

David J. Scheffer

U.S. Ambassador at Large for War Crimes Issues

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**An International Criminal Court:
The Challenge of Enforcing International Humanitarian Law**

I am grateful for this opportunity to address a California audience on the importance of establishing a permanent international criminal court. The efforts of the Southern California Working Group on the International Criminal Court to engage Californians in this issue are commendable as we advance toward the diplomatic conference this summer in Rome. One of my most important tasks in the months ahead is to discuss with Americans the importance of the permanent court and the interests at stake for the United States in its creation.

The UN talks on the establishment of a permanent international criminal court have entered their most critical stage. Only one Preparatory Committee meeting remains, next month, before the diplomatic conference begins in Rome this summer for a fixed, five-week period. The number of issues to be resolved between now and June to create a workable draft statute is daunting. The ICC would be an institution that melds the common law and civil law systems and takes into account other major legal systems. The stakes are very high, for the perpetual absence of an appropriate permanent international criminal court would embolden war criminals to conduct their business with impunity; but an ill-conceived permanent court might create bad law, discourage effective national prosecutions, and create new divisions among States.

President Clinton has repeatedly expressed his Administration's commitment to the establishment of an ICC. At the UN General Assembly in September, he called for the establishment of an ICC by the end of this century. U.S. leadership in establishing the two ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda and U.S. support for their full operation reflect the strong U.S. commitment to international criminal justice that underpins our participation in the UN talks on an ICC. We know that the success of the ad hoc tribunals is a necessary predicate to gaining universal support for the establishment and operation of a permanent court.

As head of the U.S. delegation negotiating the establishment of a permanent international criminal court, I am keenly aware of the objectives we must achieve and the national interests we must protect in creating such a court. I want to share some of them with you today.

National Law Enforcement

The rule of law, which the United States has always championed and which is a core principle of the Clinton Administration's foreign policy, stands at risk of being trampled by war criminals whose only allegiance is to their own pursuit of power. We believe that a core purpose of an international criminal court must be to impose a discipline of law enforcement upon national governments themselves to investigate and prosecute genocide, crimes against humanity, and war crimes, failing which the permanent court will stand prepared to undertake that responsibility. Just as the rule of extradition treaties is "prosecute or extradite," the rule governing the international criminal court must be "prosecute nationally or risk international prosecution." That discipline on national systems to fulfill their obligations under international humanitarian law has been and will continue to be central to the U.S. position in the negotiations. Our long-term vision is the prevention of these crimes through effective national law enforcement joined with the deterrence of an international criminal court.

The Role of the Security Council

Second, the authority of the UN Security Council under the UN Charter to restore and maintain international peace and security and to repel aggression must be fully preserved. The Security Council should play a significant role in certain procedures of the permanent court so that the dual objectives of peace and justice can be pursued most effectively.

We are very aware of the concerns expressed by many governments and by the NGO community over the role of the Security Council in the permanent court's functions. We know that those concerns are raised in good faith and we have examined those concerns in great depth. Let me emphasize, however, that the importance of a positive role for the Security Council must not be overlooked in this debate; nor must the Council's responsibilities under the UN Charter be distorted with rhetoric about politicizing the ICC.

Some in the NGO community have leaped to the conclusion that any government advocating a serious role for the Council must be set on undermining the independence of the court and subjecting it to the political control of the council. There is even disturbing talk of abandoning the United States and other key governments in a bid to create a theoretically pure but ultimately, we would argue, ineffective Court. The NGO community has been an indispensable participant in this debate and we look forward to its expert assistance in the months ahead. But if there is a misguided effort to abandon the UN talks in favor of some self-satisfying procedure to approve a statute for the ICC that will only win the support of a club of governments, we predict that effort will fail and the prospects for an early establishment of a permanent court will suffer.

The Clinton Administration believes a permanent international criminal court can be structured, but much hard work lies ahead on the road to Rome. The world desperately needs a permanent court that is fair, effective, and efficiently administered. And it will need the United States as its strongest pillar of support.

We believe the Security Council should participate in three key functions of the permanent court. First, we need to ensure that the Council and the Court are institutions that operate compatibly. The jurisdiction of the Court will involve many of the conflicts that are very properly within the jurisdiction of the Security Council. We have to find a way to prevent the Court being used deliberately or acting inadvertently to undermine the Council's critical responsibilities, and we need to ensure that the Council does not present insurmountable obstacles to the legitimate pursuit of justice against the perpetrators of genocide, crimes against humanity, and war crimes.

The second key function for the Security Council will be its power of referral of situations to the Court. This is a powerful function and most governments appear to be supportive of it in the UN talks. Our position on this is very clear: the statute of the Court should enable the Security Council to refer overall situations (such as armed conflict and atrocities) directly to the Court under any of its Charter powers. If the referral is made under Chapter VII power, then the court can act with the kind of mandatory authority that the two ad hoc tribunals currently have. This means that many of the provisions of the statute which pertain to State cooperation could be, in a sense, overridden with the obligation to fully comply with the Court's orders. If the Council's referral is not made under Chapter VII of the UN Charter, then it would trigger the same procedures as if a State Party had referred an overall situation to the court.

The third function will be the Security Council's critical role in assisting the Court with the enforcement of its orders. The statute will need to enable the court to seek the Council's assistance against recalcitrant governments which fail to perform their treaty obligations.

Complementarity

I have already emphasized the responsibility of national systems to bring perpetrators of these heinous crimes to justice. Key to that objective is a principle well-known to the negotiators but far less known to others, and that is the principle of complementarity. By that we mean that the Court will not have primary jurisdiction over the perpetrators. Rather, there will be a procedure which first looks to national systems of justice to administer the law, failing which the ICC may be activated. For example, the U.S. criminal and military justice systems are the most sophisticated and highly developed in the world. Our courts must have the primary duty of investigation and prosecution of U.S. citizens. Not only is this more effective; it also strengthens the primary responsibility of governments to prevent these crimes. This will be a key issue for the U.S. Senate when it is asked to give its advice and consent to ratification of the ICC treaty.

Some progress has been made in building complementarity into the statute, and the United States has been very active in that effort. More will be required, however, before the principle of complementarity is fully set forth in the statute. We will be focusing on what is needed to protect the legitimate interests of States

Parties which have civil and military justice systems which exemplify the highest standards of justice.

State Consent

An issue that will occupy much attention in New York next month and probably in Rome is that of "state consent." Let me clarify what we understand this to mean. On the one hand, we believe that limiting the Court's jurisdiction to the three core crimes of genocide, war crimes, and crimes against humanity should firmly establish these categories of crimes as the inherent jurisdiction of the Court. In other words, the statute would not permit a State to pick and choose among these three core crimes. Since each of these categories of crimes would be defined as arising from customary international law, all individuals from all States are obligated not to commit these crimes. So it simply would not be realistic to permit a state to "opt out" of acceding to the jurisdiction of the Court over any of these crimes.

The issue of "state consent" arises when an individual case against an individual suspect is being pursued by the Court's prosecutor. At that stage, are there any interested States which might have the right under the statute to block the Prosecutor from proceeding further against the suspect? This is an enormously important issue to some governments in the negotiations, and it is one which the International Law Commission recognized in its 1994 draft of the ICC statute.

For years the United States has reserved on the issue of state consent. We have always argued that we need to examine where other elements of the statute -- such as the role of the Security Council and the provisions on complementarity -- settle before determining what, if any, state consent to individual cases is required. The robustness of the complementarity regime will have a strong impact on issues relating to state consent. We recognize the views of many other governments and NGO's on this issue. Let me emphasize, however, that we have a responsibility, as U.S. negotiators to ensure that the court is both effective and that U.S. interests are advanced and protected in the creation of the Court.

The Role of the ICC Prosecutor

There will be much debate in coming months over the role of the ICC prosecutor. Many are advocating that the prosecutor be empowered by the statute to launch investigations independently and seek indictments against anyone, anywhere in the world. They argue that there will be sufficient checks and balances built into the statute to prevent a prosecutor from running wild or abusing his or her powers.

We take a different view. The United States has proposed that once the Court is seized with an overall situation, either by referral from a State Party or by referral from the Security Council, the ICC prosecutor should have the independence to investigate and seek indictments against any suspects who are believed to be perpetrators of war crimes, genocide, or crimes against humanity in connection with an armed conflict or atrocity that has been referred. We do not believe that a

State Party or the Security Council should lodge complaints against individual suspects. That is the job of a professional and highly skilled prosecutor. Leaving the issue of state consent aside for the moment, the authority we envision for the prosecutor would be comparable to that currently enjoyed by the prosecutor of the two ad hoc tribunals.

It will be important for the ICC's prosecutor to have some political clout behind him when he launches into his investigative duties. That political clout can be attained through the referral by the State Party or the Security Council. Without it, the prosecutor is essentially on his own and may well encounter great resistance from States Parties which could view his efforts as political in intent or as simply responding to pressure by interest groups which have their own political agendas. Practically, the referral system we have proposed will be a powerful means to launch widespread investigations by the Court where the prosecutor can exercise significant independence.

Organizational Oversight and Other Key Issues

At the March-April Preparatory Committee session, delegations will examine in detail proposals for organization of the Court, dispute resolution, amendments, withdrawal rights, funding, and how to draft the rules of evidence and procedure. The United States has submitted proposals on many of these issues to the United Nations Secretariat this week for circulation to Member States, and we will be advancing further proposals as the PrepCom nears.

We also have continued work to do to finalize the definitions of war crimes and crimes against humanity and to develop the elements of offenses for all crimes within the jurisdiction of the Court.

Conclusion

Let me emphasize in closing that no other country shoulders the burden of international security as does the United States. In the post-Cold War world, the U.S. military is called upon to defend our national security from a wide range of threats; to carry out mandates from the Security Council; to fulfill our commitments to NATO; to help defend our allies and friends; to achieve humanitarian objectives, including the protection of human rights; to combat international terrorism; to rescue Americans and others in danger; and to prevent the proliferation or use of weapons of mass destruction. Many other governments participate in our military alliances and a larger number of governments participate in UN and other multinational peacekeeping operations, such as SFOR in Bosnia. It is in our collective interests that the personnel of our militaries and civilian commands be able to fulfill their many legitimate responsibilities without unjustified exposure to criminal legal proceedings. The permanent court must not be manipulated for political purposes to handcuff governments taking risks to promote international peace and security and to save human lives. Otherwise, the permanent court, ironically, would undermine the effort to confront genocide, crimes against humanity, and war crimes.

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.

This is a challenging agenda of work, but we are determined to continue working closely with governments and NGO's on the road to Rome this summer.