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FOURTEENTH WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW[1]

A NEGOTIATOR'S PERSPECTIVE ON THE INTERNATIONAL CRIMINAL COURT

AMBASSADOR DAVID J. SCHEFFER[2]

Thank you, Colonel Lederer, both for the introduction and for the opportunity to address such a distinguished audience of military lawyers, faculty, and other guests. I also want to thank Brigadier General Thomas Romig for his hospitality and encouragement to be here today. Lieutenant Colonel Tia Johnson, the Chair of your International and Operational Law Department, merits special praise for her hard work to bring me here for the Solf Lecture.

One of the most dynamic fields of international law today is the law of armed conflict, or what is increasingly referred to as international humanitarian law and international criminal law in multilateral negotiations and in scholarly treatises. As JAG officers, you above all others recognize the importance of the U.S. military's role in developing the law of armed conflict and in complying with it. We are all guided by a remark-

1. This article is an edited transcript of a lecture delivered on 28 February 2001 by David J. Scheffer to members of the staff and faculty, distinguished guests, and officers attending the 49th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The Waldemar A. Solf Lecture in International Law was established at The Judge Advocate General's School on 8 October 1982. The chair was named after Colonel Solf who served in increasingly important positions during his career as a judge advocate. After his retirement, he lectured at American University for two years, then served as Chief of the International Affairs Division, Office of The Judge Advocate General. In that position, he represented the United States at numerous international conferences including those that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful effort in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. He served in that position until his second retirement in August 1979.

ably rich tradition of American engagement in the development and enforcement of the law of armed conflict. Well-trained forces that understand the law of armed conflict will demonstrate professionalism and compliance that cannot be seriously questioned. The lawyers who train and deploy and fight with our soldiers, sailors, and airmen are a vital line of defense. Judge advocates must know, with precision, the law of armed conflict, and they must protect their commanders throughout the cycle of operations and in any operational environment. That is a very tough job for which I believe you deserve our respect and our full support in every possible way. I have always told your superiors to sign me up for any testimony before Congress to increase your salaries and benefits. Believe me, it is a humbling experience for this lawyer to stand before so many professional military lawyers who shoulder so much responsibility.

During my tour as Ambassador-at-Large, we drew upon your profession's heritage daily as we supported the work of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, negotiated the establishment of the Extraordinary Chambers in Cambodia and the Independent Special Court for Sierra Leone, and assisted with establishing credible mechanisms of justice to respond to atrocities in East Timor, Sri Lanka, the Great Lakes region of Africa, Kosovo, Iraq, and other war zones. I am proud to have had JAG officers work for me in the Office of War Crimes Issues in the State Department and on the U.S. delegation to

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2. Former Ambassador-at-Large for War Crimes Issues. David John Scheffer was nominated by President William J. Clinton to serve as the first-ever Ambassador-at-Large for War Crimes Issues on 22 May 1997. Following Senate confirmation, he was sworn into office on 5 August 1997. The appointment carried an ambassadorial rank. This newly created post addresses serious violations of international humanitarian law anywhere in the world. Ambassador Scheffer coordinated support for the functions of the Yugoslav and Rwandan War Crimes Tribunals, headed the Atrocities Prevention Inter-Agency Working Group, and led U.S. participation in United Nations negotiations for the establishment of a permanent International Criminal Court. He also coordinated U.S. efforts to establish international records and mechanisms of accountability for past or on-going violations of international humanitarian law in conflict areas, and assisted Secretary of State Madeleine Albright in addressing the needs of victims of such atrocities. Ambassador Scheffer reported directly to Secretary Albright. During the first term of the Clinton Administration, Ambassador Scheffer was Senior Advisor and Counsel to then-Ambassador Albright. His duties included war crimes issues and national security and peacekeeping policies. He also served as the Washington representative for the United States Mission to the United Nations, as a member of the Deputies Committee of the National Security Council, and as the Alternative Representative on the United States delegation to the United Nations talks on the proposal for a permanent International Criminal Court.

the ICC talks. One of them, Lieutenant Colonel Michael Newton of the U.S. Army, a former instructor here, joins us today.

My subject today is the permanent International Criminal Court, which does not yet exist but will, within probably a few years, and thus will deeply influence much of your work as judge advocates. In approaching this opportunity, I struggled with a more classic legal analysis of the Rome Treaty regime that will govern the International Criminal Court and some general propositions that speak to the purpose and consequences of the Court. While I will emphasize some key legal points today, I also want to elevate your own thinking about this issue to its larger context in international politics and international security.

I spoke publicly often about the ICC as head of the U.S. delegation to the United Nations talks on the Court from 1997 until last month, and before then as deputy head of the delegation. You can access most of my remarks that are on the public record and in the State Department's Web site,[3] now under "Archives," probably to the satisfaction of some of my critics on the right. Since I had droves of critics on the left as well through the years, you can appreciate that I sometimes considered myself a lone warrior on this subject: someone who walked a fine line between our deeply held concerns about the impact the ICC may have on American service members and our firm resolve to lead in the application of international justice and the enforcement of the laws of war. Building, achieving, and then advancing an inter-agency consensus on ICC issues were tasks that consumed a significant portion of my job. It became common practice that I devoted far more time debating and achieving consensus within our own government, even while international negotiations were underway, than was required of any of our foreign negotiators. There was no agency I listened to more carefully, and represented under the most difficult negotiating circumstances, than the Department of Defense, including therein the Joint Chiefs of Staff. Judge advocates and Defense lawyers populated my delegation; indeed no other delegation included so many military counsels as did the U.S. delegation. They made critical contributions and protected U.S. military interests every step of the way.

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3. U.S. State Department, *Remarks, Testimony, and Briefings, at* http://www.state.gov/www/policy_remarks/.

The Rome Statute of the International Criminal Court was finalized on July 17, 1998.[4] The treaty embodying the Rome Statute will enter into force when sixty states have ratified it, and I will henceforth refer to it as the Rome Treaty. One hundred and thirty-nine states have signed the Rome Treaty; of those, twenty-nine have ratified it. The ratifiers are our allies and friends, including France, Germany, Italy, Spain, Belgium, Norway, Canada, Finland, Ghana, Iceland, Austria, New Zealand, and South Africa. Many other states are moving towards ratification, including the United Kingdom, Switzerland, the Netherlands, Ireland, Chile, and Australia. Russia signed the Rome Treaty last September. The United States signed the Rome Treaty on December 31, 2000, the last possible day the treaty permitted signature, after which any non-signatory state would have to accede to the treaty. Iran and Israel also signed the treaty on December 31st. The significant states that did not sign the Rome Treaty are Japan, China, India, Pakistan, Indonesia, Ethiopia, and Saudi Arabia, and such outcast states as Iraq, North Korea, Cuba, Libya, Myanmar (or Burma), and Afghanistan.

The U.S. decision to sign the Rome Treaty was and remains controversial. I strongly believe that President Clinton's decision was the right one. That may come as a surprise to those who followed my public statements and negotiating positions since 1995, because I often articulated the Clinton Administration's serious concerns about flaws in the Rome Treaty, particularly the flaw that military and civilian personnel of a non-party to the treaty could be ensnared by the Court's jurisdiction without the non-party's consent. But we worked that problem very hard during the negotiations over the Rules for Procedure and Evidence and the Elements of Crimes, which were adopted by consensus at the Preparatory Commission on the ICC last June, and we continued to work it at the November-December 2000 session of the Preparatory Commission.

Anyone who analyzes the Rome Treaty without also examining the Rules and Elements will reach flawed conclusions about the manner in which the ICC will be governed. That is why I speak of the "treaty regime," meaning the Rome Statute, the Rules, the Elements, and the other supplemental documents that are now being negotiated in the Preparatory Commission in New York. Still on deck in NewYork are the Relationship Agreement between the United Nations and the ICC, privileges and immu-

4. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998) [hereinafter Rome Statute].

nities for the Court, financial regulations and rules, the headquarters agreement between the Court and The Netherlands, the all-important rules of procedure of the Assembly of States Parties, and the trigger, definition, and elements for the crime of aggression. All of these supplemental documents contain critical provisions of direct relevance and opportunity for U.S. interests, and they all offer the chance to enhance the overall effectiveness and universal acceptability of the ICC. We ignore them at our own risk.

The dilemma we had to wrestle with late last year was whether we best confronted the treaty's remaining flaws, and I emphasize "remaining" subsequent to our work in the Rules and Elements negotiations, as a signatory working the issues hard from within the tent, or as a non-signatory protesting the Court's legitimacy. Knowing full well that the United States has a significant impact when engaged in such negotiations, I recommended signature and other senior officials joined me in that recommendation. Other views pointed towards non-signature as the preferred policy decision. The President deliberated with a full set of views and recommendations, and a lot of tough questions were asked. In fact, the difficulties and risks of the Rome Treaty were emphasized and described in great detail to him.

Well-meaning patriots, including some members of Congress, appear determined to derail the Rome Treaty. That would be folly. Declaring war on the treaty or just monitoring further talks with studied indifference, which appears to be the Bush Administration's chosen course for the present, would undermine U.S. interests. As a signatory, the United States now is well armed to improve the treaty regime and advance our commitment to international justice.

In the Clinton Administration we negotiated this controversial treaty, as well as the Rules of Procedure and Evidence and Elements of Crimes that we insisted be added to it, for worthwhile objectives. America's advocacy of the rule of law abroad as well as at home needs backbone, and a permanent court that we lead in shaping will advance justice. In the twenty-first century, perpetrators of heinous crimes like genocide, crimes against humanity, and war crimes must be prosecuted and punished. We proudly stand for that proposition as a nation born out of the struggle for freedom, for democracy, and for a rule of law that protects and does not trample the legitimate rights of all humankind.

Cynics overseas, and some at home, argue that this will be victor's justice alone, just as, they argue, the International Criminal Tribunals for

the Former Yugoslavia and Rwanda have been conceived. They overlook, of course, that the Yugoslav Tribunal was established long before the Dayton Accords, which could hardly be described as a traditional victory in war for any side of the Balkans conflict, and that defendants from all sides of that conflict have and will continue to stand trial. The Rwanda Tribunal has nothing to do with victory or defeat—just internal mass slaughter, and the Prosecutor has publicly made it clear that she is investigating Tutsi officials suspected of crimes in 1994.

Some critics, particularly at home, seek only victor's justice in our own image in the pursuit of international justice, and they view the ICC as a threat to that proposition. But we must be engaged constructively with the Court to ensure that international justice coexists compatibly with the requirements of international peace and security and our own self-defense and that of our alliance partners and friends. Fear of prosecution can become a self-fulfilling prophecy if we are shortsighted enough to let that fear intimidate and then conquer us. In this struggle for the law, we will prevail if we demonstrate the will to persevere through all of the detailed negotiations and all of the political maneuvering that is associated with any treaty negotiation.

My advice is blunt: Get over it. The world is changing. The International Criminal Court will be established, soon. We have to decide whether we stand for the rule of law or squirm in the face of it. If we cannot stand for the proposition that heinous crimes against humankind will be answered and build the institutions to do that job in a very complex world, then our leadership in promoting the rule of law abroad will decline rapidly and the value of our own principles will erode. Others will take the lead. The United States must have the courage to embrace change if it presumes to retain the mantle of leadership. The last decade was the beginning of an age of accountability that the United States must continue to lead, both in the interests of humanity and to ensure that justice is rendered fairly and globally in a manner that advances U.S. interests.

The alternatives—ad hocism or nothing at all—will burden future generations with inefficient and costly means to manage accountability for atrocities. The existence of the International Court will spur national courts to do the job they should be doing to bring alleged war criminals to justice and thus avoid international litigation. The Court's potential for

deterrence—problematic even in domestic law enforcement—cannot be disproved.

Let me emphasize that our remaining legal objections to the International Criminal Court were not overcome or cast aside with U.S. signature. President Clinton made that clear in his December 31st statement.[5] But those objections never dictated non-signature either. The first objection is the presumption, embodied in Article 12 of the Rome Treaty, that official personnel of a non-party state can be investigated and prosecuted by the Court provided either the state where the crime occurred or the state of nationality of the perpetrator is already party to the Rome Treaty or, as a non-party, consents to ICC jurisdiction. We based our objection on our interpretation of customary international law, namely that it does not yet entitle a state, whether as a party or as a non-party to the Rome Treaty, to *delegate* to an *international criminal court* its own domestic authority to bring to justice individuals who commit crimes on its sovereign territory, without the consent of that individual's state of nationality either through ratification of the Rome Treaty or by special consent.[6] However, we made it crystal clear in the negotiations, and I hope we continue to make it clear, that as a practical matter the United States is prepared to examine circumstances where individuals can be prosecuted before the International Criminal Court without either requirement—ratification or special consent—having been first obtained.

We sought to negotiate some of those circumstances and in effect violate our own rule of interpretation so as to create a realistic and effective mechanism for international justice. We otherwise had a very tough sell, because we would have had to argue for the rights of all manner of non-party states when most of our negotiating partners were signatory states that either had already ratified the Rome Treaty or were moving towards ratification. Imagine yourself in the shoes of one of our staunch NATO allies and supporters of the Rome Treaty, listening to an argument that, while it would benefit the United States military, also would immunize an aggressor state's military personnel from any action by the International Criminal Court. The objective of our allies is to promote ratification, not insulate non-party states. The simple negotiating reality is that it was not plausible to argue that a non-party state whose military forces are respon-

5. President William J. Clinton, Statement by the President: Signature of the International Criminal Court Treaty (Dec. 31, 2000), 2000 WL 6008.

6. *See* Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, LAW & CONTEMP. PROBS. 13 (2001).

sible for heinous crimes could avoid the Court absent a Chapter VII enforcement referral by the U.N. Security Council, a body in disfavor with many of the governments in the negotiating room, including some of our closest allies.

The methodologies we examined with other governments were creative, realistic, and relevant for the real culprits. We proposed provisions that focused only on the status of official personnel before the Court, without seeking any particular protection for other individuals, such as mercenaries, rebels, or other non-official combatants. We sought to distinguish between the "good guys" and the "bad guys" of non-party states thrashing about in the cauldron of international security challenges that define modern warfare and human right s.Although we had the reality of the international system and sheer logic on our side in these debates, we could not prevail last year with a formula that would achieve consensus among so many disparate governments engaged in the negotiations. After all, each government had to ask itself whether it was one of the good guys, or one of the bad guys.

Despite the difficulty of sustaining our interpretation of customary international law, even with pragmatically drawn exceptions, we helped negotiate Rule 44(2) of the Rules of Procedure and Evidence, the importance of which is often overlooked. One of our primary concerns about the jurisdiction of the Court has been its preconditions to jurisdiction set forth in Article 12, that conceivably could permit Iraq, as a non-party, to trigger the Court's jurisdiction over U.S. pilots engaged in defensive actions in the skies over Iraq without requiring the Court to scrutinize Iraq's conduct as well. Rule 44(2) addresses that problem and requires that any declaration by a non-party state triggering the Court's jurisdiction under Article 12 has the consequence of accepting the jurisdiction of the Court with respect to all of the crimes covered by the Rome Treaty that are relevant to the situation, a term used elsewhere in the treaty to mean the overall conflict. Thus, Iraq would have to invite the Court's scrutiny of its own illegal conduct, which is massive, in order to trigger investigation of the U.S. pilots. In its own self-interest, Iraq would avoid that opportunity.

On the larger issue of overall protection for the U.S. military, however, we finally had to face the fact that we were barking up the wrong tree, and our military services were not being well-served with losing arguments. I spent many years seeking full immunity for our military forces and their civilian leadership in negotiations that quite frankly sometimes seemed the theater of the absurd. I was given nothing to offer—certainly

not signature or ratification—in return for an absolutist carve-out that other governments, particularly our closest allies, found arrogant and hypocritical. I finally successfully lobbied my colleagues in Washington to permit me to offer a "good neighbor" pledge towards the Court in return for full protection. Since the next administration could reverse that political pledge, however, it proved unconvincing.

We constantly focused on the extreme circumstance where the International Court could theoretically pursue an American soldier even if the United States has not yet become a party to the treaty. In the eight years of my deliberations in Washington on the International Criminal Court—beginning with the work of the International Law Commission in 1993 and 1994—I do not recall hearing any senior Defense Department official refer to the core purpose of the Court, namely to advance international justice and enforce the law of armed conflict. Every single discussion was dominated by how the Court would impact the United States military. Fair enough; it was our duty as public servants to put that concern front and center, and we did year after year. I am also exceptionally aware of the sacrifices our service members have made, particularly with their lives, throughout our history. I wondered sometimes, though, what the mutilated children of Sierra Leone would think of such discussions if they could only fathom them. I imagined parading them and the thousands of other victims and carcasses I witnessed in atrocity zones around the world through the wood paneled rooms of Washington, just as a reality check.

But short of one hundred percent protection, for which there is no plausible multilateral formula, we successfully negotiated into the treaty regime an impressive body of safeguards that critics continue to overlook in their zeal to trash the treaty. When we pursued our objectives with a degree of humility, we succeeded.

There is a tendency in negotiations of this character that involve our military services and international security, to arrive at hard and fast positions within the Washington bureaucracy that are either too self-protective or too tardy, or both, to be successful in multilateral negotiations, and to stick with those positions long after their futility is obvious to all. Let me be frank: Military lawyers advising their superiors about such negotiations, and I have in mind both the Land Mines Treaty and the Rome Treaty on the International Criminal Court, need to be careful not to succumb to what will sound gutsy and All-American within the JCS Tank but will fail miserably when presented to other governments. A negotiating room is not a conventional battlefield, but it is a theater of diplomatic conflict and

cooperation. Within the negotiating arena, as in the courtroom, overwhelming force is defined by the logic and persuasiveness of one's argument and your ability to understand and then capitalize upon the other government's perspective. Our superpower status and the magnitude of our military forces mean very little in these settings. That is the hard reality today. We need to adjust and turn that reality to our own advantage with winning strategies and not self-righteous tactics that impress no one but ourselves.

During the November-December 2000 negotiations of the Preparatory Commission, our friends recommended that we should focus on our greatest strength—the principle of complementarity—as our first line of defense. The U.S. delegation worked hard in the ICC talks to ensure that there are safeguards in the treaty regime so that the Court does not hit American service members with unwarranted actions. We built into the treaty procedures by which countries with strong legal systems can investigate and, if merited, prosecute their own citizens and thus require the court to back off. The principle of complementarity, or primary deferral to national courts, is an extraordinary and somewhat complex protective mechanism that manifests itself in the treaty and in the supplemental documents. Much of the complementarity regime originated with us and we prevailed in its adoption. Indeed, in some circumstances the Rome Treaty regime offers military personnel greater protection from foreign prosecution than do current law and practice.

If the Court disregards or abuses the complementarity regime, it will quickly lose its legitimacy in the eyes even of the treaty parties. We know from the negotiations and the ratification proceedings undertaken so far that a vibrant complementarity practice by the Court is essential to the Court's survival and to its acceptance by its strongest supporters, who have no intention of being hauled before the Court themselves! The expectation of complementarity reaches back far in the evolution of the Court. I commend to you Lieutenant Colonel Mike Newton's forthcoming article on complementarity in Volume 167 of the *Military Law Review*[7] for a refresher course and for insightful analysis of how complementarity

7. Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001).

indeed would work, and how, as with all matters of law, there are some gray areas that will have to be worked out in the practice of the Court.

In December, the U.S. delegation introduced a treaty-friendly proposal for the Relationship Agreement between the United Nations and the Court now being debated in New York.[8] 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 U.N. 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 Rome Statute, the Court has the authority to ensure that admissibility indeed is examined. The Statute's preamble emphasizes the importance of complementarity, and Articles 17, 18, and 19 reinforce that objective, as do the Rules of Procedure and Evidence.[9] 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 U.S. 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 to contribute to U.N. peacekeeping and other international efforts to maintain or restore peace and security.

We crafted the provision in consultation with several of our allies. It would require the Court, on its own motion as provided pursuant to Article 19(1) of the treaty, to review 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. Why the latter requirement? Because the pri-

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8. *See* U.N. Doc. PCNICC/2000/WGICC-UN/DP.17 (2000).

9. *See Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/INF/3/Add.1 (2000) [hereinafter Draft Rules].

mary concern of the United Nations, and indeed of the United States, is to ensure that their deployments abroad to maintain or restore international peace and security are properly balanced with the Court's jurisdiction, whereas military forces that commit internal atrocities cannot be considered as pursuing any viable objective of international peace and security. Internal atrocities are such an important focus of the Court's mission that it would be futile, particularly with our European friends, and contrary to our own interests to introduce additional procedures into the investigation and prosecution of indigenous perpetrators of internal atrocities.

Our proposal would ensure that the Court would examine the admissibility of any case involving an American service member. United States federal and military courts have several opportunities to seize a case against an American service member and thus avoid ICC jurisdiction. If, by the time the International Criminal Court has investigated an American service member and indicted him or her and then requested his or her surrender, our own authorities have not exercised their complementarity rights to investigate and adjudicate that individual's alleged crime and thus void any ICC scrutiny, then we have only ourselves to blame.

The new proposal erects a final firewall, meaning that whether or not the admissibility of a case has been reviewed in the past, the Court must, on its own motion, review admissibility at the critical moment when the request for surrender is being framed. The state of nationality thus will have one more opportunity to demonstrate its performance of the complementarity criteria in an effort to prevent such surrender. Since the Court can review admissibility on its own motion at any time, the U.S. proposal simply articulates a procedural agreement between the United Nations and the Court, binding on the Court, to ensure that a final admissibility review occurs before the suspect arrives in The Hague. The proposal is reasonable and compatible with and in accordance with the treaty itself. We would be foolish not to pursue it vigorously in the on-going talks, although I fear the march of folly has already begun. Multilateral negotiations are as much about missed opportunities and bad timing as they are about anything else.

Critics have charged that there are inadequate due process protections in the Rome Treaty. Guided by career lawyers from the Justice, Defense, and State Departments, the U.S. delegation negotiated procedures and definitions of crimes consistent with our constitutional and military law practice. Monroe Leigh, Secretary of State Henry Kissinger's Legal Adviser, believes the treaty regime, including its rules, "contains the most detailed list of due process protections which has so far been promulgated; not bet-

ter than the Bill of Rights, but somewhat more comprehensive and detailed."[10] Among those protections are rights to a speedy and public trial and to confront witnesses. Neither double jeopardy nor the use of anonymous witnesses are permitted.

The fact that the treaty requires trial by judges and not by jury 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. The difficulty that the treaty's procedures arguably present under the U.S. Constitution, namely the Sixth Amendment, 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 test of admissibility—a highly unlikely event.

The reality is that our own prosecutors would pounce on that individual so fast the International Criminal Court would never have a right under the Rome Treaty to investigate him. We successfully negotiated the procedures that grant our own 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. We have it within our power not to permit extradition of an American citizen to the Court in violation of the Constituti on.Nor would the United States tolerate the International Court's misuse of its powers against American service members.

Imagine the long-term consequences for the Court if it were to leap over the safeguards already locked into the treaty regime and abuse its authority against our service members. Anyone can paint a worst-case scenario that defies the entire construct of the treaty regime and the international political system; but no one can discount the significance of the probable consequences of an extreme course of action on those who must make the decisions and then live with them.

Where do we go from here? There are some who believe we should bluntly oppose or at least be belligerent towards the Rome Treaty and effectively nullify the U.S. signature. I have heard it said that my signature of the treaty on behalf of the United States should be scratched out. It is

10. Letter from Monroe Leigh, Former Legal Advisor to Secretary of State Henry Kissinger, to Editor, The Washington Times (Dec. 30, 2000), *in Proposed International Court Will Protect Civil Liberties*, WASH. TIMES, Dec. 30, 2000, at A12.

certainly possible that Washington could emphasize the treaty's flaws, discourage others from signing or ratifying it, and punish those that are or will be parties to the treaty. But we would look foolish and intimidated, discredit our proud allegiance to the laws of war, and invite a firestorm of foreign counterattacks that would needlessly undermine the Bush Administration's evolving foreign policy. Our friends and allies would stare down any American effort to kill the treaty. Given other overseas challenges, particularly with Europe and Russia, the Administration would be wasting valuable political capital. Its own human rights initiatives, wherever they may be targeted, would suffer from an initial credibility gap.

The current Administration strategy is to sustain a small, technical presence in the New York talks solely for the purpose of engaging in discussions on the crime of aggression as they affect our own interests. I respectfully submit that the rest of the world will not be impressed and will soldier on drafting documents of central importance to the operation of the Court. The effectiveness of our voice in the aggression discussions may be degraded by our lack of commitment to the myriad of other issues before the Preparatory Commission, so many of which in fact are critical to U.S. interests. Pursuing our own interests in multilateral negotiations means paying attention to and facilitating the interests of others when those interests do not undermine ours. I sometimes found my colleagues from other agencies proposing strategies that would be suitable for bilateral negotiations, where the United States might have considerable leverage, but would be of limited relevance in multilateral settings.

I believe we should engage constructively in the Preparatory Commission negotiations to protect our interests, build a credible court, and overcome flaws by pressing reasonable proposals that other governments can embrace without having to reverse their long-standing support for the treaty. A major aim of U.S. signature of the treaty was to strengthen our negotiating hand, not immobilize it. In coming months talks will continue on the crime of aggression and how parties to the treaty will oversee the operation of the Court. On the crime of aggression, we must prevail. We have repeatedly stated our position, which we are not alone in expressing, and we must continue to press for the proper definition and trigger for the crime of aggression. I thought last December we were making progress, but it was tough going. Every effort to specify some other delegation's preferred laundry list of acts of aggression evoked equally important efforts to list the exceptions to the crime. Months and perhaps years of talks confront governments on this issue. We will far better protect our sol-

diers and citizens by engaging on all fronts in this often-tedious struggle for law than we will if we sit on the sidelines or futilely hector our allies.

The United States should leverage its new status as a signatory nation to prevail with the treaty-friendly proposals, one of which I have already discussed, that the United States already introduced last year and can be debated in the Preparatory Commission this year, if not for the Relationship Agreement then perhaps for another supplemental agreemen t.Other governments have not rejected them and they hold considerable promise. If the United States exhibits an anemic presence at the U.N. talks, we will forfeit perhaps the last opportunity we have in the Preparatory Commission to better protect our interests.

There are other steps that the United States should take unilaterally. First, both critics and supporters of the Court should find common cause in amending the federal criminal code (Title 18) and the Uniform Code of Military Justice (Title 10) to ensure that crimes under the treaty can be fully prosecuted in U.S. courts. Current codes are simply out-dated and may deprive us of our first line of defense. An inter-agency task force was reviewing U.S. law to draw up recommendations when I left office. I sincerely hope that its work continues and results in legislation creating greater symmetry between U.S. law and the crimes and punishments specified in the Rome Treaty. We do not want to invite a situation where the ICC concludes that the United States is unable to investigate and prosecute a particular individual because our legal codes do not include that individual's alleged offense as a crime punishable under U.S. law.

The U.S. delegation negotiated and accepted only what we, as a government, believe are actionable crimes under international criminal law. We insisted on the Elements of Crimes, and led the negotiations of that document for two years to a successful conclusion last June, because we had to be certain the crimes are legitimate, actionable crimes. But now we must be certain we can easily turn either to Title 18 or to the UCMJ and identify therein an identical or near-identical crime. We must be able to represent credibly that we have the ability to exercise our complementarity right and, if the evidence so requires, prosecute our own in our own courts. In this vein, serious academic work has already begun, including important scholarship by Northwestern University Law Professor Douglass Cassel, who has set the stage for serious work on Title 18 and the UCMJ in his publications.[11]

The Uniform Code of Military Justice does not specifically address crimes against humanity or genocide as crimes, but it does allow for prosecution of the underlying criminal conduct.[12] Nor does all positive international humanitarian law reside in the UCMJ as war crimes. I have serious concerns whether that will be sufficiently persuasive to the judges or the prosecutor of the International Criminal Court, each of whom will be looking for more explicitly stated crimes analogous to those set forth in Articles 5, 6, 7, and 8 of the Rome Treaty.

Regarding federal law, the crime of genocide covers only U.S. nationals (committing genocide anywhere) or genocide within the United States (by anyone).[13] Crimes against humanity are the least effectively implemented by domestic law. There is no substantive criminal statute for crimes against humanity per se, though various federal and state criminal statutes would allow punishment of criminal conduct constituting crimes against humanity (for example, torture, rape, kidnapping, or various assaults).

With respect to war crimes, the rule generally has been that only when Congress declares war are civilians accompanying the U.S. Armed Forces subject to the UCMJ.[14] The Military and Extraterritorial Jurisdiction Act of 2000 now provides jurisdiction over felonies committed by civilians accompanying the Armed Forces outside the United States at all times, even when Congress has not declared war.[15]

There are also statutes of limitations under Titles 10 and 18 that are far too limited and could compel the International Criminal Court to con-

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11. *See, e.g.*, Douglas Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 393 (2001); Douglass Cassel, *The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity*, 23 FORDHAM INT'L L.J. 378 (1999); Douglass Cassel, *The Rome Treaty for an International Criminal Court: A Flawed but Essential First Step*, 6 BROWN J. WORLD AFF. 41 (1999).

12. *See* Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74 (2001).

13. 18 U.S.C. § 1091 (2000).

14. *See* Captain Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, ARMY LAW., Aug. 2000, at 24-26.

15. Military and Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-3267 (2000). *See generally* Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—Problem Solved?*, ARMY LAW. Dec. 2000, at 1.

clude that investigation is warranted simply because our domestic statute of limitations has run its course.[16] These sections of the federal codes must be revised to reflect the crimes that need to be more explicitly stated in the codes and the reality of Article 29 of the Rome Treaty, which states: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."[17]

In a related initiative, when the Court begins to operate, the President should appoint a commission of experts to monitor federal and military courts exercising our rights under the treaty to investigate and prosecute our own. This may shock those of you who would balk at any so-called oversight of our military court system. What I have in mind is fairly modest. There would be no power to intervene in or question the actions of military courts. But the commission should have the authority to advise federal and military prosecutors, and perhaps through a transparent process the judges, about the experts' own views on whether the United States is properly exercising its complementarity rights under the Rome Treaty, even as a non-party. Demonstrating our competence and willingness to exercise national obligations would discourage scrutiny by the International Court, and the commission of experts would heighten that sense of confidence in our system by the ICC prosecutor and judges.

Further unilateral steps we should take include exploring the protections our Status of Forces Agreements (SOFA) already provide consistent with the treaty. I am not speaking here of re-opening SOFAs to accomplish this objective. Nor do I underestimate the argument that treaty proponents may make that ICC jurisdiction is a freestanding, independent right that the Receiving State could exercise in its own discretion by transferring persons to the ICC, even in the face of a SOFA provision. But when the U.S. delegation successfully negotiated the inclusion of Article 98(2) in the Rome Treaty, we had in mind our own SOFAs and their applicability. Article 98(2) states: "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."[18] There are arguments waiting to

16. *See, e.g.*, 10 U.S.C. § 843(b) (2000) (five years); 18 U.S.C. § 3282 (five years for non-capital offenses).

17. Rome Statute, *supra* note 4, art. 29.

18. *Id.* art. 98(2).

be plucked in our SOFAs and in Article 98(2) that would ensure American service members are not surrendered to the Court.

Perhaps more importantly, even as a non-party, under Article 98(2) we can negotiate agreements with other governments that would prevent any American being surrendered to the ICC from their respective jurisdictions without our consent. As a signatory state, we are now in a much stronger position to negotiate such freestanding agreements.

I would further suggest that a time may well arrive when the United States could negotiate with the Court directly an Article 98(2) agreement that would protect American service members from surrender provided, most likely, the United States made certain commitments to the Court in terms of the proper and complete exercise of complementarity by American authorities and in terms of support for and cooperation with the Court, including, perhaps, ratification of the Rome Treaty that would lock in the all-important U.S. financial support. Rule 195(2) of the Rules of Procedure and Evidence,[19] which we proposed and which was adopted by consensus last June, in my opinion offers the possibility of such an agreement.

We should not lose sight of the further protections that the treaty grants governments that ratify it. These include avoiding any exposure whatsoever to war crimes charges for an initial seven years, which if chosen by the United States would afford us more time to evaluate the competency and fairness of the Court as its most powerful State Party.[20] As a State Party, the United States would be entitled to opt out of any exposure by the Court to the crime of aggression forever.[21] Given the reality of the use of U.S. military force, a reality that typically evokes groundless but nonetheless troublesome charges of aggression from our detractors, this right to opt out is significant. Ratification also would permit the United States to participate in the oversight, staffing, and management of the International Criminal Court, as well as enable a U.S. citizen to serve as a judge. Given our experience with the ad hoc International Criminal Tribunals, these are not insubstantial privileges.

In conclusion, there are many who understandably fear misuse of the International Criminal Court against the United States despite our strong judicial system, our compliance with the laws of war, and the leverage we

19. Draft Rules, *supra* note 7, R. 195(2).
20. Rome Statute, *supra* note 4, art. 124.
21. *Id*. art. 121(5).

have when we lead. Whether this fear is real or illusory, the United States has renewed credibility as a signatory to play a major role in preventing misuse and in achieving the international justice we so firmly uphold. We forfeit that opportunity at our peril. Thank you.