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Advancing U.S. Interests with the International Criminal Court

Address by His Excellency Ambassador David J. Scheffer
Vanderbilt University Law School, March 27, 2003*

It is a great pleasure to be here in this beautiful lecture hall at Vanderbilt University Law School and to have the opportunity to speak to you this afternoon about the International Criminal Court (ICC).

In recent months, one newspaper or magazine article after another, in examining the foreign policy of the current administration and the gulf (which seems to be so pronounced now) between the United States and even its closest allies throughout the rest of the world, has listed a basic set of treaties as being partly explanatory of that gulf. The Kyoto Protocol, for example, is always part of that discussion in the context of climate change. But another such treaty is the Rome Statute of the International Criminal Court.

ROME STATUTE ON THE ICC AND THE U.S. ROLE IN WORLD AFFAIRS

While I was negotiating the Rome Statute during the last decade, it generally remained a backburner issue. Not many people were focused on it at all, certainly very few in the political realm, and getting any reporter interested in it was a Herculean task. I never dreamed, at that time, that the ICC would rise to such prominence as a part of the analysis of why the United States has drifted so far from even its closest allies. One of the reasons the ICC has become so prominent is that its source treaty is emblematic of many other treaty relationships and multilateral negotiations where, in the past couple of years, the United States has disengaged rather than engaged.

The International Criminal Court has become an icon of analysis as to why that has happened. Thus, especially for students on the verge of going out into the world to practice, it is an interesting phenomenon to examine how central this treaty has become in a much larger geopolitical dialogue about the role and responsibilities of the United States in the world. That the treaty has suddenly

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become a fulcrum of that discussion was something rarely anticipated during the negotiations, because at times it was so incredibly technical. I think it is extremely important that we start any discussion about the International Criminal Court with its purpose. That is what is most commonly lost in the United States when we debate the ICC. Our primary concern always seems to be the potential exposure of the United States to this court.

ICC PURPOSE

The purpose of this court arose from the 1990s phenomenon of post-Cold War atrocities, erupting in ways that shocked us. In response, we cobbled together ad hoc tribunals such as the international criminal tribunals for the former Yugoslavia and Rwanda. Through that experience there developed a keen interest in addressing such atrocities in a more permanent way, so that we would not have to build courts every time an atrocity occurred anywhere in the world. Beginning in 1989, with a proposal by Trinidad and Tobago for a permanent international criminal court that would prosecute the international crime of drug trafficking, the objective quickly evolved by the mid-1990s into a permanent criminal court that would resurrect the purposes of Nuremberg and Tokyo tribunals after World War II. The ICC has been designed to investigate and prosecute what I describe as atrocity crimes—genocide, crimes against humanity, and serious war crimes—that basket of crimes which has now become the focus of international criminal tribunals.

With that major purpose during the negotiations, we had our sights on the atrocities of our time. We kept in mind what was happening in the Balkans, what was happening in Rwanda, what was happening in the Congo, what was happening in so many other places in the world where massive assaults on civilians were taking place in real time. That was the central focus for the negotiators and that is the focus embodied in the actual words of the statute of the court. It is extremely important to keep this in mind because, as you engage in further discussions about this here in the United States, you will quickly be drawn into the question of how U.S. actions may be subject to this court's jurisdiction.

IMPACT OF ICC ON U.S. ACTIVITIES

The potential exposure of the United States to the ICC is a fair question. I had to deal with it at all times as a negotiator. But we must not lose sight of the fact that it was not the central focus of the

ICC, I often wished, when I was in the policy rooms of Washington with my colleagues—at the White House, at the Pentagon, at the Justice Department, and at the State Department—in countless meetings about this court at the high levels, that we would have some discussion about the central purpose of the ICC. But it almost never occurred. Those meetings were all focused on the potential U.S. exposure to the court, and how I would manage that issue going into the next round of negotiations.

I wished at times that I could have shown them what I had seen—I was in atrocity zones all the time. It would have been beneficial, I think, for policy makers to have been faced with twenty mutilated children from Sierra Leone walking silently through the policy room while we were talking, just to remind them what our meeting was about, to get them to focus on the real reason we were there. It is not just about the United States, it is about a lot of other things going on out there. We have a stake in it, and we should be part of the solution. Of course, I worked for an administration, with leaders such as President Clinton and Secretary of State Albright, that was essentially sympathetic to that purpose. Still, even from their perspective, at the end of the day, the primary issue, understandably, was the exposure of the United States to the ICC.

U.S. Exposure: Crimes Addressed

The ICC has three baskets of actionable crimes: *genocide*, *crimes against humanity*, and *serious war crimes*. It does not yet exercise actionable jurisdiction over the crime of *aggression*. Although the crime of aggression is included in the statute, it is not yet defined as a crime and, therefore, cannot be prosecuted by the court. The crime of aggression cannot be prosecuted by this court until such time as the treaty is amended with a definition of aggression as an actionable crime. So, at least for the near term, take aggression off the table; it is not relevant for our discussion.

Genocide

Only those three baskets of crimes are relevant, with a high magnitude test for each basket. The U.S. government simply is not in the business of conspiring to commit these types of crimes. If we are, there is something seriously wrong with our decision making in Washington and we ought to face up to it. Genocide, under the statute, must take place in the context of a manifest pattern of similar conduct, in other words, the acts of genocide that are in the Genocide Convention, directed against a designated group, or conduct that could itself affect such destruction. The Genocide Convention, about which I will go into detail later, does include an inherent magnitude test. No one is prosecuted in real terms for a single act of

genocide against a single individual. That should never occur. In fact, I do not know of any example where that has occurred. The crime of genocide has its own magnitude test, and the statute recognizes that.

Crimes Against Humanity

Crimes against humanity are committed as part of a widespread or systematic attack directed against any civilian population, and the attack must include the commission of multiple crimes against a civilian population pursuant to, or in furtherance of, a state or organizational policy to commit such an attack. The necessary policy to commit such an attack against a civilian population requires that the state or organization actively promote or encourage such an attack against a civilian population. The perpetrator must have known that the conduct was part of, or have intended the conduct to be part of, a widespread or systematic attack directed against a civilian population. The ICC Prosecutor must look to that test before he can take the next step in determining whether or not he proceeds to the pretrial chamber to seek an indictment.

War Crimes

War crimes, for purposes of prosecution before the ICC, are crimes committed as part of a plan or policy, or part of a large-scale commission of such crimes, and only when the material elements of the crime are committed with intent and knowledge. The definition of the crimes must be interpreted within the established framework of the international law of armed conflict, which is very important to the military. You do not make end runs around that; you have to stay within it. The perpetrator must be aware of the factual circumstances that establish the existence of an armed conflict. No one will be inadvertently convicted of this crime as it is defined in the Rome Statute and its important Article 9 (Elements of Crimes). A perpetrator has to be focused on what he is doing and must have intended that a civilian population, as such, or individual civilians not taking a direct part in the hostilities, be the object of the attack. Finally, with respect to the war crime of excessive incidental death, injury, or damage, the crime must be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated. And while that is a technical definition, it is one that was actually brought to the table by the U.S. Department of Defense.

U.S. Exposure: Due Process Protections

U.S. negotiators spent many years negotiating the ICC's protection of due process. With me at the negotiating table, I had my Pentagon team (some in uniform, some civilian lawyers at the Pentagon) and my Justice Department team. These men and women were focused on due process. The irony, I think, especially in light of our experience with the Taliban and Al Qaeda now, is that their job was to make sure that the due process rights of any accused individual, for example an accused war criminal who might be indicted by the ICC, were fully recognized and honored by the court. That is why I found a little ironic what occurred after September 11, 2001, and during the assault on Afghanistan, with respect to those who were apprehended. I remembered those years of negotiations where we fought day-in and day-out for the due process rights of mass murderers, but I did not see that replicated in the ways we were handling various terrorist suspects in the field.

What are these due process rights? Let me quickly list them for you: (1) the equivalent of a probable cause hearing, (2) liberal pretrial discovery, (3) public trial in the presence of the accused, (4) right to counsel and to confront one's accusers, (5) privilege against self-incrimination, (6) notice of the charges, (7) provisional release pending trial, (8) bars against non-prohibitive and unreliable evidence, or evidence secured in violation of human rights, (9) proof of guilt beyond reasonable doubt, (10) right of appeal, (11) presumption of innocence, (12) prohibition of any adverse inference from the exercise of the right of silence, (13) right to conduct defense in person or through the defendant's chosen council, (14) cross-examination of witnesses and the calling of witnesses on one's own behalf, (15) disclosure of any exculpatory evidence, and (16) right not to be subjected to any form of duress, coercion, or any cruel, inhuman, or degrading punishment. We successfully incorporated all of these rights.

The Rome Statute includes a guarantee of a form of Miranda warning. In the United States, this right arises in cases of custodial interrogation. Under the jurisdiction of the ICC, the prosecutor must advise a person of his rights before he is questioned, whenever there are grounds to believe that he has committed a crime, even in non-custodial interrogations. This includes a reminder of the right to remain silent, the right to legal assistance, the right to have counsel appointed if he cannot afford it, and the right to be questioned in the presence of counsel.

The major difference between this and common-law procedure—remembering that in the international theatre we primarily fuse civil and common law—is that there is no trial by jury, only bench trial. This issue was taken off the table fairly quickly. Most of the world

does not have trial by jury, and so to bring the right to a jury trial to the table and insist upon it in an International Criminal Court leaves most of the other delegations in the room scratching their heads and asking, "Come again, what is that? Where are you coming from with that?" Civil-law procedure involves only judges. So the bench decides the case before the International Criminal Court. There is no trial by jury. But, when you really think about it, you probably do not want a jury of twelve peers from all parts of the world to sit in judgment of your defendant in this court for these types of crimes. You want very expert judges who know the law, and who can understand the complexities of atrocity law,¹ to be the judges of your innocence or guilt for these particular crimes.

The civil law system also offers the availability of appeal by the prosecutor from errors of fact, law, and procedure, which the common-law system does not afford. I think it is important to remember what Monroe Leigh, who was the legal advisor at the State Department during the Ford Administration, said about all of this. He said that the list of due process rights guaranteed by the Rome Statute is, if anything, somewhat more detailed and comprehensive than that in the U.S. Bill of Rights, not better but more detailed.² It cannot be denied that the Rome Statute contains the most comprehensive list of due process protections that has thus far been promulgated.³

Judge Patricia Wald, who was a recent judge from the United States on the Yugoslav War Crimes Tribunal, also endorses the protections contained in the Rome Statute. She has been visiting places all over the world expressing her confidence in the due process rights of the ICC, particularly, in light of her experience at the Yugoslav War Crimes Tribunal.

Complimentarity

The International Criminal Court has a basic safeguard and reality check. It is called *complimentarity*. What does that mean? If any of you are students of European politics, you probably know the word *subsidiarity*, which is where the European Commission and the European Union try to devolve down to the national and sub-national levels as many forms of government possible, as opposed to imposing a supra-national form of government in Europe. Well, having a lot of

1. For an explanation of the term "atrocity law," see David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 389, 393-402 (2002).

2. *The International Criminal Court: Hearing Before the House Committee on International Relations*, 106th Congress 94-95 (2000) (statement of Monroe Leigh on behalf of the American Bar Association).

3. *Id.*

those people in the room influenced the discussions and we quickly came upon the notion of complementarity, which makes the ICC essentially a court of last resort. The ICC delegates to domestic courts, by its very framework, the first cut at the crimes within its jurisdiction. Therefore, domestic courts have the first right, the first option, to seize a case, to investigate it, and if merited, to prosecute it. That is complementarity.

Now, those cynical of the court will argue, "Oh well, that is all very nice in terms of how you have structured it, but there is an endpoint to complementarity which brings it right back to the ICC judges to determine whether or not your domestic system has done a good job of investigating and prosecuting the individual." My response to that is that in most cases there will be no final review by the ICC, but the possibility of such a final review was essential. There would be no complementarity if that ultimate escape hatch, back to the ICC judges, were not to exist. It would be a sham. The courts in Zimbabwe could simply say, "We have the case; thank you very much. You are off deck, ICC, permanently." In some cases there will have to be a judgment about whether a given national system has exercised its political will to investigate the case, whether it is capable of investigating the case, or whether it is a failed society, a collapsed state with an obviously crippled legal and political system.

Shortcomings of the U.S. Code

What are the circumstances of failed complementarity? Should a case ultimately go to the ICC because the complementarity tests are not met at the outset? We argued with great confidence that the U.S. government knows how to investigate and prosecute atrocity crimes and should have no hesitancy in doing so. If our citizens are charged with atrocity crimes, we should seize jurisdiction as quickly as possible and do the job the U.S. Code demands our prosecutors do. I must admit, however, that one of the great weaknesses we still have with respect to this court, and one upon which I think the most severe critics of the court and the strongest supporters of the court should have no problem agreeing, is the reality that there are parts of the U.S. Code that reveal gaps between crimes recognized by the Code and those set forth in the Rome Statute. In other words, not all the crimes against humanity that are set forth in the Rome Statute are replicated in the U.S. Code.

The crime of murder is certainly covered by the U.S. Code, but the "crime against humanity" as it is defined, in terms of extermination, relationship to persecution, and the other crimes set forth in Article 7 of the Rome Statute, is not covered by the Code. There are many gaps in our own law. We have not updated it sufficiently to prosecute the atrocity crimes of our time. This is not anyone's fault; we simply have not done it.

Neither Title 10 nor Title 18 of the Code has been updated in relation to customary international law. There are enormous gaps. Take, for example, the crime of genocide: we have severe restrictions on whom we can prosecute for the crime of genocide. I experienced this very clearly. We had a Rwanda Tribunal indictee living in Laredo, Texas, enjoying life with a green card. His name was Elizaphan Ntakirutimana, and he was a pastor from Rwanda, living with his doctor son in Laredo. The indictment came down in Arusha, and we deployed U.S. Marshals to Texas to track him down. We found him and arrested him for the purpose of transferring him to Arusha to stand trial before the Rwanda Tribunal. Ramsey Clark became his lawyer, and we started a four-year effort in U.S. courts ultimately to transfer him to Arusha. We succeeded in early 2000. He was transferred and just recently was convicted and sentenced by the Rwanda Tribunal. So the case was closed. But it was a long journey and a precarious one at times. I will never forget asking my INS and Justice Department lawyers, "Look, if we fail here, we have got to find a way to prosecute this man in U.S. courts. He is charged with genocide; he must not walk free; we must find a way to prosecute this individual. How will we do it?" And of course the answer was, "Sorry, but under U.S. law, you either have to be a U.S. citizen (not a green card holder) who has committed genocide elsewhere in the world or a foreigner who has committed genocide on U.S. territory. If you are not in one of those two categories, we cannot prosecute you here."

Those are the types of gaps in our law that we need to focus on. Unless we were fully capable of prosecuting these crimes in our courts, an ICC judge could easily say, "You are not capable of prosecuting this crime against this U.S. citizen, so we are going to seize this case." We do have a weakness in our system, and we need to correct it.

Other Safeguards

There are other safeguards built into the treaty that are important for us to recognize and understand. The U.N. Security Council has considerable power to refer situations to the court and thus fill up its docket. As a Security Council permanent member, if the United States had a cooperative posture towards this court, we could collaborate with our friends on the Security Council simply to fill the docket very quickly with situations we thought needed to be investigated but which did not impinge upon any U.S. interests. It may seem very cynical to put it that way, but if you were really smart about this court, you might think about such a strategy involving the Security Council.

The Security Council also has the power, under Article 16 of the Rome Statute, to stop the court from investigating a situation or

case—simply to shut it down for twelve months on the grounds that the Security Council needs to work the issue for purposes of peace and security. If the United States had a cooperative posture towards the court, then we would have the credibility with our friends on the Security Council to use that power significantly. We could, shall we say, manage the accountability agenda worldwide, emphasizing what we think should go forward and what we think should be held in abeyance in order for the Security Council to handle violent situations in real time before even reaching the accountability agenda. Unfortunately, in the last two years we have developed such a confrontational attitude towards this court, that any such measures that we might take, and which we are perfectly entitled to take, are hampered by a growing credibility gap.

Four Advantages to Ratification

Let me just say that if we were someday to ratify the Rome Statute—and it may not be for four, eight, ten, or even fifteen years—we would immediately gain four advantages. *First*, we could employ a right under the treaty not to be exposed to any war crimes charges for seven years. That is a quirky provision (for which we can thank ourselves and the French), but we could use it, just as the French have done. *Second*, if the court were to define the crime of aggression and approve it as an amendment to the Rome Statute, we would not have to embrace that crime. We could simply opt out of its application to the United States. We would have that right, as a state party, to opt out of any new crime that might be added to the statute. *Third*, we would have enormous influence in the nomination of judges, the prosecutor's staff, and the prosecutor himself or herself. We have no such influence now, and, of course, there is no U.S. judge on the bench, as yet.

I always thought that the best recommendation for a U.S. judge on the ICC would be a JAG judge. We should put one of our best military lawyers on the bench, one very cognizant of the law of armed conflict, because there are no such individuals on the bench right now. Of eighteen judges, there is not a single military law expert. We could have brought that to the bench and had an enormous impact on how the court thinks about situations and how it understands the law of armed conflict. Our nominee for judge would have been elected; there is no question about that. Of course, we do not have that option unless we become a ratified party.

Fourth, and finally, we would have influence over the operation of the court overall. During my experience with the Yugoslav and Rwanda Tribunals throughout the 1990s, almost every single day I received not just one, but often multiple phone calls from both tribunals, whether from the prosecutor, the judges, or the staff, seeking cooperative links with the U.S. government in order to get

their job done. That is just a reality. And by having that sort of relationship with a court of this nature, we could wield enormous influence over how the court operates because it would look to us for assistance. By responding to those requests, we would begin, day by day, having an influence over the operation of the court in a very constructive way. Primarily, such requests involve resources and the apprehension of fugitives, both of which allow the U.S. government to have an enormous impact on the process. However, between the United States and the ICC, there is no such communication; in fact, it is prohibited under the American Servicemembers' Protection Act.

STRATEGIES FOR U.S. ADJUSTING TO THE ICC

I will finish by talking about how the United States can adjust to the ICC. I have already talked about revising federal law. I have talked about how the U.N. Security Council can refer cases or even block the work of the court in relation to the U.S. role on the Security Council. We can also cooperate.

There is a waiver in the American Servicemembers' Protection Act called the Dodd Amendment. At least under certain circumstances, this would allow the U.S. government to cooperate with the ICC. There is also nothing prohibiting U.S. lawyers from serving as defense counsel on the ICC. So those of you aspiring to be defense counsel have a huge opportunity out there, as you gain experience. I assure you it is an honorable profession. These individuals need the best possible defense counsel. That is what establishes the integrity of the process.

I was recently in The Hague for the swearing-in of the eighteen ICC judges, and I had the, I suppose, dubious distinction of being the only U.S. government official, past or present, in the room at the time. While I was there, I had the opportunity to sit in on the Milosevic trial, at the Yugoslav Tribunal, for several days. It is astonishing, the abuse that results from someone like Milosevic representing himself—a great issue for discussion, particularly in a law school setting. It extends the trial; it introduces enormous inefficiencies. What astonished me was that the amicus lawyer for Milosevic just had to sit there, a fantastic lawyer, in his English wig. It would have been so beneficial for the court to hear him defend Slobodan Milosevic. It would have been so exciting, and the quality of the trial would have been upgraded enormously. Yet, he just sat silently because Milosevic was defending himself, introducing documents from unknown sources. Judge May would give Milosevic a little bit of leash and then have to jerk him back every ten minutes—jerk, jerk, jerk, jerk—back and forth. It becomes very tedious after

two hours of watching such tactics and disciplinary measures. But it is part of the process.

Finally, if the United States were in the game, even if we were not a ratified party, we could at least be in there, negotiating the crime of aggression. They are talking about it now, and we are not there. If there is any crime that the United States is accused of (check your papers this morning) it is the crime of aggression. Right? What was said in the Security Council yesterday by one government after another, is that the United States and the United Kingdom are accused of being engaged in aggression against the state of Iraq. Consequently, we have a lot at stake in what this word means and how this court ultimately embraces it as an actionable crime.

When I was negotiator, some of the negotiations I enjoyed the most were the aggression negotiations because I always had such clarity in my own thinking about where the ICC should go on this issue. The court is already primed to prosecute the crime of aggression, but it has to have a realistic set of parameters about how far it can go in doing so. Also of vital importance is the exact definition of the crime for the purposes of individual criminal culpability as opposed to state responsibility. It is a fascinating question, and the United States has such a strong position, it ought to be in the room on the issue. We even had consensus among permanent members of the Security Council about how to work the issue.

I will just conclude these points by saying that, in my mind, the best way to protect U.S. interests is always to be in the room negotiating, engaging, and bringing the force of our principles to the table rather than withdrawing from the room and abandoning it. In my view, any withdrawal from negotiations of this character is an abdication of the responsibility to protect U.S. interests. In this country, we have developed—and the ICC experience is emblematic of it—a cultural fear of multi-lateral institutions and of treaties of this character. That fear, the sense of almost being intimidated by this process, grows stronger and stronger. It is an extremely dangerous trend.

The United States should be at the forefront of these negotiations, whether they involve climate change, the biological weapons protocol, or the ICC. The list of treaties we have not ratified is quite long, and we could repair many bridges throughout the world simply by ratifying the easy ones. For instance, there is no reason. Additional Protocol II of the Geneva Conventions should not be ratified. President Reagan was the one who submitted it to the Senate in 1986 for ratification. What is the problem with that one? The Vienna Convention on the Law of Treaties is another good example; there is really no reason that should not have been ratified.

The best example is perhaps the Law of the Sea Treaty—the Pentagon has long supported its ratification. What is the problem? In

the negotiations for the ICC, I sought many provisions that protected U.S. interests, and the record will show that I got almost every single one of them. But, during that process, other governments would say to me, "Okay, we are going to give this to you, we are going to concede this point to the U.S. government. We know what this is, though, we have been here before. We reopened the Law of the Sea Treaty after 1981, and spent thirteen years negotiating it. We gave you exactly what you wanted in that treaty, and you signed it in 1994, but you have never ratified it. So what was the point of that exercise? Why did we do that for you guys? Now, what if you do that to us on the ICC?" Such failure to ratify important treaties significantly affects our negotiating position and our very credibility. At some point, we have to be honest brokers. By being honest brokers, at the end of the day, we best protect U.S. interests.⁴

4. For a detailed discussion of the U.S. approach to the ICC negotiations during the Clinton Administration, see David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47 (Nov. 2001 – Feb. 2002).