

International Criminal Law

INTRODUCTION BY DAVID STOELTING*

The five pieces collected here reflect the remarkable maturation of international criminal law. Only a decade ago, when the enforcement of international criminal law was a pipe dream, the events discussed herein would have been deemed implausible. Now, with international crimes being prosecuted by a growing spectrum of national and international courts, and with the participation of prosecutors, defense lawyers, investigators and non-governmental organizations, international criminal law has finally emerged as a distinct body of law with real mechanisms for enforcement.

Nothing signifies the triumph of international criminal law more than the International Criminal Court (ICC). As most countries embrace the ICC as a long-needed answer to a serious gap in enforcement, the United States has wrestled with its ambivalence. Jennifer Schense and John Washburn discuss in section I the approach of the United States toward the Court, and the PrepCom negotiations that are paving the way for the ICC to begin operation upon the sixtieth ratification.

The ICC was a consequence of the international criminal tribunals for the former Yugoslavia and Rwanda, and Maury D. Schenk, Brian J. Newquist, Lesley Stone, and Daryl A. Mundis discuss the recent activities of these tribunals in section II. Further *ad hoc* tribunals have been created in Sierra Leone, Cambodia and East Timor, and these are discussed in section III by Daryl A. Mundis. Mavis Gyamfi describes another landmark in section IV—the U.N. Convention Against Transnational Organized Crime, which is the first multilateral treaty on organized crime. Finally, in section V Brian Concannon discusses the Raboteau trial in Haiti where, following a six-week jury trial hailed by national and international observers as fair, the impoverished justice of Haiti—against all odds—convicted sixteen army officer and paramilitaries of human rights offenses arising from a 1994 massacre.

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I. The United States and the International Criminal Court

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This article describes the evolution of the U.S. government's policy regarding the International Criminal Court (ICC). In particular, we examine the activities of the U.S. government since the conclusion of the Rome Diplomatic Conference, in the course of six sessions of the U.N. Preparatory Commission for the ICC (PrepCom), and in its bilateral and multilateral relations with other States. This article also examines the recent U.S. signature and sets forth some considerations that may affect the approach of the Bush administration to future negotiations relating to the ICC.

A. SUMMARY AND INTRODUCTION

The United States identified seven flaws in the Statute for the ICC shortly after the July 1998 Rome Diplomatic Conference.¹ At the end of 1999, the United States could be reasonably confident that most of these objections would be met in the coming year. Continuing negotiations in the PrepCom on Rules of Procedure and Evidence and on Elements of Crimes for the Court were making good progress toward finding solutions or compromises for three of them. Of the others, the United States has simply dropped three. These had to do with the crimes of terrorism and drug trafficking, the Statute's ban on reservations, and the self-initiating prosecutor.

The remaining objection was that the jurisdiction of the ICC must not extend to military service members and civilian officials of the United States as long as it has not ratified the Rome Statute. During the 1999 and 2000 PrepCom sessions, this demand continued to overshadow the numerous and often centrally important contributions the U.S. delegation made at the PrepCom to strengthening the operations and jurisprudence of the Court.

By the end of the Rome diplomatic conference, this position had emerged as the remainder of earlier and unsuccessful American efforts at broad control of the Court. These had included, for example, an attempt to make the U.N. Security Council the sole source of cases for the ICC. On its last day, the conference definitively rejected a U.S. proposal to deny jurisdiction to the Court over "acts . . . committed by officials or agents of a State not party in the course of official duties and acknowledged by the State as such"² unless that State had consented.

The delegation also carried over from Rome, and into the 1999 and 2000 sessions, two distinct styles in the conduct of their diplomacy. The first was conventional—and often very skillful—multilateral diplomacy, employing the usual techniques of initiating and exchanging texts, searching for compromises that avoided papering over real disagreements in favor of results the Court could use, and emphasizing cooperation with others for a

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1. See *Developments at the Rome Treaty Conference: Testimony Before the Senate Foreign Relations Committee*, 106th Cong., July 23, 1998 (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court).

2. *Proposal Submitted by the United States of America to the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/C.1/L.90 (1998).

common purpose. This was often backed up by formidable expertise and thorough preparation. The admiration and respect it created considerably offset the resentment and impatience aroused by the second approach.

The second approach combined a hard and continuous push for an exemption with a search for concessions that might allow Washington to reconsider the need for it. This was an obviously contradictory combination. The possibility of an American signature was raised more and more openly as another inducement for concessions in the last two PrepCom sessions in this period. By the beginning of 1999, most delegations had come to believe that neither an exemption nor any reconsideration in Washington would ever happen. Moreover, they were increasingly irritated by U.S. demands for concessions to which it was now clear there would never be any return.

B. FOURTH SESSION OF THE PREPARATORY COMMISSION (MARCH 13-31, 2000)

At the fourth PrepCom session, delegates began to focus in earnest on the completion of the draft Rules of Procedure and Evidence and the Elements of Crimes with the June 30, 2000 deadline established by the Final Act of the Rome Conference drawing nearer. The U.S. delegation continued to remain actively engaged in the negotiations, especially in drafting the Elements of Crimes. The United States had successfully insisted at the Rome Conference that the PrepCom should be charged with drafting the elements.

Delegations were also further encouraged by the provisional resolution of some of the issues raised by U.S. Ambassador David Scheffer as being of "fundamental concern to the United States." Among those issues resolved were the elements for the war crime of the direct or indirect transfer of civilian populations into occupied territories. Both the U.S. and Israeli delegations were concerned about what they viewed as an undue extension of international law beyond that contained in the Geneva Conventions. After months of intense negotiations, delegations on all sides were able to reach agreement on a set of elements that mirror exactly the definition of the crime in the Rome Statute, while allowing sufficient flexibility to adapt to possible changes either in international law or in the political situation concerned. Resolution was also achieved on a provision of Article 12, which required clarification. Article 12(3), as worded, allows a non-State party to temporarily accept the Court's jurisdiction for purposes of "the crime in question." The PrepCom accepted a Bosnian proposal that clarified that such acceptance would apply to "all crimes of relevance to the situation," thus meeting a widely shared concern that the use of the word crime alone might allow some States to use the Court to prosecute political enemies while denying the Court's jurisdiction over their own crimes.

The primary issue for the U.S. delegation, however, remained unresolved, and delegates could not begin to determine how to approach it. On the strength of pressure from the Department of Defense to maintain the U.S. position and without any clear signal from The White House, the U.S. delegation continued to seek a total exemption for U.S. nationals. It was widely anticipated that the U.S. delegation would at least informally introduce a proposal to achieve this exemption at the March session of the PrepCom. However, the U.S. delegation did not circulate any language. Instead, Ambassador Scheffer met informally but systematically with heads of delegations to sound out support for two mechanisms, which he hoped Washington would accept as constituting an exemption: a rule procedure based on Article 98 and the addition of text to the relationship agreement between the U.N. and the ICC. The purpose of the rule was to allow the Court to enter into agreements with States to limit surrender of individuals to the Court. The relationship agreement, as an

agreement between the Court and the United Nations, would then include language to create an exemption from surrender to the Court of officials and military personnel of the United States and of other non-State parties to the Court. At the end of the March session, the U.S. delegation demonstrated its intention to pursue both the rule and the text for the relationship agreement through a footnote attached to the rolling text at the last minute.³

Most delegates could not support the idea of a complete exemption for American nationals. Many agreed that both the proposed rule and text for the relationship agreement were not legally justified and would be harmful to the Statute and to the Court. Many also resented the insistence of the United States in obtaining the exemption without regard to the serious damage it would do to the credibility and effectiveness of the Court. Nonetheless, it was difficult for them to resist the political pressure exerted on countries in their capitals to concede to the United States, and the tactical maneuvering of the U.S. delegation in the PrepCom.

The results of the fourth PrepCom session touched off intense but largely inconclusive discussions within the Clinton administration. These reached sub-cabinet working groups and apparently involved the Secretaries of Defense and State as well. Regional bureaus within the State Department became extensively engaged in the ICC issue for the first time, giving the State Department's participation in inter-agency debates unprecedented depth and vigor. The State Department was finally authorized to pursue the Article 98 approach, but was not allowed to offer even signature as an inducement. This outcome was publicly expressed in a letter to other governments by Madeleine Albright.⁴

3. The footnote simply read, "One delegation may propose an addition to the rule related to article 98." *Addendum, Annex II: Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/WGRPE(9)/RT.1, at 6 (Mar. 21, 2000), available at <http://www.un.org/law/icc/prepcomm/mar2000/english/rev1ad1e.pdf>.

4. The letter from U.S. Secretary of State Madeleine Albright to foreign ministers around the world, calling for support of the U.S. position, dated April 17, 2000, is part of the archives of the Coalition for the International Criminal Court. The text of the letter reads as follows:

17 April 2000

Dear Mr. Minister:

I am writing to you at this time to emphasize the critical importance we attach to our proposal for the proposed International Criminal Court (ICC). We are seeking a provision in the UN/ICC relationship agreement and a Rule to Article 98 of the Rome Statute to address our fundamental objective to prevent, unless certain conditions are met, the surrender or acceptance by the ICC for trial of nationals of non-party States who are acting under governmental direction and whose actions are acknowledged as such by the non-party State.

We must achieve, before it is too late, the proper balance between the noble aims of the ICC treaty, namely, to bring to justice perpetrators of genocide, crimes against humanity, and serious war crimes, and the continuing need for responsible nations to maintain or restore international peace and security and to undertake humanitarian missions. We believe our proposal advances both goals with non-parties and with parties to the ICC Treaty. Yet, it would still make it extremely difficult for individuals from rogue states to act with impunity. Our proposal is consistent with Article 98 and is not an amendment or modification of the Rome Statute. If our proposal is adopted by the U.N. Preparatory Commission on the ICC this year, it would address the fundamental concern that leads U.S. to oppose the treaty and would enable U.S. to assist the ICC as appropriate. The end result would be a stronger ICC that would benefit from a relationship with the United States. It also would give U.S. time to evaluate the treaty regime and the Court's operation before making a final decision about our participation in the Court.

There is too much at stake for international justice and international peace to go down a path that would drive a wedge between the United States and the ICC. I strongly urge you to support our

The letter backfired with its most important recipients because it seemed to push a position on Article 98 that had already been rejected at the end of the fourth session. Moreover, the letter used the language of the proposal that had been so soundly defeated in Rome. Many read it as a threat of continued American opposition to the Rome Statute.

Nonetheless, the letter became the basis for instructions for strenuous demarches on this position by individual envoys in capitals worldwide and by U.S. delegations at multilateral meetings. Many of the latter were regional, such as conferences between the United States and the European Union.

C. FIFTH SESSION OF THE PREPARATORY COMMISSION (JUNE 12–30, 2000)

As a result of these discussions with other countries, the U.S. delegation approached the fifth session of the PrepCom with the realization that their full proposal was generating strong opposition among the Like-Minded Group of States (LMG)⁵ and, in particular, the European Union (EU). This was accompanied by the realization that time was quickly running out if any exemption was to be achieved through the Rules and Elements.

The U.S. approach changed tactically but not substantively in June. The United States set aside the exemption language for the relationship agreement and began to press for only the rule, arguing that alone it was harmless. The United States formally introduced a new text of the rule at the start of the fifth session.⁶ These activities caused some confusion

proposal as the June session of the preparatory commission approaches, and to instruct your delegation accordingly. In any event, we would appreciate your consulting U.S. prior to making any final decision on this important matter.

Sincerely,
Madeleine K. Albright
Secretary of State

5. The LMG developed as an informal government grouping in 1995, during the Ad Hoc Committee of the General Assembly created to address the ICC. What started out as a group of approximately six or seven States at the start of the Ad Hoc Committee grew to include close to twenty like-minded States by the end of 1995, including Argentina, Australia, Austria, Canada, Denmark, Egypt, Finland, Germany, Greece, Italy, Lesotho, the Netherlands, New Zealand, Norway, Portugal, Samoa, Singapore, South Africa, Sweden, Switzerland, and Trinidad and Tobago. The LMG coalesced around a very specific initial goal: to advance the negotiations in the face of P-5 and other efforts to sidetrack the process by obtaining a recommendation of the Ad Hoc Committee that the General Assembly create a preparatory committee, with a view towards establishing a date as soon as possible for a diplomatic conference. The core membership of what came to be called the Like-Minded Group of States (LMG) emerged as early debates revealed similarities among delegations on key issues, including the court's jurisdiction and how that jurisdiction would be triggered, and what should constitute the Statute's core crimes. Eventually, the impact of the LMG's coordination, together with that of the Coalition for an International Criminal Court, has a decisive, constructive impact on the outcome of the Rome Conference. For a more detailed description of the evolution of the LMG, see the chapter on the role of NGOs in the development of the Rome Statute by Jennifer Schense and William Pace, part of a commentary edited by Antonio Cassese, due for publication in 2001.

6. See *Proposal Submitted by the United States of America Concerning Rules of Procedure and Evidence Relating to Part 9 of the Statute (International Cooperation and Judicial Assistance): Proposed Rule to Article 98*, U.N. Doc. PCNICC/2000/WGRPE(9)/DP.4 (2000), available at <http://www.iccnw.org/html/us2000.html> (unofficial version; official version on file with the U.N. and the NGO Coalition for the International Criminal Court).

The U.S. delegation also introduced a proposal relating to Part 13 of the Rome Statute that would require the approval of both the State of nationality of the accused and the State upon whose territory the crime was committed in order to proceed with investigations and prosecutions of crimes added by amendment to the Rome Statute. Such a provision would be contrary to Article 12 of the Statute, which requires the permission

because it was clear from the April and May demarches that the United States required both the rule and the relationship agreement text to achieve an exemption. Nonetheless, the United States put forth only the rule in June and asked that it be considered "on its own merits."

Efforts to prevent the U.S. rule from being accepted were unfortunately made more difficult by the all-or-nothing environment building at the PrepCom. The PrepCom bureau flatly opposed a vote on the Rules and Elements because of the belief that while a rule to Article 98 would alone be harmless, the possibility of adoption of the Rules and Elements by anything less than consensus would reflect disagreement about their universal acceptability and slow the momentum of ratifications. The LMG followed suit. This encouraged the United States not to concede on the rule or to let up the political pressure. A few delegates held out for a vote, but in the end succumbed to the pressure to accept the rule and to adopt both the Rules and Elements by consensus. This consensus, however, could only be achieved if the rule was accompanied by a warning in the summary of the session's proceedings that the rule was indeed stand-alone and could not be linked to the relationship agreement or any similar agreement in the future.⁷ The chair of the PrepCom (in his capacity as head of the Canadian delegation), Portugal (on behalf of the EU), and many members of the LMG spoke after the adoption of the text to emphasize that there would be no re-opening of the Rome Statute. It was clear, however, from public and private statements of members of the U.S. delegation as of October 2000 that the strenuous campaign for a U.S. exemption would continue.⁸

Preparations in Washington before the sixth session of the PrepCom had a feverish and desperate quality. Supporters of the ICC within the administration, especially in the State Department, saw the opportunity to sign the Statute slipping away. A full confrontation with the Defense Department was avoided with the latter's grudging agreement to let the delegation try to put together a combination of measures that would collectively provide for full exemption. Since this agreement came very late and the multiple proposals in the U.S. position made it difficult to advocate forcefully, American international activity in support of it, including bilateral demarches, was comparatively slight.

of only one of the two categories of States. This proposal has been interpreted as reflecting U.S. delegation concerns about eventual inclusion of the crime of aggression. As mentioned in the section of this report addressing aggression, further discussion of the U.S. proposal has been postponed until a more appropriate time, most specifically when the Rules of Procedure of the Assembly of States Parties are negotiated.

7. The rule reads, "The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court." *Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1, at 89 (Rule 195) (2000). The proviso in the session summary reads, "It was generally understood that rule 9.19 [renumbered as rule 195] should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or State." *Proceedings of the Preparatory Commission at Its Fifth Session*, U.N. Doc. PCNICC/2000/L.3/Rev.1, at 3 (2000), available at <http://www.un.org/law/icc/prepcomm/jun2000/5thdocs.htm>.

8. To name a few press sources in which the U.S. delegation's intentions are made clear, see *U.S. Gains a Compromise on War Crimes Tribunal*, N.Y. TIMES, June 30, 2000; *100 Countries Approve War Tribunal*, AP ONLINE, June 30, 2000, at <http://www.ap.org>; *U.S., Opponents Claim Win on International Court*, UNITED PRESS INT'L, June 30, 2000; *War Crimes Court Ratified by Canada; U.S. Battles to Keep Citizens Exempt from Prosecution*, THE OTTAWA CITIZEN, July 1, 2000; *U.S. Wins Time to Protect Forces from War-Crimes Panel*, WASH. TIMES, July 1, 2000; *Official Outlines U.S. Strategy on War-Crimes Court*, UNITED PRESS INT'L, Aug. 2, 2000.

D. SIXTH SESSION OF THE PREPARATORY COMMISSION (NOVEMBER 27–DECEMBER 8, 2000)

The working environment at the sixth session of the PrepCom was overshadowed by the approaching December 31, 2000, deadline for signature of the Rome Statute. By the start of the sixth session, twenty-three countries had ratified the Rome Statute, a fact underscored by the announcement on the first day of the session that South Africa had ratified; that number would rise to twenty-seven by the end of the year. In addition, two States—the Syrian Arab Republic and the United Arab Emirates—announced on the first day that they had signed and Peru announced that its signature was imminent. An additional twenty-two States would sign the Statute before the deadline, bringing the final number of signatories up to 139.⁹

Speculation among delegates was rife that the United States might sign the Statute before the deadline. This was not the first time the possibility was openly addressed: Ambassador Scheffer had encouraged delegates to believe that he might be able to persuade President Clinton to sign, if the U.S. delegation received concessions in the texts of the Rules and the Elements, amounting to an exemption. However, this possibility never had its desired effect on other delegates at the PrepCom because they recognized that they could not concede what the U.S. delegation would require to successfully make its case for signature in Washington.

The U.S. delegation continued to seek a full exemption from the PrepCom, focusing primarily on the relationship agreement text. To achieve this, the first proposal addressed Article 10 of the draft relationship agreement, apparently seeking to interpose the United Nations between non-State parties and the Court as the conduit for documentation about admissibility of specific cases.¹⁰ Seventeen other delegations spoke strongly against this proposal because of the likelihood that transmittal of information through the Security Council could effectively delay admissibility determinations and hamper the work of the Court. The rolling text of the draft agreement omits this proposal; however, the United States did succeed in having a footnote attached calling for future consideration of how to address transmission of information relating to the surrender of U.N. peacekeepers.¹¹

On the last day of the working group on the relationship agreement, the United States introduced a second proposal, DP.17, calling for the addition of a new article to the draft agreement.¹² This article reflects most closely the original U.S. proposal for the relationship

9. It should be here noted that 120 States voted to adopt the Rome Statute at the close of the Rome Diplomatic Conference, a figure that was a goalpost for NGOs, governments, and others promoting signature of the Statute.

10. *Proposal Submitted by the United States of America: Comments on Document*, PCNICC/2000/WGICC-UN/L.1, U.N. Doc. PCNICC/2000/WGICC-UN/DP.12 (Dec. 6, 2000), available from the U.N. Office of Document Services and on file with the International NGO Coalition for the International Criminal Court.

11. Footnote 12 states, "Some delegations suggested that it would be useful to include somewhere in the present Agreement a provision dealing with the transmission of information to the United Nations by the Court regarding a request for surrender of any member of United Nations peacekeepers when the Court deems it appropriate." See *Discussion Paper Proposed by the Coordinator*, U.N. Doc. PCNICC/2000/WGICC-UN/RT.1 (Dec. 7, 2000). Due to a lack of active U.S. participation in the February/March 2001 PrepCom to support this element, this footnote was subsequently dropped from the draft agreement, U.N. Doc. PCNICC/2001/L.1/Rev.1/Add.1. Both documents are available from the U.N. and are on file with the NGO Coalition for the International Criminal Court.

12. See U.N. Doc. PCNICC/2000/WGICC-UN/DP.17 (Dec. 7, 2000). *Proposal Submitted by the United States of America: Comments on Document*, PCNICC/2000/WGICC-UN/2.1—Proposal for a new article.

agreement, which the LMG and the EU so soundly rejected leading into the fifth session of the PrepCom.¹³ However, because it was introduced on the last day, there was no time to discuss it. This proposal and others were added to the rolling text of the relationship agreement as an annex, with the note that: "Owing to the lack of time, the Working Group deferred consideration of the following proposals to the next session." The Coordinator further stressed during the final plenary that there was no priority given to the proposals contained in the Annex, but that they were included simply because they were introduced during the last session and had not been discussed by the Working Group.

Also on the last day, the United States submitted a third proposal to the plenary that was neither formally introduced nor discussed. This proposal requested an extension of the PrepCom's mandate in order to consider the development of factors for the Court that may be relevant for the investigation, prosecution, and surrender of suspects, including the context within which an alleged crime has occurred and a State's contribution to international peace and security. The United States intended for these two eleventh-hour proposals to effectively result in a near-total exemption for American nationals. It would, of course, also similarly benefit the nationals of other countries, which could meet the criteria required by the proposals.¹⁴ The Working Group on the Relationship Agreement will address DP.17; the second proposal will be dealt with by Zsolt Hetesy of Hungary, the PrepCom Bureau's contact point for the headquarters agreement. The Bureau encouraged delegations to share any comments or suggestions regarding the U.S. proposal with the contact point; therefore, responses from delegations to this proposal will likely shape the Bureau's decision as to the framework in which this proposal will ultimately be addressed.

Finally, a number of delegations discussed the possibility of an extension of Article 124 of the Rome Statute to States having signed the Rome Statute but not having ratified. The effect of such an extension would be to exempt the governments, but not the nationals, of non-State parties from the Court's jurisdiction over war crimes for the first seven years after entry into force. However, there was limited support for this proposal; moreover, the U.S. delegation did not consider it a full exemption, so the idea was eventually dropped.

E. CLINTON SIGNS THE ROME STATUTE

The Rome Statute closed for signature at midnight on December 31, 2000. The United States, along with Israel and Iran, signed a few hours before this deadline. Ambassador Scheffer signed the Statute on behalf of the U.S. government. President Clinton's decision

13. The text of the proposal reads as follows:

In order to encourage contributions by States to promote international peace and security, and unless there has been a referral to the Court pursuant to article 13(b) of the Statute, the United Nations and the Court agree that the Court shall determine on its own motion pursuant to article 19(1) the admissibility of a case in accordance with article 17 when there is a request for the surrender of a suspect who is charged in such case with a crime that occurred outside the territory of the suspect's State of nationality.

Proposal Submitted by the United States of America, supra note 6.

14. The effect of the two proposals together would likely be to require the Court only to evaluate a State's ability to exercise complementarity, and not a State's willingness to do so, as required by Article 17 of the Rome Statute. However, it should be noted that as long as this decision rests in the hands of the judges, even this drastic step would not result in the 100 percent exemption, which the U.S. Department of Defense demands.

to sign, unlike some of his other last-minute moves, did not preempt any action that his successor might take and had been long and thoroughly debated within his administration.

This debate began immediately after the end of the sixth session of the PrepCom. Opponents, especially in the Department of Defense, declared that nothing should undercut the demand for exemption and future efforts to achieve it. Proponents argued that the Clinton administration had supported the principle of an international criminal court consistently since 1995 and that signature would be a closing confirmation of this support.¹⁵

By early November, the Clinton administration was receiving appeals for signature from many sources. Non-governmental organizations and individuals approached every office and individual concerned with the ICC in the administration and some organizations with nationwide memberships mounted effective letter-writing campaigns. These campaigns culminated in the delivery of a selection of these letters in person to the president. Letters to the president also came in from Congress, religious organizations and leaders, distinguished human rights activists, and persons prominent in other fields. Heads of state and government from other countries, American notables, and personal friends called or visited him to urge signature.

Finally, newspapers across the country editorialized in favor of signature. Their general approach was that the United States should not turn its back on the Court and should use signature to retain American influence over the final stages of shaping and establishing the ICC.

In the end, this approach is also reflected in the official statement accompanying the U.S. signature. However, this document bears the marks of the contention that dominated debate within the U.S. government until the very end. The statement repeats the concern that the ICC must not have jurisdiction over nationals of states not party to the Statute so that the United States can observe the Court in its formative years before choosing to become subject to its jurisdiction. In this way, the statement fails to dispel the longstanding confusion within the U.S. government about the Court's jurisdiction over individuals, not over states. It also refers to other unspecified flaws in the Statute, but leaves it to the incoming administration to meet these concerns and advises that until that is done, the Rome Statute should not be submitted to the Senate for ratification.

F. CONCLUSION

As this article was written, the Bush administration was considering its long-term policy toward the ICC. At the seventh session of the PrepCom, from February 26 to March of 2001, the United States absented itself except for the working group on aggression. The style and substance of American participation in the work before the PrepCom in September 2001 will establish the boundaries of American policy and limit the options of those who make it. Will the new government feel bound to signal its disapproval of the Clinton signature as strongly in this international forum as it has domestically? Will it wish to participate in shaping the Court through its positions on such issues as the Rules of Procedure of the Assembly of States Parties, the Court's financial regulations and rules, and its relations with the U.N.? Finally, the new Secretary of State has made clear that his

¹⁵ Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 32, U.N. Doc. A/CONF.39/27 (1969).

administration even more sternly insists on exemption than its predecessor. His delegation is likely to discover at the eighth session of the PrepCom, if not before, that the nations traditionally allied to the United States are precisely those that will continue to put exemption out of reach.

II. International Criminal Tribunals for the Former Yugoslavia and for Rwanda

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This section summarizes the significant developments that occurred during 2000 relating to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹⁶

A. STRUCTURAL CHANGES TO THE ICTY AND ICTR

The Statutes of the ICTY¹⁷ and the ICTR¹⁸ were amended in 2000 with the goal of substantially reducing the lengths of trials conducted before the Tribunals. These amendments were the culmination of a process begun in 1998,¹⁹ when the U.N. General Assembly requested the Secretary-General to establish an expert group to review the effective operation and functioning of the ad hoc Tribunals.²⁰

On November 22, 1999, the Secretary-General transmitted to the General Assembly the expert group's report,²¹ containing forty-six recommendations for improving the efficiency of the Tribunals. Following the release of the expert group report, the General Assembly

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16. For information regarding earlier developments at the ICTY and ICTR, see Douglas Stringer, *International Criminal Tribunal for the Former Yugoslavia*, 31 INT'L LAW. 611 (1997); Monroe Leigh & Maury Shenk, *International Criminal Tribunal for the Former Yugoslavia*, 32 INT'L LAW. 509 (1998); Maury Shenk et al., *International Criminal Tribunal for the Former Yugoslavia and for Rwanda*, 33 INT'L LAW. 549 (1999); Maury Shenk et al., *International Criminal Tribunal for the Former Yugoslavia and for Rwanda*, 34 INT'L LAW. 683 (2000). The recent, extremely significant surrender of Slobodan Milosevic to the ICTY by the Serbian government will be discussed in a similar article next year.

17. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993). The full text of the statute with current amendments is available at <http://www.un.org/icty/basic/statut/statute.htm> [hereinafter ICTY Statute].

18. S.C. Res. 955, U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955 (1994). Text of the statute is available at <http://www.ictcr.org> [hereinafter ICTR Statute].

19. For a more detailed account of this process, see Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT'L L. 759 (2000).

20. See G.A. Res. 53/212, U.N. GOAR, 53rd Sess., 5th Comm., Annex, Agenda Item 135, U.N. Doc. A/Res/53/212 (1998); G.A. Res. 53/213, U.N. GOAR, 53rd Sess., 5th Comm., Annex, Agenda Item 137, U.N. Doc. A/53/213 (Dec. 18, 1998).

21. *Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991. Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994*, U.N. GOAR, 54th Sess., Annex, Agenda Items 142 and 143, U.N. Doc. A/54/634 (1999).

requested comments from the Tribunals on the recommendations proposed by the expert group.²²

Shortly after these comments were submitted, ICTY President Jorda presented a report to the General Assembly and Security Council on behalf of the ICTY Chambers.²³ The plan set forth in his report contained three primary elements and was designed to greatly reduce the length of pre-trial detention faced by the accused at the ICTY. First, the Security Council should consider amending the ICTY Statute to include *ad litem* (or *ad hoc*) judges. Second, in order to expedite appeals, the ICTY Statute should be amended to increase the number of appellate judges. Third, the ICTY Rules of Procedure and Evidence (RPE) should be amended to permit the Trial Chambers to delegate more authority to the chambers' senior legal officers for the management of the pre-trial phase of the pending cases.

On November 30, 2000, in response to this ICTY proposal, the Security Council adopted Resolution 1329,²⁴ amending the statutes of both the ICTY and ICTR, and generally following the plan submitted by President Jorda, with the exception of the amendments to the ICTY RPE.²⁵

Resolution 1329 amended the ICTY Statute, creating twenty-seven new *ad litem* judges and expanding the Appeals Chamber to seven judges, thereby increasing the composition of the chambers from fourteen to sixteen permanent judges.²⁶ The *ad litem* judges will be assigned exclusively to the Trial Chambers in accordance with strict statutory guidelines. Only nine *ad litem* judges may serve at any one time and no more than six may be assigned to any one Trial Chamber.²⁷ Once *ad litem* judges are assigned, each Trial Chamber would be split into either two or three sections,²⁸ each of which will contain three judges.²⁹ Each section must be composed of both permanent and *ad litem* judges, in order to ensure that each section benefits from the experience of the permanent judges.³⁰ It is anticipated that once the *ad litem* judges are appointed, the ICTY will be able to conduct six trials simultaneously. This will expedite the trials for those accused currently in pre-trial detention awaiting trial.

22. See G.A. Res. 54/239, U.N. GOAR 5th Comm., 54th Sess., Annex, Agenda Item 142, U.N. Doc. A/Res/54/239 (2000); G.A. Res. 54/240, U.N. GOAR 5th Comm., 54th Sess., Annex, Agenda Item 143, U.N. Doc. A/Res/54/240 (2000).

23. See *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GOAR, 55th Sess., Annex, Agenda Item 52, U.N. Doc. A/55/382-S/2000/865 (2000). This report is also available on the ICTY website, <http://www.un.org/icty/pressreal/RAP000620e.htm>.

24. S.C. Res. 1329, U.N. SCOR, 4240th mtg., U.N. Doc. S/RES/1329 (2000). Articles 12-14 of the ICTY Statute were amended, while Article 13*bis*, Article 13*ter* and Article 13*quarter* were added. Articles 11-13 of the ICTR Statute were amended. The amended articles are included as Annex I (ICTY) and Annex II (ICTR) to Resolution 1329.

25. Article 15 of the ICTY Statute vests in the judges the authority to adopt and amend the RPE. Thus, that part of President Jorda's proposal relating to amendments to the RPE to expand the responsibilities of the chambers' senior legal officers will be addressed at a future plenary of the ICTY judges.

26. ICTY Statute, *supra* note 17, art. 12; ICTR Statute, *supra* note 18, art. 11(b). Pursuant to ICTR Statute art. 13(4), the two ad hoc Tribunals share a common Appeals Chamber.

27. ICTY Statute, *supra* note 17, art. 12.

28. Depending on whether that Trial Chamber is assigned three or six *ad litem* Judges. It is likely that each Trial Chamber will be split into two sections, however.

29. ICTY Statute, *supra* note 17, art. 12(2).

30. See *id.*