**Cornell International Law Journal**

Volume 32
Issue 3 *Symposium 1999*

Article 9

# U.S. Policy and the International Criminal Court

David J. Scheffer

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

 Part of the Law Commons

Recommended Citation

Scheffer, David J. (1999) "U.S. Policy and the International Criminal Court," *Cornell International Law Journal*: Vol. 32: Iss. 3, Article 9.
Available at: http://scholarship.law.cornell.edu/cilj/vol32/iss3/9

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

# U.S. Policy and the International Criminal Court

David J. Scheffer*

The United States has had and will continue to have a compelling interest in the establishment of a permanent international criminal court. We have long contemplated an international criminal court. Such a court can both deter and punish those who might escape justice in national courts. As head of the U.S. Delegation to the International Criminal Court (ICC) talks since mid-1997, I can confirm that the United States has had an abiding interest in supporting an ICC that would operate efficiently, effectively, and appropriately within a global system that also requires our constant vigilance to protect international peace and security. However, based on international law and the reality of our international system, we refused to support the final draft of the Treaty in Rome last summer.

On December 8, 1998, we joined the consensus in the U.N. General Assembly to adopt a resolution creating the Preparatory Commission on the ICC (PrepCom), the first session of which met in New York under the expert leadership of Philippe Kirsch, the Legal Adviser of the Canadian Ministry of Foreign Affairs. Last month I led the U.S. Delegation in the critical work of the PrepCom to develop the Elements of Crimes and the Rules of Procedure and Evidence. This summer the PrepCom will afford an opportunity to address concerns we and others have had about the effectiveness and acceptance of the ICC. This is an important opportunity. We believe the problems in the Rome Treaty that prevent us from signing it can be solved, and that it is in the interest of all governments to address those problems now so that we can all be active partners in the ICC. There is far more to lose in the effectiveness of the ICC if the United States is not a Treaty Partner than there is to gain from its current dubious regime of jurisdiction. As I said at the United Nations last October, we do not pretend to know all the answers. We surely hope some creative thinking can be generated in the months ahead.

At the Rome conference last summer, the U.S. Delegation worked with other delegations to achieve important objectives. One major objective was a strong complementary regime, namely, deferral to national jurisdiction. A key purpose of the ICC should be to promote observance and enforcement of international humanitarian law by domestic legal systems. There-

* Ambassador at Large for War Crimes Issues. Remarks at the Cornell International Law Journal 1999 Symposium, March 5, 1999, Ithaca, New York. The Cornell International Law Journal has added citations to the major statutes referred to by Ambassador Scheffer. Portions of this Article derive from David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

32 CORNELL INT'L L.J. 529 (1999)

fore, we were pleased to see the adoption of Article 18 (preliminary rulings regarding admissibility),[1] drawn originally from a U.S. proposal, and its companion Articles 17 and 19.[2] We considered it only logical that, when an investigation of an overall situation is initiated, relevant and capable national governments be given an opportunity under reasonable guidelines by the court to investigate their own nationals or others within their jurisdiction.

Our negotiators successfully preserved appropriate decision-making for sovereigns that are obligated to cooperate with the court. Some delegates were tempted to require unqualified cooperation by States Parties with all court orders, notwithstanding relevant national judicial procedures. Such obligations of unqualified cooperation were unrealistic and would have raised serious constitutional issues not only in the United States but in many other States. Part 9 of the Statute[3] represents hard-fought battles in this respect. The requirement that States Parties "shall ensure that there are procedures available under their national law"[4] is pragmatic and legally essential for the successful operation of the court. We were pleased that participating delegations discussed the Rules of Procedure and Evidence with a constructive attitude at the February session of the PrepCom. Some progress was made, and we trust that the groundwork has now been laid to accelerate the work on the Rules in the months ahead.

The procedures established for the International Criminal Tribunal for the Former Yugoslavia show that some sensitive information collected by a government could be made available as lead evidence to the prosecutor, provided that these detailed procedures are strictly followed. We applied this experience to the challenge of similar cooperation with a permanent court. It was not easy. Some delegations argued that the court should have the final determination on the release of all national security information requested from a government. This argument is inconsistent with the Rome Statute since Article 72[5] states that a national government must have the right of final refusal if the request pertains to its national security. In the case of a government's refusal, the court may seek a remedy from the Assembly of States Parties or the Security Council.

The United States helped lead the successful effort to ensure that the ICC's jurisdiction over crimes against humanity shall include acts in internal armed conflicts and acts in the absence of armed conflict. We argued successfully that there had to be a reasonably high threshold for such crimes. The same standard should apply in war crimes. A major achievement of Article 8 of the Treaty is its application to war crimes committed during internal armed conflicts.[6] In order to widen acceptance of the

1. Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999, 1012.
2. *Id.* at 1012-14.
3. *Id.* at 1051-61.
4. *Id.* at 1052.
5. *Id.* at 1043.
6. *Id.* at 1006.

application of the Statute to war crimes committed during internal armed conflicts, the United States helped negotiate language that excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.

The U.S. Delegation insisted that definitions of war crimes be drawn from customary international law and that they respect the requirements and intent of military objectives during combat. We had long sought a high threshold for the court's jurisdiction over war crimes, since individual soldiers often commit isolated war crimes that by themselves should not automatically trigger the massive machinery of the ICC. We believe the definition arrived at serves our purposes well: "The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes."[7]

One of the more difficult, but essential, issues to negotiate was the treatment of crimes against women, either as a crime against humanity or as a war crime. The U.S. Delegation worked hard to include explicit references to crimes relating to sexual assault in the text of the Statute. Such crimes include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of significant magnitude. We were also instrumental in creating acceptable definitions of command responsibility that reach into civilian chains of command and the defense of superior orders.

Our emphasis on the Elements of Crimes resulted in Article 9 of the Treaty,[8] which requires their preparation – a task that governments have now undertaken in the PrepCom. This task is critical in order to transform international norms into individual criminal culpability. We have to balance the rights of the accused and due process with the interests of international justice. Despite some early criticism directed at U.S. motivations, we are pleased that work on the Elements progressed well during the first session of the PrepCom and that there is now a very good basis for making more progress. We look forward to more constructive and cooperative work with delegations in the months ahead. We trust that early skepticism about the intent behind our draft Elements has been put to rest and that serious professional work can now continue in order to complete the work on Elements of Crimes as soon as possible.

These accomplishments and others in the Rome Treaty are significant. However, the U.S. Delegation was not prepared at any time during the Rome Conference to accept text that represented a political compromise on fundamental issues of international criminal law and international peace and security. We could not negotiate as if certain risks could be easily dismissed or certain procedures of the permanent court would be infallible. We could not bargain away unique security requirements or our need to uphold basic principles of international law even if some of our closest allies reached their own level of satisfaction with the final Treaty. The

7. *Id.*
8. *Id.* at 1009.

United States made compromises throughout the negotiations in Rome but always emphasized that the issue of jurisdiction had to be resolved satisfactorily or else the entire Treaty and the integrity of the court would be imperiled.

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

Admittedly, many recent international treaty regimes, including those directed at terrorism, have used universal jurisdiction as a means of enforcement. Under such a treaty, criminals involved in airplane hijacking, airplane bombings, and attacks on diplomats as internationally protected persons, can be tried in the courts of any treaty signatory, no matter the place of the offense or the nationality of the victim. The treaties against hostage-taking and torture also provide for universal jurisdiction, as the lawyers for General Augusto Pinochet have recently learned. However, the exercise of universal jurisdiction is limited to treaty parties. Additionally, use of universal jurisdiction in the operational law of war has been halting. The 1949 Geneva Conventions make use of it for grave breaches of the conventions, but these four conventions are limited to the deliberate mistreatment of civilians, prisoners of war, the wounded, and the shipwrecked.[9] The Hague regulations and the laws and customs of war which establish the limits on war do not directly provide for universal jurisdiction. Protocol I of 1977 to the Geneva Conventions defines as a grave breach any disproportionate use of force, or the use of force in environmentally objectionable ways, but the United States and a number of other countries have not yet ratified Protocol I. Thus, the universal jurisdiction created by the Rome Conference would mean something new, at least for U.S. troops stationed abroad.

The ICC is designed as a treaty-based court with the unique power to prosecute and sentence individuals, but also to impose obligations of cooperation upon the contracting states. A fundamental principle of interna-

9. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

tional treaty law is that only states that are party to a treaty should be bound by its terms. Yet Article 12 of the ICC Treaty reduces the need for ratification of the treaty by national governments by providing the ICC with jurisdiction over the nationals of a non-party state.[10] Under Article 12, the ICC may exercise such jurisdiction over anyone, anywhere in the world, even in the absence of a referral by the Security Council, if either the state of the territory where the crime was committed or the state of nationality of the accused consents.[11] Ironically, the Treaty exposes non-parties in ways that the parties themselves are not exposed.

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

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

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

We clearly recognize the dilemma posed by the limitations of Article 12, namely that it will exclude from the court's jurisdiction strictly internal atrocities committed by non-consenting non-party states, absent a Security Council referral. On the one hand, we object to any presumption that sixty ratifications of the Treaty, and its entry into force, automatically exposes every individual everywhere in the world to the ICC's jurisdiction unless

10. Rome Statute of the International Criminal Court, *supra* note 1, at 1010.
11. *Id.*

the Security Council exercises its Chapter VII powers. We always envisaged this Treaty regime's reach to grow as more states ratify it. However, we did not envisage the Security Council giving the court the ability to leap-frog over jurisdictional barriers. On the other hand, we are open to considering ways to address the most obvious manifestation of contemporary illegality, namely the self-inflicted atrocity by the rogue regime. The obvious procedure is the Security Council referral.

In Rome, the U.S. Delegation offered various proposals to correct the jurisdictional problem. The other permanent members of the Security Council joined us in a compromise formula during the last week of the Rome conference. One of our proposals was to exempt from the ICC's jurisdiction conduct that, in the absence of a Security Council referral, arises from the official actions of a non-party state acknowledged as such by that non-party. This would require a non-party state to acknowledge official responsibility for an atrocity in order to be exempted, an unlikely occurrence for those who usually commit genocide or other serious violations of international humanitarian law. In contrast, the United States would confirm as a matter of course its participation in international peacekeeping and enforcement actions. It is likely that there would be odious non-party regimes that would not blink at admitting genocide as an official state policy. However, that simply reflects the fact that the ICC cannot pretend to cover everyone everywhere under every circumstance if the Security Council fails to act. Regrettably, our proposed amendments to Article 12 were rejected on the premise that the proposed draft of the Treaty was so fragile that if any part were reopened, the conference would fall apart.

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

I will not belabor the final hours of the conference except to say that it could have been done differently and the outcome might have been far more encouraging. While we firmly believe that the true intent of national governments cannot be that which now appears reflected in a few key provisions of the ICC Treaty, the political will remains within the Clinton Administration to support a treaty that is fairly and realistically constituted. We hope developments will unfold in the future so that the considerable support that the United States could bring to a properly constituted international criminal court can be realized.