

**AMBASSADOR-AT-LARGE FOR WAR CRIMES ISSUES DAVID J. SCHEFFER**  
**DELIVERS REMARKS BEFORE THE 6TH COMMITTEE OF**  
**THE 53RD GENERAL ASSEMBLY**  
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SCHEFFER: Mr. Chairman, there are many representatives of governments in this room today whose determined and sincere efforts to establish a permanent international criminal court deserve our appreciation and recognition. All of us involved in this effort sought to draft a treaty that would lead to the enforcement of international humanitarian law by a judicial institution of impeccable credibility and deserving of our collective participation and support. We all labored for years to negotiate the complex structure of a court that would fairly reflect the soundest principles and procedures of criminal law and stand the test of time in a violent and unpredictable world. Under the leadership of two leading diplomats of the law, Adriaan Bos of the Netherlands and Philippe Kirsch of Canada, we sought a noble and worthy objective whose time has clearly arrived. That objective is to hold accountable and bring to justice the perpetrators of the most egregious crimes against humankind: genocide, crimes against humanity, and serious war crimes. All of us understand that a permanent international criminal court is a bold experiment.

At preparatory committee meetings in New York and for five weeks in Rome, we deliberated as to how that can be accomplished in a world comprised of sovereign governments, each with its own penal system but each bound together with the cords of customary international law, reflected both in international treaties and in common practice. The treaty negotiated in Rome this year, and which a large number of governments have now signed, has many provisions that we support, though we have reluctantly had to conclude that the treaty, in its present form, contains flaws that render it unacceptable. Even as we recognize this, we also recognize that the final text represented an effort to promote values that are important to the American people: justice, due process, and respect for the rule of law. Mr. Chairman, in Rome, it had been our strong hope, as reflected in President Clinton's long commitment to establish an appropriate international criminal court, that the conference would achieve a consensus on the resolution adopting the treaty.

The Clinton administration has a record that pointed toward that objective, and has ensured that the U.S. support for the two existing international criminal tribunals for the former Yugoslavia and Rwanda is second to none. Many other governments here today have made important contributions to the success of the tribunals. But not only does the United States provide both tribunals with significant financial resources, both assessed and through voluntary contributions, we also use our diplomatic resources, we make in-kind contributions of personnel and equipment, we offer the tribunals important information, and we have even brought our military capabilities to bear to ensure that the tribunals are effective. Thus, we had hoped in Rome for a consensus that would allow the United States to begin planning the kind of support that the permanent court will need if it is also to be effective -- to sustain a costly investigative capability, to build its infrastructure in The Hague, to achieve custody of indictees, and to work with the UN Security Council for enforcement initiatives. So long as the United States is unable to join the treaty, it would be unrealistic to expect the United States to give the court that level of support. We fear that, without the United States, the effectiveness of the permanent international criminal court will fall far short of its potential.

We remember the lessons of the early decades of this century when ambitious international institutions were created that, in part because of the lack of

American participation and support, either collapsed or became irrelevant. All of us in Rome shared a common goal that an international court should be able to prosecute tyrants who commit mass murder, mass rape, or mass torture against their own citizens, while at the same time not inhibiting States from contributing to efforts to help protect international peace and security. The irony of the Rome outcome on Article 12 is not lost on us. Consider the following. A State not a party to the treaty launches a campaign of terror against a dissident minority inside its territory. Thousands of innocent civilians are killed. International peace and security are imperiled. The United States participates in a coalition to use military force to intervene and stop the killing. Unfortunately, in so doing, bombs intended for military targets go astray. A hospital is hit. An apartment building is demolished. Some civilians being used as human shields are mistakenly shot by U.S. troops.

The state responsible for the atrocities demands that U.S. officials and commanders be prosecuted by the international criminal court. The demand is supported by a small group of other states. Under the terms of the Rome treaty, absent a Security Council referral, the court could not investigate those responsible for killing thousands, yet our senior officials, commanders, and soldiers could face an international investigation and even prosecution. The complementarity regime is often offered as the solution to this dilemma. However, complementarity is not the answer, to the extent it involves States investigating the legality of humanitarian interventions or peacekeeping operations that they already regard as valid official actions to enforce international law. The court could decide there was no genuine investigation by a 2-to-1 vote. We have other concerns of principle about the relationship between Article 12 and international law. Our fundamental concern is, in the absence of a Security Council referral, the court asserting jurisdiction over non-party nationals.

Mr. Chairman, another fundamental concern we have about the Rome treaty is the way amendments to crimes are adopted and applied. In its present form, the amendment process for the addition of new crimes to the jurisdiction of the court or revisions to the definitions of existing crimes in the treaty will create an extraordinary and unacceptable consequence. After the States Parties decide to add a new crime or change the definition of an existing crime, any State that is a party to the treaty can decide to immunize its officials from prosecution for the new or amended crime. Officials of non-parties, however, are subject to immediate prosecution. For a criminal court, this is an indefensible overreach of jurisdiction. Likewise, there will be some who regard the idea that State Parties can opt out of prosecution for war crimes for 7 years, while non-parties cannot, as an incentive to join the court. Criminal jurisdiction -- individual criminal jurisdiction -- should not be played with in this way. We have other fundamental concerns, such as the inclusion of an undefined crime of aggression. Aggression carries with it an extremely problematic process of definition. How this issue will be resolved is too unclear for so important an issue.

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. There are a number of important issues that this Committee will address in its resolution on the Preparatory Commission. We agreed in Rome that the Preparatory Commission sessions can be funded from the United Nations annual budget. Those sessions, however, must be absorbed so that the UN regular budget does not exceed \$2.533 billion. The Preparatory Commission will consider many important issues, including the elements of crimes and the rules of evidence and procedure. As a signatory of the Final Act in Rome, the United States is entitled to participate in the Preparatory Commission. However, in our view, it is also essential that the Preparatory Commission afford the opportunity for governments to address their more fundamental concerns. While we know the few concerns that we have, we do not presume that we have all the answers. No doubt as we discuss how to build

an effective court, new solutions will emerge. We do know that, when building an international institution that is intended to last for the ages, a solid foundation of support is essential. We would hope that such a process might lead to a court that would command the broad support and credibility that an international criminal court requires if it is to succeed. Our choice of this process is also made with care. We have heard it suggested that the United States should exercise "benign neglect" or that we should wait until the Review Conference 7 years after entry into force of the treaty -- a conference to which the United States, as a non-party, would not be entitled to fully participate. We have rejected both of these options. Another option would be to oppose the treaty in a variety of ways.

We would prefer, however, a policy of positive and forward- looking engagement in the hope of ensuring a treaty that will stand for values and goals common to us all. In conclusion, Mr. Chairman, the advantages deriving from strong United States support for the international criminal court should not be sacrificed for a concept of jurisdiction that may not be effective and even runs the risk of dividing us on an issue -- international justice -- that will be difficult enough to achieve if we are together. The credibility of the court will be demonstrated in how it builds its relationships with sovereign governments and in how well it supports, and is supported by, the requirements of international peace and security. The international community's willingness and ability to prevent and, where necessary, respond effectively to atrocities is of fundamental importance to us all. The opportunity remains for the international criminal court to achieve its full potential. We hold the stakes for international peace, security and justice to be too great to accept anything else.

Thank you, Mr. Chairman.