defining the crime and settling on its trigger is a long negotiating process, so the real issue is how the matter is resolved in the future.

On-going correction requiring, at a minimum, the leverage of U.S. signatory status: The United States must remain deeply engaged in on-going negotiations in the Preparatory Commission concerning the definition, elements and requirements for the crime of aggression. The United States was joined by other delegations, including the other Permanent Members of the UN Security Council, in arguing for the requirements that 1) the Security Council must trigger investigation of the actionable crime of aggression by first determining that a State has committed aggression, and 2) the definition must be based strictly on customary international law and hence be of a narrow character (for example, a “war of aggression”). These discussions will continue probably for years and need a strong and credible U.S. voice in them. Any amendment including an actionable crime of aggression would have to achieve ratification by seven-eighths of all States Parties, which is a very high bar.¹⁶⁹ If the United States were to be a State Party prior to such an amendment, it could “opt out” of the crime of aggression forever pursuant to the Article 121(5) right for States Parties.¹⁷⁰

6. *Resolution E and Article 123 – Crimes of Terrorism and Drug Crimes*

Flaw: Resolution E adopted at the Rome Conference recommended that the Review Conference to be held seven years after entry into force of the ICC Treaty¹⁷¹ should “consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.”¹⁷² The United States opposed this language in Rome because we were not consulted on it and had no opportunity to debate it at the conference. Its inclusion in Resolution E occurred in secret on the night of July 16, 1998. We had maintained a long-standing position, well known to all delegations, that these two categories of crimes were inappropriate for ICC jurisdiction.¹⁷³

Correction: Nothing in the ICC Treaty requires the inclusion of crimes of terrorism and drug crimes. The issue will only emerge at the seven-year

168. The first opportunity is seven years after entry into force. *See id.* art. 123.

169. *See id.* art. 121(6).

170. *See id.* art. 121(5).

171. *See id.* art. 123.

172. *See* BASSIOUNI, DOCUMENTARY HISTORY, *supra* note 8, at 104-05.

173. *See* 1995 Report, *supra* note 7, at 11 (“The United States Government continues to reserve its judgment on whether conventions related to crimes of international terrorism . . . are appropriate for the jurisdiction of the ICC.”).

review conference and only if States Parties desire to pursue it seriously at that time. There was little discussion of these crimes during Preparatory Commission meetings prior to the September/October 2001 session. The terrorist attacks of September 11, 2001, on the United States may make discussion of the crime of terrorism as a new crime for the ICC more plausible in the future. However, the issue of defining an actionable crime of terrorism will doubtless be an enormous challenge for negotiators. There may also need to be a special accommodation for anti-terrorism conventions and their emphasis on domestic prosecution of terrorist actions.

7. Article 120: No Reservations

Flaw: Article 120 states, "No reservations may be made to this Statute."¹⁷⁴ The United States opposed such a prohibition prior to and during the Rome Conference.¹⁷⁵ The U.S. delegation believed that at a minimum there were certain provisions of the Treaty, particularly in the field of state cooperation with the ICC, where domestic constitutional requirements and national judicial procedures might require a reasonable opportunity for reservations that did not defeat the intent or purpose of the Treaty. If some qualified right to reservations had been permitted for the Treaty, then I believe the United States would have been much better positioned to support or at least not object to the draft that emerged on July 17, 1998, in Rome.

Article 120 stands unaltered. But some of the issues that the United States might have found useful to create reservations about have been addressed in the Preparatory Commission.¹⁷⁶ It is also entirely possible that other initiatives by the United States as a signatory of the ICC Treaty could further lessen the desirability of reservations. If the United States were to consider ratification of the ICC Treaty, then certain conditions and understandings could be developed that would have essentially the same protective character as reservations.

8. Article 8(2)(b)(viii): Occupied Territory

Flaw: Article 8(2)(b)(viii) defines as a war crime, "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory"¹⁷⁷ While most of this text is drawn from well-estab-

174. See ICC Statute, *supra* note 6, art. 120.

175. 1998 *Testimony Before the Senate Foreign Relations Committee*, *supra* note 7, at 15.

176. The Preparatory Commission addressed some U.S. concerns regarding Articles 12, 15, 8(2)(b)(viii), and it approved Elements of Crimes and Rules of Procedure and Evidence sought by the United States. See ICC Statute, *supra* note 6, art. 12 (outlining the preconditions to the exercise of jurisdiction); see also *id.* art. 15; *id.*, art. 8(2)(b)(viii) (discussing the consequences of directly transferring civilians within and outside of occupied territory). See generally ICC *Elements of Crimes*, *supra* note 30; LEE, ICC ELEMENTS AND RULES, *supra* note 30, at 3-231; ICC *Rules of Procedure and Evidence*, *supra* note 31; LEE, ICC ELEMENTS AND RULES, *supra* note 30, at 235-702.

177. See ICC Statute, *supra* note 6, art. (8)(2)(b)(viii) (emphasis added).

lished customary international law codified in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War¹⁷⁸ and in Protocol Additional to the Geneva Conventions (Protocol I),¹⁷⁹ the italicized words are new and caused the United States and Israel considerable concern over whether the crime would be used politically to prosecute Israeli officials. The italicized words are not drawn from customary international law.

Correction: The problem was corrected, to the satisfaction of the Government of Israel, in the Elements of Crimes. The elements for Article 8(2)(b)(viii) include a footnote that reads, "The term 'transfer' needs to be interpreted in accordance with the relevant provisions of international humanitarian law."¹⁸⁰ This footnote assures Israel that any allegation regarding this particular war crime would have to be grounded in established international humanitarian law. On December 31, 2000, Israel signed the ICC Treaty with the following relevant statement:

At the 1998 Rome Conference, Israel expressed its deep disappointment and regret at the insertion into the Statute of formulations tailored to meet the political agenda of certain states. Israel warned that such an unfortunate practice might reflect on the intent to abuse the Statute as a political tool. Today, in the same spirit, the Government of the State of Israel signs the Statute while rejecting any attempt to interpret provisions thereof in a politically motivated manner against Israel and its citizens. The Government of Israel hopes that Israel's expressions of concern of any such attempt would be recorded in history as a warning against the risk of politicization, that might undermine the objectives of what is intended to become a central impartial body, benefiting mankind as a whole.¹⁸¹

In summary, during the Preparatory Commission sessions of 1999 and 2000, the most significant flaws, Articles 12 and 15, were partially corrected and the stage was set for further corrections. The flaw in Article 121(5) was positioned for correction in 2001. The flaw in Article 124 was ripe for further negotiation following intensive discussions in 2000. The flaws in Article 5 (crime of aggression) and Resolution E (crimes of terrorism and drug trafficking) remain non-threatening and should remain so provided the United States continues to engage constructively and with credible leverage as a signatory state in the Preparatory Commission discussions about these crimes. The U.S. delegation was concerned about being blindsided with reference to these crimes in the ICC Treaty and in

178. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 47-78, 75 U.N.T.S. 287, 318-338 (entered into force Oct. 21, 1950), available at <http://www1.umn.edu/humanrts/instree/y4gcpcp.htm>.

179. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 63, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978), available at <http://www1.umn.edu/humanrts/instree/y5pagc.htm>.

180. See *ICC Elements of Crimes*, *supra* note 30, at 28; see also LEE, *ICC ELEMENTS AND RULES*, *supra* note 31, at 158-62.

181. See Israel's Signature of the Rome Statute of the International Criminal Court (ICC); Statement Upon Signature, at 1 (2000) (on file with the *Cornell International Law Journal*).

Resolution E at Rome, and my testimony before the Senate Foreign Relations Committee within a week after the conclusion of the Rome Conference demonstrated that concern.¹⁸² But the reality is that none of these crimes are actionable crimes until the Treaty is amended to incorporate them (no sooner than seven years after the Treaty enters into force¹⁸³) so they would not present any imminent threat to U.S. interests when the ICC is established and begins to operate. The flaw in Article 120 is irreversible (short of amendment to the ICC Treaty which can take place no sooner than seven years after entry into force of the Treaty¹⁸⁴), but as other flaws are corrected, the need or desirability to seek reservations to the Treaty diminishes. This certainly occurred with the work product of the Preparatory Commission during 1999 and 2000. The utility of conditions and understandings attached to U.S. instruments of ratification of the ICC Treaty should not be underestimated. Finally, the flaw in Article 8(2)(b)(viii) was corrected.¹⁸⁵

D. Unresolved Concerns on December 31, 2000

Important U.S. concerns about the ICC Treaty regime that remained unresolved on December 31, 2000, thus were the following:

1. The potential, albeit remote possibility of exposure of U.S. service members to the jurisdiction of the ICC while the United States remains a non-State Party (Article 12). A U.S. proposal for the Preparatory Commission sought to address this issue.¹⁸⁶

2. The anomaly in Article 121(5) that grants a State Party the right to opt out of a new or amended crime but implicitly exposes a non-State Party to the new or amended crime. A U.S. proposal for the Preparatory Commission sought to address this issue.¹⁸⁷

3. The need for reasonable guidelines for the *proprio motu* Prosecutor (Article 15). A U.S. proposal for the Preparatory Commission sought to address this issue.¹⁸⁸

4. A proper definition and trigger for the crime of aggression (Article 5).
5. The long history of active U.S. engagement in negotiations set the stage for U.S. leadership on this issue in 2001.

5. Determine what steps the United States should take under Article 98(2) of the Statute to confirm the applicability of existing Status of Forces Agreements and the possible need to negotiate additional international agreements that would prevent the surrender of U.S. citizens to the ICC without U.S. consent.

182. See 1998 Testimony Before the Senate Foreign Relations Committee, *supra* note 7, at 14.

183. See ICC Statute, *supra* note 6, art. 121(1).

184. See *id.*

185. See *id.* art. 8(2)(b)(viii).

186. See U.S. Proposal PCNICC/2000/WGICC-UN/DP.17, *supra* note 42.

187. See U.S. Proposal PCNICC/2000/WGRPE(13)/DP.1, *supra* note 132, at 2.

188. See Discussion Paper PCNICC/2000/WGICC-UN/RT.1, *supra* note 133, arts. 4-5.

6. Determine how the U.S. federal criminal code (U.S.C. Title 18) and the Uniform Code of Military Justice (U.S.C. Title 10) should be amended to ensure that crimes falling within the jurisdiction of the ICC can be thoroughly investigated and prosecuted in U.S. courts, thus ensuring U.S. reliance on the complementarity provisions in the ICC Treaty.¹⁸⁹

The premise underlying these remaining concerns about the ICC Treaty was the need for continued active engagement by the United States as a signatory in the Preparatory Commission sessions, bilateral and multi-lateral negotiations on Article 98(2) agreements, and the amendment of relevant domestic law. As of early 2002, the Bush Administration had not pursued any of these endeavors with the exception of a minimalist, mid-level presence at the Preparatory Commission sessions generating occasional interventions on the crime of aggression and financial rules and regulations.

III. Safeguards for U.S. Personnel Under the ICC Treaty Regime

The central issue confronting the United States government with respect to the ICC is the risk that the Court may seek to investigate, obtain custody of, and ultimately prosecute a U.S. service member or U.S. Government official in connection with that individual's official duty. Although referenced in somewhat different contexts earlier in this article, the safeguards that already exist in the ICC Statute and its supplemental documents are significant when viewed in their totality. I often referred to these as the "matrix of safeguards" that would minimize the risk of prosecution of U.S. service members and government officials. The following list focuses on the major safeguards.

A. Safeguards Available Without U.S. Ratification of the ICC Treaty

1. Complementarity

The complementarity principle (Articles 17, 18, and 19) was championed by the United States throughout the nearly five-year period of negotiations leading to the ICC Treaty and to the Rules of Procedure and Evidence adopted on June 30, 2000. In fact, the most potent complementarity provision, Article 18, was entirely a U.S. proposal that, following some revision in negotiations, was adopted at the Rome Conference.¹⁹⁰ I doubt that many delegates would dispute the view that the maximum possible protection under complementarity was achieved in the negotiations. Although the United States pursued various proposals that would have strengthened complementarity even more than what resulted in both the Treaty and the Rules of Procedure and Evidence, until the U.S. proposal of December 7, 2001¹⁹¹ there was no other realistic means to push the envelope of comple-

189. See generally Cassel, *supra* note 39, at 428-35.

190. See Proposal Submitted by the United States of America: Preliminary Rulings Regarding Admissibility, Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/1998/WG.3/DP.2.

191. See U.S. Proposal U.N. Doc. PCNICC/2000/WGICC-UN/DP.17, *supra* note 42.

mentarity any further.

The complementarity principle requires that the ICC defer to national legal systems that are willing and able to investigate and, if merited, prosecute perpetrators over which they have jurisdiction.¹⁹² The United States should be able to meet this test with respect to U.S. personnel, and thus render inadmissible any relevant case, provided U.S. federal law and the Uniform Code of Military Justice are amended to track thoroughly all of the specific crimes in Articles 5-8 of the ICC Treaty.¹⁹³ Without such amendments to U.S. law, arguments could be raised that a gap in U.S. law renders the United States “unable” to investigate and prosecute the specific crime. Many of the concerns about the complementarity regime as it would be applied to the United States are concerns that would be vastly diminished if U.S. law were revised to close the gaps between U.S. law and the ICC Treaty. Ultimate U.S. ratification could be made conditional upon adoption of the necessary amendments to U.S. law, but such amendments should be undertaken in any event since complementarity is available as protection even to non-States Parties. This will be critical during the years that the United States is only a signatory to the ICC Treaty. Many signatory States are undertaking this revision exercise of their national criminal codes.¹⁹⁴

Some of the criticism of the complementarity regime is either ill-informed or unrealistic. The desire for a strictly “objective standard to determine whether the ICC should assert jurisdiction when a State decides not to prosecute”¹⁹⁵ is laudable, but exceptionally difficult to codify while still providing the Court with enough latitude to exercise jurisdiction over rogue or recalcitrant states that seek to abuse the complementarity privilege. Nonetheless, the criteria for determinations of “unwillingness” and “inability” in Article 17(2) and (3) must be applied by the Court and their objectivity is as, if not more, rigorous than alternative formulations of “clearly erroneous” or “reasonable basis” that have been proposed.¹⁹⁶ Any attempt to re-open these criteria would risk weakening the complementar-

192. See Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 *MIL. L. REV.* 20, 26-27 (2001).

The complementarity principle is the fulcrum that prioritizes the authority of domestic forums to prosecute the crimes defined by Article 5 of the Rome Statute. Phrased another way, the complementarity principle is intended to preserve the power of the ICC over irresponsible states that refuse to prosecute nationals who commit heinous international crimes, but balances that supranational power against the sovereign right of states to prosecute their own nationals without external interference.

Id.

193. See generally Cassel, *supra* note 39, at 428-35.

194. Canada, Germany, France, United Kingdom, Norway, Spain, Australia (as signatory), and New Zealand are some of the states that have signed and/or ratified the ICC Treaty and have revised their domestic law accordingly. See generally Recent Government Documents/Implementating Legislation, at www.iccnw.org/html/gov_t.html (January 2001).

195. Gurulé, *supra* note 34, at 9.

196. See *id.*

ity regime rather than strengthening it – a prospect well recognized by delegations in the final days of the Rome Conference. Nonetheless, the U.S. delegation tightened the review criteria for admissibility in the Rules of Procedure and Evidence. After much negotiation in the Preparatory Commission, delegations agreed upon Rule 51 which states that a State referred to in Article 17(1), including one that has decided not to prosecute a suspect, may bring to the Court’s attention information “showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.”¹⁹⁷

In negotiations over Article 18,¹⁹⁸ the United States had sought to require a unanimous decision by judges in the Pre-Trial Chamber and in the Appeals Chamber when challenging the sufficiency of a State’s investigations into a situation. But the majority rule prevailed in the negotiations.¹⁹⁹ Concern raised about the prosecutor’s power to investigate under Article 15²⁰⁰ must be tempered with the reality of how the complementarity regime is implemented, a barrier that Article 15(4) acknowledges.

Critics of Article 18 seek vainly to find some definitive way to prohibit the ICC Prosecutor from pursuing an investigation after a State has exercised its right under Article 18 to investigate its nationals or others within its jurisdiction with respect to a situation being investigated by the Prosecutor. At each one of these breakpoints in the complementarity regime, some means had to be devised for the investigation to return to the Prosecutor in the event the State was not exercising its responsibilities to investigate and prosecute perpetrators of atrocity crimes within the Court’s jurisdiction. The whole construct of complementarity could not have been negotiated without these release valves. Otherwise, the complementarity regime would have collapsed in the negotiations under the argument that any State intending to prevent any credible investigation of atrocity crimes and essentially fostering a sham procedure at home would thwart permanently the jurisdiction of the Court over these crimes. Critics who view the complementarity regime only through the prism of worst case scenarios that might expose U.S. service members to ICC jurisdiction engage in analytical exercises that are so narrow in scope as to be utterly unrealistic when applied to the multilateral reality of the negotiations shaping the ICC Treaty regime. In those negotiations the worst perpetrators of atrocity crimes (hence *not* the United States) necessarily have been focused upon. Proposals that would have the effect of shielding the worst perpetrators from ICC jurisdiction find little if any support among governments supporting the ICC Treaty, and their consensus is required for the adoption of any proposal.

197. See *ICC Rules of Procedure and Evidence*, *supra* note 31, at 31.

198. See *ICC Statute*, *supra* note 6, art. 18.

199. See Gurulé, *supra* note 34, at 19-40.

200. See *id.*

2. Negotiation and Confirmation of Article 98(2) Agreements

The United States can negotiate bilateral or multilateral agreements to protect any American citizen from surrender to the ICC.²⁰¹ The United States can leverage the approval of such international agreements with particular countries as a precondition to wide-ranging U.S. cooperation with the Court during its non-State Party status and ultimately to U.S. ratification of the ICC Treaty. Existing Status of Forces Agreements already constitute de facto Article 98(2) agreements for personnel in SOFA jurisdictions.²⁰² Rule 195(2),²⁰³ successfully sought by the United States, leaves open the possibility of negotiation of an international agreement between the ICC and the United States to protect any American citizen from surrender to the ICC.

3. Security Council Power to Refer Situations

The power of the Security Council to refer situations²⁰⁴ enables the Council to shape the ICC's jurisdiction in any particular situation provided sufficient support is found in the Council to refer the situation under a Chapter VII resolution. This means that if the Council seizes the opportunity, particularly in a situation that has already engaged the Council as a threat to international peace and security, to refer a situation to the ICC, then such referral can be tailored to minimize the exposure to ICC jurisdiction of military forces deployed to confront the threat. The Chapter VII resolution would define the parameters of the Court's investigations in the particular situation. The Security Council also could use the power of referral to insulate domestic amnesty arrangements from the reach of the ICC by specifying in a referral, for example, that those individuals who have received or will receive amnesty in accordance with domestic procedures fall outside the scope of the referral. This may be particularly relevant for amnesties of low and mid-level personnel who normally would be of little interest to an ICC Prosecutor anyway. But the power of the Security Council to shape the referral could facilitate peace-making while still upholding a significant role for the ICC to play in achieving international justice in any particular situation. The United States will exercise more influence to initiate or shape these decisions as a constructive signatory of the ICC Treaty than as an opponent to the Court. Two permanent members of the Security Council, the United Kingdom and France, have ratified the ICC Treaty²⁰⁵ and thus will not entertain U.S. proposals designed to undermine the Court or confirm U.S. opposition to the Court. In addition, as a signatory of the ICC Treaty, Russia²⁰⁶ is unlikely to join any U.S.

201. See ICC Statute, *supra* note 6, art. 98(2).

202. See Ruth Wedgwood, *Consensus Through the "Ithaca Package"*, 32 CORNELL INT'L L.J. 535, 541 (1999) ("SOFA agreements bar arrests under ICC jurisdiction . . . in light of Article 98 of the Rome Statute . . ."). *But see* Paust, *supra* note 68, at 10-15.

203. See ICC Rules of Procedure and Evidence, *supra* note 31, at 89.

204. See ICC Statute, *supra* note 6, art. 13(1)(b).

205. See Country-by-Country Ratification Status Report, *supra* note 25.

206. See *id.*

opposition to the Court.

4. Security Council Power to Prevent ICC Action

The Security Council can prevent the ICC from investigating and prosecuting crimes for one year, and can renew any such resolution under the same conditions.²⁰⁷ This power can be a substantial protection for U.S. interests but only if the United States has the credibility, as a constructive signatory of the ICC Treaty, to persuade other Council members, both permanent and non-permanent, that such suspension of ICC action is not intended as an assault on the ICC or as a challenge to its legitimacy but rather as a necessary action to restore or maintain international peace and security.

5. High Thresholds for ICC Crimes

The threshold for any ICC investigation and prosecution of crimes is high enough that it is unlikely that the United States and its official personnel should plan and engage in such extraordinarily severe and systematic crimes so as to trigger the subject matter jurisdiction of the Court. The jurisdiction of the Court is limited to the “most serious crimes of concern to the international community as a whole.”²⁰⁸ “Genocide” requires the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”²⁰⁹ “Crimes against humanity” must be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,”²¹⁰ and that attack must involve the multiple commission of crimes against any civilian population, “pursuant to or in furtherance of a State or organizational policy to commit such attack.”²¹¹

“War crimes” fall within ICC jurisdiction “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes,”²¹² and only when the material elements of the crime are committed with intent and knowledge.²¹³ Prior to the Rome Conference, the United States sought a higher and more definitive threshold for war crimes charges by removing the words “in particular” from the definition in Article 8(1),²¹⁴ but there was concern among other governments, including many of our NATO allies, that we not superimpose upon the Geneva Conventions of 1949 and the Additional Protocols I and II of 1977 a higher threshold. It was feared that the enforceability of these conventions would be impaired if the ICC Treaty created a new threshold not otherwise found in the conventions themselves. Nonetheless, when joined with the preambular language, Article 5(1),²¹⁵ the prominence given to the requirements of Article 8(1) in

207. See ICC Statute, *supra* note 6, art. 16.

208. See *id.* art. 5(1).

209. See *id.* art. 6.

210. See *id.* art. 7(1).

211. See *id.* art. 7(2)(a).

212. See *id.* art. 8(1).

213. See *id.* art. 8.

214. See *id.* art. 8(1).

215. See *id.* art. 5(1).

the provision itself,²¹⁶ and the simple reality that the ICC cannot expend its resources on the investigation and prosecution of isolated war crimes by individual soldiers, the threshold for war crimes should remain relatively high. The ICC will look foolish pursuing an individual soldier for an isolated war crime that does not meet the important criteria set forth in Article 8(1).²¹⁷

6. Elements of Crimes

The Elements of Crimes impose stricter discipline on the prosecution of ICC crimes than found only in the Statute.²¹⁸ In general, a person must commit material elements of a crime with intent and knowledge about that crime.²¹⁹

With respect to the crime of genocide, the conduct must take place “in the context of a manifest pattern of similar conduct directed against the group or was conduct that could itself effect such destruction.”²²⁰

With respect to crimes against humanity, the necessary “policy to commit such attack”²²¹ against a civilian population requires that the State or organization “actively promote or encourage such an attack against a civilian population.”²²² The perpetrator must have known that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.²²³

With respect to war crimes, the elements of war crimes must be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea. The perpetrator must be aware of the factual circumstances that established the existence of an armed conflict.²²⁴ Regarding the war crimes of attacking civilians or civilian objects, the perpetrator must have intended the civilian population as such or individual civilians not taking direct part in hostilities or such civilian objects to be the object of the attack.²²⁵ Regarding the war crime of excessive incidental death, injury, or damage, it must be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.²²⁶

216. See *id.* art. 8(1).

217. This is why the definitions of war crimes do not contain the requirements seen for crimes against humanity. See Gurulé, *supra* note 34, at 31.

218. See Lietzau, *supra* note 33, at 4.

219. See *ICC Elements of Crimes*, *supra* note 30, at 5 (“As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”).

220. *ICC Elements of Crimes*, *supra* note 30, at 6.

221. *Id.* at 9.

222. *Id.*

223. *Id.*

224. *Id.* at 23.

225. *Id.*

226. See *generally id.* at 27.

7. *Criteria the Prosecutor Must Consider before Initiating an Investigation*

The Prosecutor must consider whether

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under Article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice [the last fact is effective only if confirmed by the Pre-Trial Chamber].²²⁷

At the request of the requesting State or the Security Council if it has made a referral, the Pre-Trial Chamber may review the Prosecutor's decision not to proceed and request the Prosecutor to reconsider that decision.²²⁸

8. *Protection from Politically-Motivated Charges by Non-States Parties*

When a non-State Party seeks to accept the jurisdiction of the Court by "declaration" to advance a particular set of charges, it must accept the jurisdiction of the Court for the whole situation at issue, and thus open itself up to ICC scrutiny.²²⁹

9. *Rights of Suspects and the Constitutionality of the ICC Treaty*

Suspects are accorded a comprehensive set of due process rights that fulfill constitutional requirements for a treaty of this character establishing an International Criminal Court.²³⁰ Critics who have focused on supposed U.S. constitutional defects in the ICC Treaty are either ill-informed about the treaty regime, including its supplemental documents, or overlook international practice by the United States.²³¹

227. ICC Statute, *supra* note 6, art. 53(1).

228. *See id.* art. 53(2).

229. *See id.* art. 12(3); *see also* ICC Rules of Procedure and Evidence, *supra* note 31, at 29 (setting forth, in Rule 44(2), the procedural requirements for the declaration described in Article 12(3) of the ICC Treaty); discussion *supra* Part II.C.1.

230. *See* ICC Statute, *supra* note 6, arts. 20, 22, 55, 57 (3), 58, 61(3), 63, 66, 67, 69(7). *See generally* ICC Rules of Procedure and Evidence, *supra* note 31.

231. Compare Lee A. Casey & David B. Rivkin, Jr. *The International Criminal Court vs. the American People*, at <http://www.heritage.org/library/backgrounder/bg1249.html> (Feb. 5, 1999) ("U.S. participation would be unconstitutional because it would subject individual Americans to trial and punishment in an extra-constitutional court without affording them all the rights and protections the U.S. Constitution guarantees.") with Leigh, *supra* note 68, at 130-31 ("Indeed, the list of due-process rights guaranteed by the Rome Statute is, if anything, somewhat more detailed and comprehensive than those in the American Bill of Rights. Not better, but more detailed.") and *The International Criminal Court: Hearing Before the House Comm. on Int'l Rel.*, 106th Cong. 92-101, 96 (2000) (statement of Monroe Leigh on behalf of the American Bar Association) [hereinafter Monroe Leigh statement] ("[I]t cannot be denied that the Treaty of Rome contains the most comprehensive list of due process protections which has so far been promulgated."). In further response to critics of the Rome Treaty, Leigh provided a point by point comparison of due process rights in the Treaty of Rome and in the U.S. Constitution. *See* Monroe Leigh statement, *supra*, at 90-91. One constitutional issue that merits

further comment concerns jury trials. See Leigh, *supra* note 68, at 130 (“Trial by jury, however, is not available to service members under the Fifth Amendment. They are excepted from coverage by the text of the Fifth Amendment. And the same exception is generally assumed to be applicable under the Sixth Amendment.”); see also DEFENSE NEWS OP-ED, *supra* note 3, at 1.

The fact that the treaty requires trial by judges is not surprising in an international criminal court that merges common and civil law practice. It is well-settled extradition practice to accept trial without jury outside the United States and for these crimes qualified judges might be preferred to international jurors. The difficulty the treaty’s procedures arguably present under the U.S. Constitution is if the United States were to become a party to the treaty and an American citizen commits on U.S. territory genocide, crimes against humanity, or war crimes that meet the court’s rigorous tests of admissibility—a highly unlikely event.

The reality is that our own prosecutors would pounce on that individual so fast the international court would never have a right under the treaty to investigate him. We successfully negotiated the procedures that grant our justice system maximum discretion to seize a case against any U.S. citizen, even if the crime is committed overseas, and if merited indict and prosecute him before an American jury.

Id.; see also Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT’L L. 73, 125-26 (1995).

Excellent analyses of the U.S. Constitution and the ICC can be found in Marquardt (although its publication in 1995 pre-dates the final text of the Rome Treaty) and in an essay by Professor Ruth Wedgwood of Yale Law School. I quote Professor Wedgwood at some length because she has summarized the key arguments in this debate. See Ruth Wedgwood, *The Constitution and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 119, 121, 123 (2000).

The ICC is a new creation in international jurisprudence, and thus, one should not expect cut-and-dried precedent on the matter. But the most persuasive answer is that there is no forbidding constitutional obstacle to U.S. participation in the treaty

First, the United States has used its treaty power in the past to participate in other international tribunals that affect the lives and property of Americans.

Second, the ICC is carefully structured with procedural protections that closely follow the guarantees and safeguards of the American Bill of Rights and other liberal constitutional systems.

Third, the offenses within the ICC’s jurisdiction would otherwise ordinarily be handled through military courts-martial or through extradition of offenders to the foreign nation where an offense occurred. Thus, the detailed structure of American common law trial procedure would not ordinarily be applicable to these cases in any event

. . . .
American negotiators at Rome worked hard to ensure that the permanent ICC would follow demanding standards of due process. To that end, any defendant is guaranteed the right to have timely notice of the charges against him, the presumption of innocence, the right against self-incrimination, also forbidding any adverse inference from the exercise of the right to silence, the right to the assistance of counsel and to the assistance of an interpreter, the right to bail, the right to a speedy trial, the right to conduct a defense in person or through the defendant’s chosen counsel, the right to cross-examine the witnesses against him and to call witnesses on his own behalf, the right to disclosure of any exculpatory evidence, the right not to bear any burden of proof but rather to require the prosecution to prove guilt ‘beyond reasonable doubt,’ and the right not to be subjected to any form of duress or coercion, or any cruel, inhuman, or degrading punishment. In addition, the ICC Statute even guarantees a form of Miranda warnings — a privilege that has often been criticized in the United States since its enunciation by the Supreme Court in 1966 as offering undue protection of

10. *Pre-Trial Chamber Protection of Suspect's Rights*

The Pre-Trial Chamber may issue orders to assist a suspect in the preparation of his or her defense²³² and must periodically review its ruling on the detention of a suspect and ensure that a suspect is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.²³³ If such delay occurs, the Court must consider releasing the suspect, with or without conditions.²³⁴

11. *Protection of National Security Information*

The United States has full power to withhold information or documents from the Court if such disclosure would, in the opinion of the United States Government, prejudice its national security interests.²³⁵ If a State Party or the United Nations is requested by the Court to provide documents or information in its custody which were disclosed in confidence to it by the United States, the State Party shall seek the consent of the United States as a pre-condition to any disclosure.²³⁶ If the United States refuses to consent, there is no disclosure of such information.²³⁷ The U.S. delegation waged a long and often lonely and acrimonious struggle for this protection, and with the support of key governments this critical U.S. requirement ultimately prevailed.²³⁸

12. *Diplomatic Immunity*

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently . . . under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.²³⁹

U.S. diplomats or other official personnel enjoying diplomatic immunity in any jurisdiction thus would be shielded from a surrender request

criminal suspects. The Miranda case requires oral notice of rights when a defendant is in custodial interrogation. The ICC statute is even more protective, requiring that the prosecution advise a person of his rights before he is questioned whenever there are grounds to believe that he has committed a crime, even in noncustodial interrogation – including a warning of the right to remain silent, the right to legal assistance, the right to have counsel appointed if he cannot afford it, and the right to be questioned in the presence of counsel.

The major differences from common law procedure in the ICC are the use of a factfinding panel of three Judges instead of a jury, with a verdict to be rendered by the vote of at least two Judges, and the availability of an appeal by the prosecution from errors of fact, law, and procedure.

Id.

232. See ICC Statute, *supra* note 6, art. 57(3)(b).

233. *Id.* art. 60(4).

234. See *id.*

235. See *id.* art. 72.

236. *Id.* art. 73.

237. *Id.* art. 73.

238. See ICC Statute, *supra* note 6, art. 73; see also Discussion Paper PCNICC/2000/WGICC-UN/RT.1, *supra* note 133, art. 11.

239. ICC Statute, *supra* note 6, art. 98(1).

from the ICC provided such immunity is consistent with international law.²⁴⁰

13. *Rule of Specialty*

A suspect surrendered to the Court cannot be proceeded against, punished, or detained for any conduct committed prior to surrender other than the conduct which forms the basis of the crimes of which that person has been surrendered. Thus the Court cannot prosecute the suspect for conduct that falls outside the conduct upon which the indictment is framed.²⁴¹

B. Safeguards Proposed by the United States in 2000

1. *Final Review of Admissibility*

The United States proposed on December 7, 2000, a provision for the Relationship Agreement between the United Nations and the ICC that would require the Court, on its own motion, to undertake a final review of admissibility of a case when a surrender request is prepared against a suspect for an alleged crime outside that suspect's territory of nationality.²⁴²

2. *Guidance to the Court*

The United States proposed on December 7, 2000, that the Preparatory Commission prepare factors for the Court to consider in the investigation, prosecution, and surrender of suspects, including the context within which a crime is committed and the contributions that a State makes to international peace and security.²⁴³

3. *Protection from Introduction of New Crimes*

The United States proposed on June 8, 2000, that the Rules of Procedure for the Assembly of States Parties require that,

With respect to a crime added by amendment to the Statute pursuant to article 121, paragraph 5, the court may exercise jurisdiction only if the amendment has entered into force for both the State of nationality of the alleged perpetrator and the State in whose territory the crime was committed.²⁴⁴

4. *International Agreements Relating to Surrender of Suspects to the ICC*

The United States proposed during the June 2000 session of the Preparatory Commission a provision that became Rule 195(2) of the Rules of Pro-

240. *See id.*

241. *See id.* art. 10.

242. *See* U.S. Proposal PCNICC/2000/WGICC-UN/DP.17, *supra* note 42; *see also* discussion *supra* Part II.C.1.

243. *See* U.S. Proposal PCNICC/2000/DP.1, *supra* note 166; *see also* discussion *supra* Part II.C.1.

244. *See* U.S. Proposal PCNICC/2000/WGRPE(13)/DP.1, *supra* note 132; *see also* discussion *supra* Part II.C.3.

cedure and Evidence.²⁴⁵ This rule keeps open the possibility of an international agreement between the ICC and the United States that focuses on the surrender issue.

C. Further Safeguards Available if the United States Were to Ratify the ICC Treaty

1. *Non-Exposure to War Crimes Charges for Seven Years*

The United States could “opt-out” of any war crimes exposure before the ICC during the initial seven years of U.S. participation as a State Party in the Court.²⁴⁶

2. *Non-Exposure to the Crime of Aggression and Other New Crimes*

The United States could “opt-out” forever of any amendment that would add an actionable crime of aggression or any other new crime to the ICC Treaty provided, in the event any such amendment is to be acted upon at the seven-year review conference, the United States becomes a State Party prior to that conference.²⁴⁷

3. *U.S. Influence in the Nomination and Election of Judges and Prosecutors*

Only as a State Party would the United States be entitled to nominate candidates for ICC judges and vote for the election of all judges.²⁴⁸ Only nationals of States Parties may be elected judges,²⁴⁹ so a U.S. national, in most cases, could only become a judge if the United States is a State Party.²⁵⁰ Only as a State Party would the United States be entitled to vote for the Prosecutor and Deputy Prosecutors.²⁵¹

4. *U.S. Influence in the Operation of the ICC*

While the United States as a State Party would be obligated to pay a proportionate share of the ICC’s costs, that fact alone would make the United States the most influential government in the Assembly of States Parties overseeing and determining the budget of the ICC each year and the election of judges and prosecutors. The reliance on U.S. financial support can deeply influence the priorities and actions of the ICC prosecutors and judges.²⁵²

245. See Rules of Procedure and Evidence, *supra* note 31, at 89; see also discussion *supra* Part II.C.1.

246. See ICC Statute, *supra* note 6, art. 124.

247. See *id.* art. 121(5); see also *id.* art. 123(1).

248. See *id.* art. 36(4)(a).

249. *Id.* art. 36(4)(b).

250. See *id.* art. 36(4). However, the ICC Statute provides the possibility for a dual national to become a judge. Therefore, it is conceivable that a U.S. dual national resident in a country that is a State Party to the ICC, could be nominated and elected as a judge provided that he/she has met the other qualifications set forth in Article 36.

251. See *id.* art. 42(4).

252. See *id.* art. 112; see also *id.*, art. 115. See generally Proceedings of the Preparatory Commission at its Seventh Session; Annex III: Draft Financial Regulations and

IV. Steps the United States Could Take to Live with the ICC Treaty

There are many initiatives that the United States Government could take to further protect its interests in the establishment and operation of the ICC and set the stage for consideration of ratification of the ICC Treaty by the United States. Some of those initiatives are described below:²⁵³

1. The United States should remain deeply engaged in the UN Preparatory Commission negotiations to advance treaty-friendly proposals that protect U.S. interests, such as strengthening complementarity, defining the crime of aggression, ensuring proper exercise of power by the Prosecutor, and ensuring that non-parties are not subject to new or amended crimes.

2. The United States should amend the U.S. federal criminal code (Title 18) and the Uniform Code of Military Justice (Title 10) to ensure that ICC crimes can be investigated and prosecuted domestically and thus benefit from the principle of complementarity under the ICC Treaty, which is the primary and strongest line of defense against unwarranted charges against Americans. The White House should establish a non-partisan commission of experts to ensure, through its oversight, that the United States takes full advantage of its rights under the complementarity regime of the ICC Treaty.

3. The United States should unilaterally declare every *relevant* Status of Forces Agreement an Article 98(2) international agreement. The U.S. delegation held open the probability throughout the negotiations that existing Status of Forces Agreements constitute Article 98(2) agreements. Indeed, the origin of Article 98(2) was the importance of the protection afforded by Status of Forces Agreements.²⁵⁴ The United States should confirm the relevance of the Status of Forces Agreements as soon as possible and, if other governments acquiesce in the U.S. announcement, then their sufficiency as Article 98(2) agreements should be sustained. If there are objections to the U.S. announcement, then Washington can challenge the objecting government to enter into a special Article 98(2) agreement with the United States or suffer in its bilateral relationship with the United States.

4. The United States should reinforce through executive declaration or Congressional resolution the U.S. position that its signature on December 31, 2000, did not prejudice our long-standing legal interpretation of the ICC Treaty regarding ICC jurisdiction over non-State Party nationals. For example, relevant language might read, "U.S. signature of the ICC Treaty does not prejudice our long-standing legal interpretation of the Treaty, namely that the Court cannot exercise jurisdiction over the nationals of non-States Parties except under certain circumstances." We would want to leave vague what those circumstances are (because they can be pragmati-

Rules, U.N. Doc. PCNICC/2001/L.1/Rev.1/Add.2 (2001), available at <http://www.un.org/law/icc/prepcomm/mar2001/english/rev1ad2e.pdf>.

253. See generally David J. Scheffer, *A Negotiator's Perspective on the International Criminal Court*, 167 *MIL. L. REV.* 1, 13 (2001) [hereinafter Scheffer, *Negotiator's Perspective*].

254. See 1995 Report, *supra* note 7, at 4.

cally negotiated), but as discussed elsewhere in this Article we endorsed jurisdiction arising from a UNSC Chapter VII referral to the Court²⁵⁵ or from consent of the State of nationality²⁵⁶ or for the purpose of bringing rogue State perpetrators to justice.²⁵⁷

5. The United States should negotiate Article 98(2) agreements with targeted governments (particularly if we conclude they are not adequately covered by Status of Forces Agreements), thus protecting U.S. personnel from surrender to the ICC from those countries. This would enable the United States to use its bilateral leverage to accomplish its multilateral objective. In the context of the campaign against terrorism, the United States should use its leverage with coalition members to achieve this protection. The United States would stipulate that it will not ratify the ICC Treaty until a "critical mass" (defined reasonably) of such Article 98(2) agreements have been concluded. The United States would continue to include relevant non-surrender language in new extradition treaties and mutual legal assistance treaties.²⁵⁸

6. The United States should declare that if U.S. personnel are surrendered to the ICC without U.S. consent prior to U.S. ratification of the ICC Treaty, the United States will suspend and perhaps terminate all measures to ratify the Treaty. In any U.S. ratification exercise, there would be an understanding prepared that if U.S. personnel are surrendered after U.S. ratification despite U.S. objection and American exercise of complementarity, then the United States must review its options for withdrawal from the Treaty.

Conclusion

Two realities confront the United States: First, the establishment of the International Criminal Court is a *fait accompli* and will be realized soon whether or not the United States becomes one of the first sixty State Parties to the ICC Treaty or whether or not the United States wages an opposition campaign against the ICC. Second, the world indeed changed on September 11, 2001, in a direction that points towards constructive and multilateral U.S. engagement in the enforcement of international criminal law, including through the ICC. The flaws that remain in the ICC Treaty can be addressed in such a manner as to assure the United States Government that its interests are protected and that the Court remains focused on the authentic perpetrators of atrocity crimes. But that prospect for remedying the flaws will fade permanently unless the United States re-engages in the Preparatory Commission and with its allies and friends to satisfactorily address U.S. concerns in ways I have described in this Article and

255. See discussion *supra* note 66 and accompanying text.

256. See discussion *supra* note 68 and accompanying text.

257. See discussion *supra* note 67 and accompanying text.

258. Extradition Treaty with Poland, U.S. CONG. SERIAL SET, S. TREATY DOC. 105-14, 105th Cong. (July 9, 1997).

elsewhere.²⁵⁹

The September 11th terrorist attacks offer the opportunity to use U.S. credibility as a signatory nation to request of our coalition partners in the war against terrorism that they enter into Article 98(2) international agreements with the United States. Washington could assure them that when a critical mass of these agreements (and confirmation of relevant Status of Forces Agreements) is obtained and certain treaty-friendly proposals by the United States are satisfactorily considered either in the Preparatory Commission or in the Assembly of States Parties, the Executive Branch will submit the ICC Treaty to the United States Senate for its advice and consent. Given the deployment in foreign territories and on the high seas of U.S. military forces for an undetermined length of time in the campaign against terrorism, there is every reason to argue for the merit of the Article 98(2) agreements and for confirmation of the reach of existing Status of Forces Agreements (as well as any new Status of Forces Agreements that are negotiated to accommodate U.S. troop deployments overseas).

The United States signed the ICC Treaty for the purpose of sustaining U.S. leadership in the enforcement of the laws that seek to punish the perpetrators of atrocity crimes. We should exercise that leadership, now more than ever, with the courage and integrity that the rest of the world expects us to demonstrate. If we abandon the opportunity to lead the world in the investigation and prosecution of atrocity crimes, then history will record the inexplicable folly of a great nation.

259. See generally *Negotiator's Perspective*, *supra* note 253; DEFENSENEWS OP-ED, *supra* note 3.